

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

PROEFSCHRIFT

TER VERKRIJGING VAN DE GRAAD VAN DOCTOR AAN DE KATHOLIEKE UNIVERSITEIT
BRABANT, OP GEZAG VAN DE RECTOR MAGNIFICUS, PROF.DR. F.A. VAN DER DUYN
SCHOUTEN, IN HET OPENBAAR TE VERDEDIGEN TEN OVERSTAAN VAN EEN DOOR HET
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Chapter 24

Turkey

SCENERY

Few countries occupy a more strategic position than Turkey. It is situated at the crossroads of East and West. A small part is linked to Europe, bordering Greece and Bulgaria, while the bulk of the country stretches towards Armenia, Azerbaijan, Georgia, Iran, Iraq and Syria. The two parts are separated by the Bosphorus that traverses Istanbul. But the real split is not so much geographical as it is mental. Turkish society is very complex, involving many contradictions or paradoxes. As an Islamic nation, Turkey is exceptional in so far as it is a secular state. The Turkish people still value and respect this secularism, despite a growing awareness of Muslim religion and traditions.

Historical facts, religion, politics and economic changes are important factors in the compartmentalisation or segregation of modern Turkish society and contribute to the complexity of the Turkish nation.¹ Turkey is torn between two worlds, as it has been from time immemorial. Invasions by numerous nations from East and West have caused Turkey to shed its cultural skin frequently and radically. In Istanbul, for instance, the well-known Hagia Sophia and the Blue Mosque which face each other across a park, look fairly similar but are in fact separated by time (1.100 years), culture (Byzantine² versus Ottoman), and religion (Greek-Orthodox versus Muslim). The Ottoman empire began in 1299 with the rule of the Osmons over Western Turkey. The empire expanded over the years to include the rest of Turkey, large parts of the Arab world and Eastern Europe. In 1683, the Turks marched to the gates of Vienna. The defeat at Vienna led to the gradual collapse of the Ottoman empire. This event, together with the Greeks getting permission to occupy most of Western Turkey, precipitated a growing national sentiment. A revolutionary government was formed in Ankara under the leadership of Mustafa Kemal, better known by the honorary name Atatürk or Father of the Turks. The revolutionary government started a war of independence which ended with the spectacular defeat of the Greek army in August 1922. The Turkish Republic was founded on October 23, 1923 with Atatürk as its first

¹ For instance, Turkey is an Islamic country, but also the only NATO ally in the Middle East. It has aspirations to become a member of the European Union and a desire to reach the Western standard of living. At the same time, people do not want to forget their (religious) roots which lie in the East.

² The Byzantine era was the result of the split of the Roman Empire into an Eastern and a Western part. The new capital of the Eastern region was situated in Constantinople, now known as Istanbul. Byzantium reached its peak under Justinianus (AD 538 – 565).

president. He was a Muslim and a fierce secularist at the same time. He replaced the sultanate with a secular Republic. Atatürk's reforms were clearly inspired by the West. He introduced the Latin alphabet and a Western-European legal framework and abolished holy Islamic laws (Şeriat). And he suppressed Islam as an organized force in public life.³ In the first 27 years of the Republic, the one-party regime of Atatürk and his successor, İsmet İnönü, began to create a modern nation directed towards Europe. From the 1950's on, the Turkish economy expanded, due to a more democratic⁴ government and its young hard-working population.⁵

Turkish political lines were drawn in the fifties. On one side are the socialist parties following in the footsteps of Atatürk. On the other side are the conservative parties which have inter alia a more tolerant attitude towards Muslim traditions and opinions. Until 1991, when section 163 of the Penal Code was abolished, any link between politics and Islam had been prohibited. The third powerful force in the political arena is the army. No discussion of Turkey or Turkish politics can be complete without considering their influence. The armed forces are the largest organized power block in the country and absorb approximately half of the national budget.⁶ Three generations of political leaders have tried to bring the army under civilian control. In response, three generations of generals have deposed democratically elected governments in order to steer the country back to the path of Atatürkish orthodoxy. Military coups took place in 1960, 1971 and 1980. In February 1997, the army bluntly warned that it would no longer tolerate 'insidious Islamisation' and forced Necmettin Erbakan of the Welfare Party to step down as Prime Minister after 11 months. To legitimize its authority, the army refers to the Constitution: 'the statutes and programmes of political parties shall not be in conflict with [...] the principles of the democratic and secular Republic' (s. 68 Const.).⁷ The armed forces, however, do not have unlimited powers to dictate their will, as is reflected in the limited duration of their coups.⁸

³ Furthermore, Atatürk encouraged citizens to abolish traditional dress and headdress.

⁴ The concept of democracy is widely claimed but poorly defined in Turkey, a country that holds one of the highest number of writers, journalists and intellectuals behind bars and has an anti-terrorist law flexible enough to include 'crimes of opinion'. See Amnesty International, *Türkiye pers vogelrij*, Dutch monthly, nr.7/8 1997, pp.22-24 and Time magazine, January 1998, p. 16. This is also one of the reasons why none of the interviewees, except for the academics of the Universities in Istanbul, wanted their names to appear in this chapter. I have therefore chosen to mention only their profession and the date and place of the interview. I interviewed several policemen from two police stations in Istanbul and one in Ankara, teaching staff at the police academy in Ankara, officials of the Police Directorate of the Ministry of the Interior, three lawyers, three public prosecutors and two judges of the criminal courts in Istanbul and Ankara. Furthermore, I spoke off the record with magistrates in the Hakimevi in Ankara (a hotel for magistrates) where I was graciously invited to stay and with one clerk of the court in Ankara whom I met in a department store. The interviews were held in Turkish and translated by Ömer Melikoğlu, a student at Tilburg University. Without his help, I could not have studied the implementation of R (85) 11 in Turkey.

⁵ 46% of the Turkish population is under 20 years of age. Turkish Daily News, October 24, 1997.

⁶ For over a decade, Turkey has been engaged in an armed conflict with the PKK, struggling for the independent state of Kurdistan in southeastern Turkey. The state of emergency justifies the large sums invested in the army and preserves the power of the army generals. On the other hand, it allows the civilian governor to restrict the freedom and liberties of those who live or work there including the press, and it allows removal from the area of persons deemed hostile to public order. See *Turkey Human Right Practices*, of the US Department of State, 1995.

⁷ Constitution of the Republic of Turkey, quoted from the official translation, available on the Internet. See http://home.imc.net/turkey/p_consti.html

⁸ See S. Nisanyan, *Turkey*, Sun Tree Publishing, Singapore, 1993, pp. 7-34

However, in 1997 the army was helped by the courts. On 16 January 1998, the Turkish Constitutional Court ruled Muslim fundamentalist parties to be contrary to the Constitution and classified the Welfare Party as a 'locomotive for anti-secular activities'. Nonetheless, the process of re-Islamisation will not easily be stopped.⁹ The more so, because to many Turks, the Muslim political leaders are the only leaders who are still trustworthy and able to regenerate ethics in Turkish politics. Allegations of corruption of officials and ties between politicians and criminals are widespread. Ever since the Susurluk scandal, Turks are convinced that their Members of Parliament engage in corruption and abuse of power.¹¹ A 'clean hands' operation like that carried out in Italy is almost impossible here because Turkish magistrates are too closely linked to the state.¹² (see § 3.3).

Besides politics and religion, rapid urbanization and economic change also contribute to the complexity of Turkish modern society. As recently as the 1950's, Turkey was an agricultural society with practically no paved roads, less than 8,000 telephones and a literacy rate of only 20 percent. Nowadays, approximately 80% of the population is literate, roads have introduced modern life to even the remotest parts of the country and 25% of the population now own a car. But economic growth is not equal throughout the country. Eastern Turkey remains an economic nightmare, whereas Istanbul's economy is booming. The population of this important trade town has grown from one million to an estimated 10 million inhabitants,¹³ housing vast numbers of first-generation 'immigrants' from the countryside. Turkey has made this transition within the lifetime of one generation. As a result, people are torn between traditional values and life styles, and the ways of a modern,

⁹ Veiled and covered women can be seen more and more frequently. In the early nineties, the ban on headdress was abolished after endless debates in parliament, although every university retained the right not to allow women with headdress on campus. What started as an action of Muslim students, who appeared with headdress at university – some because of their beliefs, others as a protest against the authorities – has grown into a symbol of fundamentalist resistance. The relaxing of Atatürk's dress code and granting the right to wear a head scarf does not mean that all religious clothing is permitted. Unlike in Iran, it is prohibited for women to wear the all black dress covering all body parts and for men to wear the turban and long coat.

¹⁰ In 1997, Turkey had 71,293 mosques, while another 2617 mosques were under construction. In August 1997, however, the Turkish directorate for religious affairs decided to limit not only the number of new mosques but also the number of Koran schools. NRC, 12 August 1997.

¹¹ The Susurluk scandal refers to the car accident near Susurluk, a town on the highway between Istanbul and Izmir on the 3rd of November 1996. A high police officer, a well known Turkish mafia boss and a former beauty queen were found dead in the car, and only the fourth passenger, a Kurdish politician survived. Since the accident, Turkish public opinion is more and more convinced that there exist cooperation between the state and the mafia against Kurdish nationalists. The Turkish media revealed details showing that in this struggle all means were permitted: e.g. burning down Kurdish villages, murdering political activists and even the military taking over the drug trade to finance military activities and impoverish the PKK. Since the Susurluk scandal, the majority of Turkish people have been absolutely appalled by their leaders. During the entire month of February 1997, millions of Turks turned out their lights for one minute at 9.00 p.m. as a national protest against the widespread abuse of power by politicians and officials.

¹² D.J. van Baar, *Voor schepping Atatürk is nog geen alternatief*, Volkskrant, 5 February 1997.

¹³ According to the official count (December 1997), the Turkish population consists of 62,606,157 inhabitants, 65% of them live in urban areas. Istanbul is the largest city (9,198,000 inhabitants), followed by Ankara (3,684,000) and Izmir (3,174,000). NRC, 11 December 1997.

industrialized nation.¹⁴ All these features in combination have turned Turkish society into a highly complex, segregated and at times contradictory community. Modern Turkey is a country which is compartmentalised along socio-political and religious lines; it balances between an eastern identity and western economic aspirations. These characteristics make Turkey a fascinating country for outsiders but very difficult to comprehend. For a researcher coming from a West-European culture and unable to read or speak the Turkish language, it is not easy to grasp legal culture and give a reliable account of legal theory and practice.

¹⁴ In this respect the position of women in Turkish society is illustrative. In 1925 Atatürk abolished polygamy, gave women equal status in divorce and set a minimum age for marriage. Their equality of inheritance and of testimony in court was also granted. In 1926, religious marriage was replaced by civil marriage. In 1934, female suffrage was introduced. Progress in reality was not achieved as easily. Women are still being forced into marriage, suffer in a situation of dependence or domestic violence but are afraid to speak out. According to the bestseller 'Women in Islam' by Bekir Topaloğlu, a woman may be beaten if she challenges her husband or if she undermines the integrity of the marriage. On the other hand, however, a growing number of women hold high positions in society. See S. Nisanyan (1993), pp. 53-69. According to Turks who have lived in the West, such as my interpreter Mr. Melikoğlu, and Mr. Polat, assistant professor at the Middle-East Technical University in Ankara, the career perspectives of university-educated women are better than in most European countries.

PART I: THE TURKISH CRIMINAL JUSTICE SYSTEM

1 INTRODUCTION

It is quite difficult to compare the position of victims of crime within criminal law and procedure in Turkey to similar situations in other countries, for several reasons. First of all, in practice victims do not yet have a real role in the criminal justice system. In that respect their position is certainly worse than it would be in most other European countries. In Turkey, the attention is foremost focussed at securing the position of suspects and accused within the framework of criminal law and procedure. Secondly, several factors of a different nature and magnitude than in most other legal systems determine the functioning of the criminal justice system. As a result, this report signals not only the problems faced by victims and the inconsistencies with R(85)11 but also tries to give some background information on typical features of the criminal justice systems and its participants. This is of particular importance regarding a jurisdiction which is not particularly well known among legal practitioners and academics outside Turkey and its neighbouring countries, and which is not usually included in comparative studies. Therefore, the Scenery and Part I are more comprehensive and explanatory than usual. Finally, it is important to mention that I was accompanied by a translator¹⁵ during the my stay in Turkey to study the formal and actual¹⁶ implementation of R (85) 11.

2 GENERAL REMARKS AND BASIC PRINCIPLES

Until the middle of the 19th century, Turkey's criminal justice system was based on Islamic law applied by the Islamic (*Shari'a*) courts. During the Ottoman period, a transition was made to Western European law. The Ottoman rulers turned to France and copied the Napoleonic Codes. The Napoleonic Penal Code was introduced in 1950, and was followed by the Code of Criminal Procedure in 1879. The Turkish people could choose between Islamic law and secular European law. Foreigners had their own justice system which was applied by consular courts. At the time, three legal systems functioned in one and the same country. This complicated situation lasted until 1924. In 1920, the decision was made to create one justice system for all inhabitants of Turkey. The legislature decided to make a fresh start and break with all former systems. It turned to Germany for its criminal procedural law (1924) and to Italy for its Penal Code (1926). The rules for the judiciary were

¹⁵ Mr. Ömer Melikoğlu. Without his kind cooperation my research programme in Turkey would have been less successful. His translations and commitment were of primary importance to the realization of this report.

¹⁶ This chapter is largely based on anonymous interviews (see footnote 4) and I want to thank all those who explained criminal law and procedure and its practice to me. Without their kind cooperation and hospitality I could not have carried out the research. We used English translations of the Turkish Penal Code and the Code of criminal procedure. The other Acts mentioned in this chapter were translated (orally) by Dr. R.F.Sokullu-Akinc and Dr. F.S. Mahmutoğlu, Department of Criminal law and Procedure of the University of Istanbul in Beyazit, to whom I owe much gratitude.

taken from the French Act on the Judiciary.¹⁷ Together, these foreign Codes form the foundation of the modern Turkish criminal justice system. Today, German influences, and to a lesser extent Italian influences, are still very noticeable, even though the original Codes have been amended several times to the needs of Turkish society.¹⁸ It is primarily Germanic legal traditions and culture which influence the law in action.

In 1924, another measure was taken which greatly influenced the criminal justice system. The courts of appeal were abolished. Only one court of appeal now exists, consisting of eleven criminal chambers. Legal remedies against the decisions of the courts in the first instance have to be presented to this court. It goes without saying that the workload of this court is enormous. It has been calculated that the court has about four minutes per appeal. Most revisions are therefore superficial, and only the complicated cases are studied in detail. It is recognized that this aspect of the organization of the judiciary needs revision. A recent proposal to reform the Turkish Code of criminal procedure sees at the re-introduction of courts of appeal.¹⁹ There are also proposals to change the Penal Code. Important incentives for these proposals are the rulings of the European Court of Human Rights and the decisions of the Commission of Human Rights.²⁰ In 1992, the desire to ensure conformity with these judgements and decisions was a driving force behind reforms designed to safeguard the rights of the accused.²¹ As of this time, suspects cannot be held in police custody for more than four days without a court order (previously this period was 15 days). Also suspects can no longer be detained simply on the basis of the seriousness of the crime. They are given the right to unsupervised access to a lawyer and the right to appeal every decision regarding the length of pre-trial detention. The maximum length of pre-trial detention is now fixed at 24 weeks whereas the average time spent in detention while awaiting trial was 70 weeks in 1990. Furthermore, the Code of criminal procedure now banned certain interrogation techniques in order to prevent torture and ill-treatment during interrogations by the police.²²

The criminal justice system is characterised by a mixture of inquisitorial and accusatorial elements. The pre-trial stage is inquisitorial and based on the principle of secrecy. The trial stage is accusatorial. The public prosecutor usually brings about public prosecution. However, there are some exceptions in which the victim can bring charges against the accused. Another characteristic is that the judge plays an active role during the trial. He may initiate his own investigations and he controls the questioning of experts and

¹⁷ With regard to their foreign origin, criminal law and procedure are no exception in Turkey. Turkish civil law is based on the Swiss Code of Neuchatel, the Code of commercial law is mainly taken from German and Swiss laws.

¹⁸ Professor Yenisey, Lecture for German students, Marmara University, 16 October 1997.

¹⁹ The proposal to reform the law was presented to the Minister of Justice in November 1997.

²⁰ The European Court of Human Rights has condemned Turkey eight times. In the *Aksoy* case of 18 December 1996, the fiercest condemnation in the Court's history was pronounced. Turkey was convicted for violation of article 3 of the Convention (torture), article 5-3 (length of detention without judicial control) and a violation of article 13 (denial of effective remedy). This is the first time any country has been condemned for torture.

²¹ The Act of 1 December 1992.

²² K. Kangaspunta (ed.), *Profiles of criminal justice systems in Europe and North America*, European Institute for Crime Preventions and Control affiliated with the United Nations, Publications series no. 26, Helsinki, 1995, pp. 198-201.

witnesses, including the victim²³ (see §§ 4, 5 and 8).

2.1 Basic Principles

The pre-trial stage is governed by the legality principle but this does not mean that prosecution is mandatory in all cases (see § 3.2). The trial is governed by the immediacy and orality principle, therefore all the evidence of the prosecution and defence has to be presented and repeated during the trial, including the statements of witnesses and experts.

3 CRIMINAL JUSTICE AUTHORITIES AND PARTNERS

3.1 Investigating Authorities

The investigating authorities are subdivided into the civilian and the military police forces, such as the gendarme and the coastal security guards. The military police forces are part of the military. In Turkey, the term national police is used to refer to both ordinary police officers and the gendarme. At present, the gendarme have the same status as the police and share the same powers, but they are part of the defence forces and are under the command of the Ministry of Defence and the Ministry of the Interior.²⁴ The national police force is directed exclusively by the Ministry of the Interior. The gendarme is active in the rural areas and those under emergency rule, either independently or in coordination with the police. In the cities, the gendarme is kept in reserve for maintaining order.²⁵ In practice, the military do not only assist the police but act as the police with full powers for maintaining public order and law enforcement; they usually exercise powers independently from police command structures.²⁶ Unlike ordinary police officers, members of the gendarme are not trained in police schools, even though it is questionable whether their present education is sufficient to perform police tasks. It is not unusual that those eligible for military service have to fulfill police duties in isolated areas or in territories under emergency rule. After four months of military training in the army they are considered to be ready for action. The use of the gendarme generates illegal and undesired police activities and causes much tensions in the relationship between the police and Turkish citizens.²⁷

²³ F. Golcuklu, 'Law of procedure', in: T. Ansay, D. Wallace, *Introduction to Turkish law*, Kluwer, Deventer, 1987, pp. 244-245.

²⁴ Gendarme structure, duties and powers Act, s. 4.

²⁵ Eryilmaz, Doctoral thesis, chapter two (p. 127): under publication.

²⁶ A.H. Aydin, 'Democracy and policing: Militarization versus democratization of the Turkish police', *Turkish Yearbook of Human Rights*, vol. 17-18, 1995-1996, p. 61.

²⁷ If one examines the cases brought before the European Commission and the Court for Human Rights, the majority of complaints concern the abuse of police power by the gendarme. The shortcomings on the part of the gendarme do not only generate criticism abroad but also the hostility of citizens towards the State. In the areas where the gendarme operates citizens see this police force as the exclusive representative of the State. The State, however, upholds that the employment of the military as part of the police remains a necessity. (Yenisey, as translated by Eryilmaz in his doctoral thesis). See also A.H. Aydin (1995-1996), pp. 55-68; I. Cerrah, 'Policing demonstrations in Turkey: recent changes in British and Turkish public order policing and their impact on democratic rights violations', *Turkish Yearbook of Human Rights*, vol. 17-18, 1995-1996, pp. 69-87.

In general, Turkish police forces adhere to a repressive policing style. 'We can argue that the Turkish police fall into this style, since they are highly centralised, alienated from the community and serve a government lacking in public consensus. The police are not involved in community policing and do not seem to be the servant of the community.'²⁸ Unsurprisingly, the Turkish police do not have a very good reputation, although there have been changes for the better in recent years. Many Turks – and not only suspects – fear the police.²⁹ Of course, the substandard conditions in which the police have to perform their duties are no excuse for such behaviour. It must be emphasized, however, that the police face a lot of difficulties which do not exist as such in other countries. These difficulties can be divided into three categories: work conditions³⁰, selection³¹ and training (for training see § 8.1). These difficulties contribute to the creation of a specific police subculture which strongly influences the performance of the individual police officer. According to Sokullu, Turkish police subculture has the following characteristics: solidarity, secrecy, social

²⁸ Quotation by J. Alderson, taken from: A.H. Aydin (1995-1996), p. 58.

²⁹ It is perhaps significant that the name used by Turks to refer to the police is *karakol* (black hand). A new name is being considered as one of the measures to change the image of the police. It is common knowledge that the police are accused of human rights violations. According to an Amnesty International report (November 1996), the police regularly maltreat children – even those under the age of 12 – during interrogation and questioning. They are said to beat children, give them electrical shocks, hose them with cold water and lock them up naked in solitary confinement. The Turkish authorities declares that the responsible policemen and gendarmes have been punished. Amnesty International, however, mentions a court decision in which policemen were found guilty of mistreating a twelve-year-old boy so badly that he had to be treated in hospital in the intensive care unit, but they were only given a fine.

³⁰ First of all, the police suffer from an excessive workload and unwanted transfers throughout Turkey. It is no exception for police officers to have to work ten to twelve hours a day. Sometimes they have to remain on duty for up to 18 hours a day. Such long hours will not contribute to the patience and good temper of most policemen. The policy of transfers is another factor adding to the stress of the police, both at home and on the work floor. Police officers are regularly transferred to different regions in Turkey. This policy is caused by the need to have civil servants, and thus also police officers, working in remote and rural areas of Turkey. The state does not take the family situation into account, or the preference of the individual police officer. Transfers cause social isolation of policemen, especially if they are transferred to a region where they do not understand local customs and feel like an outsider. It further enhances the feeling of being a separate group in society, with its own rules and morals.

³¹ Many police officers come from middle and lower class families and economic factors have an important bearing on choosing the police profession as a career. In Turkey, police high-schools exist, and thus children are stimulated at a very early age to become a policeman. Once a child enters a police high school, his career is fixed to a large degree. The advantage for parents is threefold: education is good, free of charge and the child will have job security as a police officer. Unfortunately, the down side of the system is that part of the police have not become a police officer out of choice or free will and do not particularly like police work. See Y.Z. Ozcan, A. Caglar, 'Who are the future police elites? Socio-economic background of the students at the police academy in Turkey', *Policing and Society*, vol. 3, 1994, pp. 287-301.

³² With respect to selection, it is most unfortunate that the police is often forced to hire anyone who applies for the job. Regularly, there are less applicants than persons needed. As a result, the police feel they cannot be too selective and hire everyone. Even the clearly incapable or unsuitable applicants will be trained to become a policeman. In practice, no real selection of future police officers takes place. Information supplied by the Directorate General of the Police, Ministry of the Interior, Ankara, 22 October 1997.

isolation, conservatism, suspicion and deception. The latter two characteristics originate mainly from distrust of the efficiency of the criminal justice system and a feeling of being let down by politicians and society.

The combination of those elements, together with a public outcry to fight crime, can form a breeding ground for unlawful police behaviour. Police officers who violate the rights of suspects or use unlawful methods to gather evidence do not feel guilty because in their subculture this is justified in the interest of putting criminals behind bars. The individual police officer justifies unlawful behaviour by referring to long hours at work, tiredness, stress, unwanted transfers and a low salary. Under such circumstances, it is hardly surprising that despite the introduction of punitive and deterrent methods to refrain police officers from unlawful behaviour, the results are far from spectacular. Moreover, certain elements of the subculture, such as solidarity and secrecy, make it very difficult to change police behaviour and to punish individual policemen.³³ The subculture is bound to affect daily police activities, such as investigations in the pre-trial stage.

Pursuant to the law, the public prosecutor is in charge of any criminal investigation (see § 3.2) but may conduct his investigations through the police, who have to carry out his orders. The orders are usually written down, however, they are given orally in emergencies only (s. 154 CCP). The police then have to conduct investigations of crimes. The outcome of the investigations has to be sent immediately to the public prosecutor (s. 156 CCP). In practice, however, the police perform all investigative activities despite the fact that the ordinary policeman is not properly trained to do this. There is no special branch of the police responsible for judicial investigative activities. As a result, the investigations performed by the police lack quality.³⁴ Yenisey feels that it would be advisable to create a specially trained judicial police force or, at least, make sure there is real supervision by public prosecutors.

Policemen and public prosecutor have a rather impersonal relationship in the big cities. The public prosecutor never gets involved in the actual investigation, and in the cities contacts with the police are established by phone. This is a larger problem than in most other countries because there is no judicial police and not every police officer knows how to conduct an effective investigation, to preserve evidence and to write reports in accordance with the law. Most of the problems are caused by the fact that the police do not look at the situation with a legally trained eye. The police do not always correctly write down reports of victims. Other documents do not always contain the elements necessary to use them in court (see § 7.1). This causes tensions between the two authorities, because evidence gets lost, and relevant facts get distorted. In return, it causes delays, repetitive questioning (see § 8.2) – the public prosecutor often has no choice but to hear victims or witnesses again – dismissals and acquittals. The training and practical abilities of the police are often considered inadequate by the prosecution service (see § 8.1). Public prosecutors should

³³ See F. Sokullu-Akinci (1997).

³⁴ According to Professor Yenisey relatively many suspects are acquitted by the court for lack of evidence simply because of poor investigative work. In Turkey, 30% of the cases end in an acquittal; 50% with a conviction, and the remaining 20% can no longer be prosecuted because of undue delays or because they have become prescribed by lapse of time. The most common reason for acquittal is the poor quality of the criminal investigation: the police fail to collect enough condemning and legally valid evidence into the legal file. Yenisey considers the absence of a judicial police force an important reason for this high percentage of acquittals. Yenisey (1997).

therefore be more actively involved in the search for evidence (see § 3.2).³⁵

According to the police, few problems occur in their contacts with the prosecution service. The only problem the police mention is their disappointment with the results of the public prosecutor's activities, and the outcome of the court proceedings. The police are generally satisfied with their cooperation with the prosecution service, which in contrast is not so happy with their relationship (see above, and § 3.3).

No specific laws or regulations deal with the relationship between the police and victims. The only possible exception is s. 2 of the Police Act which states the duty of the police to protect society and prevent any crimes or danger threatening the public. Furthermore, no special police units for children or victims of sexual offences are in operation. However, it is claimed that special vice squads exist in every large town, which can be called in if the police need them³⁶ (see § 8).

3.2 Prosecuting Authorities

Public prosecutors (*savcı*) are appointed for life. Although they have the same qualifications as judges, they are not considered to be part of the judiciary. Public prosecutors are obliged to perform executive activities and are not independent, unlike the judiciary. A public prosecutor must follow orders from his superiors, such as the Ministry of Justice or the city governors (s. 148 CCP).

Every court of general criminal jurisdiction has a public prosecutor's office consisting of a public prosecutor and deputies. The public prosecutors also prosecute in the other courts. For instance, the function of the public prosecutor at the aggravated felony court is performed by the public prosecutor assigned to the court of general criminal jurisdiction in the city where the felony court is situated. The peace court functions without a public prosecutor, in the sense that the public prosecutor is not present during the trial. However, he does initiate the proceedings.

Upon being informed of the alleged occurrence of a crime, the public prosecutor will start preparatory investigations (*haz rî k soruşturma*) in order to try to identify the offender and to be able to decide whether prosecution is called for. Pre-trial investigations are conducted in secrecy and are based on written police reports. The prosecution service is in charge of investigations in the pre-trial stage. As soon as a public prosecutor is informed of the occurrence of a crime, he is required to make the necessary investigations and decide whether or not to press charges against the alleged perpetrator. The public prosecutor has to collect both the evidence against and in favour of the accused and has to help to preserve the proof (s. 153 CCP). The public prosecutor may make his investigations either directly or through the police (s. 154 CCP, see § 3.1). The results of the investigation are transferred to the public prosecutor. The model in which the public prosecutor directs the police is based on a high degree of cooperation between the police and prosecution service, and of mutual trust. The cooperation between the police and the prosecution service is said to be rather good; however, it is not without its problems (see § 3.1). The prosecution service, is however, not without blame. According to Yenisey,

³⁵ According to public prosecutors interviewed both in Istanbul and Ankara, the training of police officers for these practical activities is highly inadequate (see under A1). The 1997 reform proposal includes the creation of a judicial police force.

³⁶ Information supplied by police officers in the Kartal district, Istanbul, *Kartal Merkez Karakol Amirliği*, 13 October 1997.

public prosecutors are not as sufficiently involved in the investigative stage as they should be (see § 3.1).

If the public prosecutor feels there is a *prima facie* case, he brings an indictment (*iddia-name*) before the competent court (s. 163 CCP). The Minister of Justice may also order a public prosecutor who has decided not to prosecute to initiate criminal proceedings (s. 148 CCP).³⁷ A case should be dismissed when the offender, punishable only by fine or one month imprisonment, deposits the minimum fine before the court hearing. If this sum is paid before public action is initiated and within ten days of the date on which the crime occurred, the case will be dismissed (s. 119 PC).

The public prosecution has an almost exclusive monopoly of prosecution but not the duty to prosecute all crimes (see § 7.1). In a few cases specified by law where the injury is perceived to be more private than public, the victim may instigate criminal proceedings by means of filing a complaint (*sahsi dava*, s. 344 CCP – see § 5.3) with the public prosecutor (see § 5.2). But as a rule, the public prosecutor initiates prosecution (s. 139-140 Const.). If, on the other hand, the public prosecutor decides not to prosecute, he will inform the accused if the latter has already been questioned or if a warrant for his arrest is issued (s. 163-164 CCP, see § 6.1, B.6).

For training of public prosecutors and judges, see § 8.1.

3.3 Judiciary

The position of the judge is a very important one for he has a very active role. In establishing the facts and finding the truth, judges are assisted by public prosecutors. To safeguard the judiciary's independence, only the Supreme Council of Judges can appoint, promote or punish judges and examining magistrates (s. 159 Const.). The Code of criminal procedure, in its ss. 21 through 30 CCP, further ensures the impartiality and independence of judges and the courts. Unfortunately, politics may play a role in the actions of the Supreme Council because the it does not exclusively consist of members of the judiciary. The Minister of Justice is the president of the Council and the under-secretary of this Ministry is an *ex officio* member. Considering that the Ministry of Justice has two seats out of seven and the Minister is the chairperson of the Council, independence and tenure of the judiciary may be jeopardized.³⁸ However, this may not be the only danger to the independence of judges. Judges are civil servants and just like other civil servants and functionaries, i.e., police officers and teachers, they may be sent to the most remote parts of Turkey, even against their will. Concerning judges, this is done in the following manner: judges have to do a test and those with the lowest scores are sent to small towns in Anatolia where they have to stay for at least two years. If they want to be relocated to a better location, they have to present themselves before the Council which will decide who will be promoted and where they will be posted. This dependence on the Council and Ministry of Justice may influence the decisions of judges. It makes it more difficult for a judge to take a decision which make him unpopular at the Ministry of Justice. Moreover, if one takes into consideration that most human rights violations and thus 'difficult' court cases occur in the remote Eastern areas, the argument goes around in circles. A system in which a judge remains in one place or at least in his place of choice would be preferable to the current system; however, this has proven to be very difficult in Turkey where most civil servants wish to

³⁷ F. Golcuklu (1987), pp. 250-251, 255-256.

³⁸ See F. Sokullu-Akinci (1997), p. 4.

work in the three big cities (Istanbul, Ankara and Izmir) and do not want to go to small towns or rural areas. The eastern part is especially unpopular because of the conflict with the Kurdish nationalists. Therefore, the government has no option but to force judges to work in the more unpopular and remote areas.³⁹

There are two types of criminal courts in Turkey, the general and special courts.⁴⁰ Among the special courts are the Constitutional Court (*Yüce Divan*), which can try for instance the President and members of the Council of Ministers (s. 146 et seq. Const.); the Courts of State Security (s. 143 Const.); the Military Courts (s. 145 Const.); the Traffic Court and the Juvenile Court. The Courts of State Security were established to deal with offences against the State, the democratic order or any offense directly involving the internal and external security of the State. The High Court of Appeals may also review verdicts of the Court of State Security (s. 143 Const.). There are Juvenile Courts in Turkey, however, these only operate in the three main cities (Istanbul, Ankara and Izmir). The juvenile court system is heavily criticized. Firstly they are criticized because they do not function nation-wide and secondly because the three existing courts lack the capacity and resources to deal with minors. Consequently, many juvenile delinquents have to go on trial in a court of general jurisdiction.⁴¹

The general courts try all kinds of criminal cases, except those expressly referred by law to the special courts. They can be divided into four categories of increasing importance, based mainly on the distinction of crimes into misdemeanours (*kabahatler*) and felonies (*cürümler*).⁴² The justice of peace courts (*Sulh Ceza Mahkemeleri*) try misdemeanours, and have a single judge who tries cases. The courts of general criminal jurisdiction or courts of first instance (*Asliye Ceza Mahkemeleri*) are also single judge courts. Next in the hierarchy are the aggravated felony courts (*Ağır Ceza Mahkemeleri*), which have three judges presiding the trial, one of which is the Chief Justice.⁴³ The latter courts are located in the provincial capitals (*il*) and the two former types of court are to be found in the county capitals (*ilçe*). The Supreme Court (*Yargı tay*), it is the only court of appeal and the tribunal of last resort to review the rulings of the other courts.⁴⁴ The decisions of the Supreme Court are taken as precedents for legal rulings in the lower courts throughout the country. The Supreme Court's main task is to secure the unity of jurisdiction and uniformity of legal interpretation of the law. In exceptional cases, such as trials in which the accused is a high-rank civil servant, the Supreme Court has original and final jurisdiction (s. 154 Constitution).

³⁹ Yenisey (1997).

⁴⁰ See Introductory Act on the Code of Criminal Procedure.

⁴¹ F. Gölçüklü (1987), pp. 247-248.

⁴² F. Gölçüklü (1987), pp. 212-215.

⁴³ See the Introductory law to the Turkish Penal Code (*Mer'iyet Kanunu*), ss. 25 et seq.

⁴⁴ Ordinary legal review (*kanun yolu*) consists of exception (*itiraz*) and appeal to the Supreme Court (*temyiz*). Exceptions (or petitions) are open to decisions of judges but not to court decisions. In general, it is the next higher court who will handle the exception. Ordinary appeals have to be lodged with the Supreme Court, but only on the grounds of legal error. The appeal must be made within one week after the decision becomes final (s. 312 CCP). Normally, the Supreme Court will reverse the decision on points of law that the lower court applied incorrectly and forward the case to the original court or a nearby court for a new judgment. In exceptional cases, the Supreme Court may review a case on its merits (s. 322 CCP). See F. Gölçüklü (1987), pp. 258-259.

Courts of general criminal jurisdiction:

misdemeanours:	Justice of peace courts
less serious felonies: (punishable by a maximum of 10 years' imprisonment)	Court of general criminal jurisdiction
serious felonies: (punishable by a minimum of 10 years)	Aggravated felony court
appeals:	Supreme Court

In Turkey, civil and criminal cases are heard by the same judges. This system, which is born out of reasons of economy is criticised today because it is no longer believed that a judge should be knowledgeable about all branches of law. Specialized chambers exist only in the big cities.⁴⁵ Furthermore, there are not enough judges and public prosecutors to handle the growing case load. The efficiency and effectiveness of the judicial system is further reduced by the lengthy trials and working methods; for example the work is still largely done without computers. This situation is not likely to change in the foreseeable future, because the budget for the judiciary is said to be too low (about 1% of the national budget).⁴⁶

3.3.1 Criminal Proceedings

Criminal proceedings consists of a mix of inquisitorial and accusatorial elements. The pre-trial stage is inquisitorial, while the trial is accusatorial. However, in recent years, there have been some changes in the investigative stage. In 1985, the preliminary judicial stage was abolished.⁴⁷ It was conducted by the examining magistrate (*sorgu hakimi*) and was aimed at investigating complicated cases. Consequently, the function of examining magistrate no longer exists⁴⁸ and the police is the only institution conducting investigations (see §§ 3.1 and 3.2). The second change took place in 1992. Until then, the preliminary investigations had been conducted in secrecy, and information was withheld even from the suspect who was kept in detention without support of a lawyer. Now, the suspect has the right to a lawyer (s. 135-5 CCP). The defence counsel has the right to give legal and practical assistance to the suspect from the very beginning of his arrest and may be present during all further investigative activities.⁴⁹

During the accusatorial trial stage, the public prosecutor will normally present the case and try to prove the facts, although the judge may look for additional evidence. As a rule, trials are conducted orally. Every piece of evidence has to be presented orally to the court and the parties involved, witnesses and experts must be examined during the trial. Records are read aloud to ensure that the court has access to every piece of evidence (ss. 238, 242, 244, 249 CCP).⁵⁰ Trial proceedings start at the moment the indictment is sent to the court

⁴⁵ F. Golcuklu (1987), p. 245.

⁴⁶ Information supplied by lawyers and public prosecutors in Istanbul, 14 and 16 October 1997.
⁴⁷ Act nr. 3206 of 1985.

⁴⁸ F. Golcuklu (1987), p. 245.

⁴⁹ F. Sokullu-Akinci (1997), p. 4.

⁵⁰ F. Golcuklu (1987), pp. 256-258.

(s. 163 CCP). Within Turkish criminal proceedings, the trial has the function of a final investigation. Therefore, the trial consists of two stages: the preparation for trial (*duruşma hazırlığı*) and the actual trial (*duruşma*). The preparation for the trial consists of administrative actions, such as setting the date, summoning the parties, notifying them of the names of the witnesses called by the other party. If a witness is unable to give evidence during the trial, the court may order a hearing through a delegated judge or interrogatory commission (ss. 206-219 CCP). After the preparations have been concluded, the trial commences in the presence of the participants (s. 209 CCP) and is open to the public (see § 8.3). All stages and hearings of the trial are normally conducted in the presence of the accused (s. 240 CCP). Nevertheless, the accused may be excused from attending some of the court sessions and may send his defence counsel if his presence is not necessary (ss. 225-226 CCP). Trial *in absentia* is only allowed if the crime is punishable by fine or short-term imprisonment, confiscation of property or a combination thereof (ss. 269 ff CCP). The victim will usually have to be present during the first court session and may be excused from further sessions if the court does not need to hear the victim again (see § 8.2).

The actual trial begins with a roll-call of the witnesses and experts. Thereafter, the identity of the accused is registered, and this is followed by a reading of the indictment. Then the accused is questioned, in the absence of the witnesses (s. 236 CCP) and the pieces of evidence are introduced. Subsequently, the witnesses are examined. After the defendant has heard the witnesses, experts or accomplices, he is asked whether he wants to challenge the evidence presented. Upon the completion of the introduction and adjudication of the evidence, statements may be made by the victim or the complainant, the public prosecutor, other interested parties and finally the accused. The public prosecutor may reply to the statement of the accused and the defence counsel may respond. The accused has the right to have the last word (s. 251 CCP). The trial ends with the verdict of the court which consists of two parts: the judgment proper (*hüküm*) and the justification of the decision (*gerekeçe* – s. 260 ff CCP).

If possible, the trial is held without interruptions; however, criminal proceedings may be suspended or adjourned if necessary (s. 219 CCP). In practice, adjournments and suspensions of trials are very common, particularly in cases before the court of general criminal jurisdiction, where most cases are tried. If a case concerns a serious felony, the waiting times are much shorter, not only because there is a specialized court for these offences (the aggravated felony court), or because there are less of these felonies, but also because the law establishes a time limit before which the trial has to start. The trial proceedings have to begin within 31 days of the pre-trial detention of the suspect (see § 8.2).⁵¹

At the sentencing stage, the courts may choose one or more of several punishments, within the boundaries set by law. Punishments for felonies are death by hanging (*idam*), long-term imprisonment which means up to 24 years or life (*ağır hapis*), imprisonment (*hapis*), heavy fine (*ağır para cezası*) and disqualification from holding public office. The death penalty has not been carried out since 1984.⁵² With respect to misdemeanours the penalties are: imprisonment up to two years (*hafif hapis*), light fine (*hafif para cezası*) and disqualification from practising a certain profession or trade (s. 11 PC). The Act on the Enforcement of Penalties (Act nr. 647) has changed the implementation of the Penal Code. It divides penalties into three categories: death by hanging; long or short-term imprisonment, which

⁵¹ Information supplied by a lawyer, Istanbul, 14 October 1997.

⁵² However, this may change in the near future; it is possible that the leader of the PKK, who was sentenced to death in 1999, will be the first person to be executed since 1984.

means more than six months or less than six months, and fines. In addition, there are certain secondary penalties. These include police supervision (s. 28 PC), confiscation of property (s. 37 PC), custody or treatment of mentally ill persons (s. 46 PC), commitment to an institution (s. 53 PC) and custody and treatment of drug addicts or alcoholics (ss. 404 and 573 PC). Judges are free to choose between imposing the minimum or the maximum penalty, or anything in between. Aggravating circumstances – *inter alia* provocation, (s. 51 PC) and re-offending (s. 81 PC) – and attenuating circumstances (s. 29 PC) may play a role here. Moreover, if the perpetrator has been found guilty, the court may also order the payment of damages or the restitution of property and the payment of court expenses (s. 32 PC). Finally, the enforcement of the decision to suspend punishments may be postponed until the personal rights of the victim have been restored or redressed voluntarily by the convict (s. 93 PC).

3.4 Enforcement Authorities

The enforcement authorities, enforcing the sanctions imposed by the court, are not responsible for the enforcement of any payments by the offender to the victim (see § 7.3), nor do they assist the victim.

3.5 Probation and Penitentiary Services

The probation and penitentiary services do not involve themselves in any way with victims of crime.

3.6 Victim Services

There are no nation-wide services that involve themselves with victims. However, there have been some initiatives in the big cities, mainly in Istanbul, to help victims. For instance, at the faculty of psychology of the Istanbul University and at the Institute of Legal Medicine and Forensic Sciences centres have been created for free psychological and/or medical help to victims of sex-related crimes (see § 3.7 and § 8.1, A.1). In the early nineties, the first women shelters were opened in Istanbul.⁵³ Women who are going through a divorce, who have been beaten up, forced to prostitution or who have been sexually abused can go to these shelters. Usually, the women go back to their husbands and families because of the social pressure to resume the role of wife, mother or daughter. In the rural areas, running away from home is almost impossible. The police, friends and her own family would make sure that she goes back. And what is more, a woman who runs away from home risks her life. She is considered 'the property' of her husband and she has to obey him. Disobedience can be severely punished.⁵⁴

⁵³ D. van Delft (1992), p. 33. During my visit to Turkey, I did not visit a shelter. According to the persons I spoke to (policemen, lawyers, magistrates, academics, medical doctors, family members of my interpreter) no such services existed. Therefore, if such services exist as Van Delft claims, they are not well-known.

⁵⁴ See D. van Delft (1992), p. 33.

3.7 Medical doctors and the Institute of Legal Medicine and Forensic Sciences.

The Istanbul Institute of Legal Medicine and Forensic Sciences (*Istanbul Üniversitesi Adli Tıp Enstitüsü*) has established the only centre for victims of rape, sexual assaults or physical violence in Turkey. The centre is called the Section of Sexual Assault (SSA) and was established as a model for multi-disciplinary research in this field.⁵⁵ The original plan was to open such a centre in more towns, but so far they lack funding.

According to SSA research on this subject, 88% of rape victims are children and among child victims anal penetration is frequent (56,5%). Only a small percentage (12%) of victims of sexual offences are adults. According to the Ministry of justice statistics, 9237 trials regarding sexual assault cases, including rape, were held in 1994. The real number of sex offences can probably be multiplied by at least ten. The dark number is high, especially if the perpetrator is a family member. According to the researcher, some estimates claim that less than 5 to 10% of rape cases are reported to the authorities. Possible explanations for this are that the court historically prosecutes the women rather than the defendant, victims fear publicity or have no trust in the law enforcement agencies, the rapist is known by the victim, and finally victims are afraid that the offender will not be punished by the courts.⁵⁶ Most of the victims of sex offences (70%) were medically examined within the same day or the next day.⁵⁷ They are usually physically examined two or three times, which is a traumatic and humiliating experience for most victims. The more so if one considers that going to a gynaecologist is already a big step to most Turkish women. At the SSA, the victim is examined only once and the victim is prepared for the physical by a psychologist, who talks for about 15 minutes to the victim and explains the procedure.⁵⁸ The SSA trains doctors and nurses and teaches them for instance to check victims for venereal diseases and to give female victims the morning after pill. On far too many occasions, a victim of rape turns out to be pregnant and abortions are not always possible for religious reasons or simply because the pregnancy is already in an advanced state, which means that the life of the victim may be affected in a far-reaching way. If the rape victim is an unmarried girl, she will never be able to find a husband (see § 3.1) unless she has a secret operation to repair the vaginal membrane. The test for venereal disease is very important to victims because if this disease can be proven in court, the punishment of the offender can be increased by 50%.⁵⁹

3.8 National Ombudsman

There is no such institution in Turkey. This does not mean, however, that a commission

⁵⁵ M.F. Yavuz, A. Özasan c.s., *Sexual assault cases in Turkey, 1990-1995*, Institute of Legal Medicine and Forensic Sciences, Istanbul, paper presented at the Annual Meeting of the American Academy of Forensic Sciences (1997), pp. 1 and 4.

⁵⁶ M.F. Yavuz c.s (1997), p. 1.

⁵⁷ M.F. Yavuz c.s (1997), p. 3.

⁵⁸ In a normal, average hospital the situation is very bad. The medical doctors are not trained to treat victims of sex offences. They often do not know what to do, for instance in 99% of the cases the evidence is not secured or no samples are taken and analysed. Furthermore, most laboratories are very badly equipped. As a result, there is usually no evidence against the offender which can be used in court.

⁵⁹ Information supplied by Dr. Yavuz (MD) of the Institute of Legal Medicine and Forensic Sciences, Istanbul, 17 October 1997.

or ombudsman to whom the public can complain about the (local) authorities is not needed. To victims and defence counsels of the accused alike, it is very difficult to complain about the authorities, let alone to accuse them of unlawful acts. There is a special procedure for those who want to complain, but in practice extra-judicial criteria have to be met. The case concerned must be based on a very serious allegation and the complainant must have a respectable position or status in society. If one of these conditions is not fulfilled, it is unwise to complain about persons in authority. Moreover, it is very difficult to find witnesses who are willing to testify in public against, for instance, members of the police forces. Most people are too afraid to confirm their accusations in a testimony. As a result, it is almost impossible to seek justice because without witnesses, the case will simply be dismissed.⁶⁰

4 SOURCES OF LAW

4.1 General Sources of Law

Legislation is the principal source of law. Written law may be classified into five categories of descending authority and importance. The Constitution (*Anayasa*) is the most important code and defines the ideology of the state, the principal organs of government, the rights and duties of the individual and the relationship between the individual and the state. The supremacy of the Constitution is expressed in section 11 which states that 'laws shall not be in conflict with the Constitution. Its principles are binding fundamental legal principles [...]'. The 1961 Constitution introduced judicial control of enactments and created the Constitutional Court. The same principle returned in the 1982 Constitution (ss. 146-153). Second, there are the different codes and statutes, such as the Penal Code and the Code of Criminal Procedure. Third in authority are the statutory decrees of the Council of Ministers (*kanun hükmünde karameler*). These decrees cannot be applied to fundamental liberties and political rights of individuals. Normally, the Constitutional Court exercises control over these decrees, unless they concern emergencies or martial law. In fourth place in the ranking are the regulations (*tüzükler*) of the Council of Ministers which govern the enforcement of statutes. These are followed by the by-laws (*yönetmelikler*) that are issued by the Prime Minister, ministries and public corporate bodies and aim to ensure that statutes or regulations are enforced.

To a lesser extent, customary law and case law are sources of law. Customary law as such cannot determine crimes nor punishments because of the principle of written law as a safeguard of individual liberties (*nullum crimen*). Court decisions are also considered to be a source of law. The lower courts of criminal law may be bound by decisions of the Supreme Court, but not all decisions of the Supreme Court enjoy authority. As a rule, the decisions of the General Assembly of all Chambers of the Supreme Court are binding. Other decisions of the Supreme Court, although not legally binding, are respected by the inferior courts (see § 3.3).

Legal doctrine has a strong influence on the legal system. Not only because jurists make recommendations about changes in law, but also because academic publications often have a persuasive effect on judges. Legal doctrine is rarely quoted by the court in its decisions; nevertheless, the opinion of academics plays an increasingly important role in the Turkish legal system. Many recent decisions taken by the Supreme Court have made references to

⁶⁰ Information supplied by lawyers in Istanbul, 14 October 1997.

legal books that enjoy authority.⁶¹

4.2 Sources of Criminal Law and Procedure

The Penal Code was adopted in March 1926 and is based on the Italian Penal Code of 1889.⁶² Although it has been modified several times, its essence has been preserved until today. The Penal Code contains general principles of criminal law (book I) and specifies most crimes (book II and III) (see § 3.3). In addition to the Penal Code, several penal statutes exist which contain specific crimes and regulate particular fields of criminal law. Many civil laws also prescribe penalties for certain criminal acts.⁶³ The principal source of criminal procedure is the Code of Criminal Procedure of April 1929 (Act nr. 1412). It is a translation of the German Code of Criminal Procedure of 1877, and includes some minor changes. The Code has frequently been amended, for instance in July 1985 when the preliminary investigative stage was abolished together with the office of the examining magistrate (Act nr. 3206). Another example of recent amendments to the Code is the prohibition to use illegally obtained evidence (s. 254-2 CCP)⁶⁴

4.3 Specific Victim-Oriented Sources of Law and Guidelines

The Penal Code and the Code of Criminal Procedure include sections which are relevant to victims (see Part II). In practice, however, as the rightful result of the decisions of the European Court for Human Rights, much more attention is given to the rights of the accused (see § 2). Consequently, the rights of victims that have been incorporated in to the law do not yet get the attention they deserve during the criminal process. Other enactments relevant to victims are the Terrorism Act and the Press Act. The 1991 Terrorism Act (T.A.)⁶⁵ states that victims who report terrorist acts are entitled to protection (see § 8.3, G.16). Also, the 1950 Press Act⁶⁶ contains a number of provisions aimed at protecting certain specific groups of victims against publicity (see § 8.3, F.15).

Legal aid

No legal aid is available to victims.

State compensation

In a few exceptional instances, victims can get compensation from the state. First, victims can get state compensation if damages were incurred in riots and the proprietor is not insured. Second, the *Fakir Fukara* fund – to be compared with an emergency welfare fund – may offer financial assistance to victims of crime who have landed themselves in precari-

⁶¹ A. Guriz, *Sources of Turkish law*, in: T. Ansay, D. Wallace, *Introduction to Turkish law*, Kluwer, Deventer, 1987, pp. 1-21.

⁶² Law no. 765, March 1, 1926. An English translation of the Turkish Penal Code can be found in the American Series of Foreign Penal Codes, no. 9 (1965).

⁶³ F. Golcuklu (1987), p. 206.

⁶⁴ Illegally obtained evidence through for instance illegal search and seizure, illegal line-ups, wire tapping or illegal secret agents is to be excluded and cannot be taken into consideration by the court.

⁶⁵ Act on Terrorism, Law no. 3713 of April 12, 1991.

⁶⁶ Press Act, Law no. 5680 of July 15, 1950.

ous economic situation.⁶⁷ Finally, certain victims of terrorism may apply for state compensation. A State Compensation Fund has been set up for civil servants who suffered as result of terrorism (*Sosyal Dayanışma ve Yardımlaşma Fondundan* – s. 22 T.A).

5 ROLES OF THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM

Victims can assume various roles, such as that of the civil claimant or auxiliary prosecutor. However, in practice, their role remains marginal. Before the trial, the victim has no influence at all. It is only in the courtroom that he or his lawyer has access to the public prosecutor's file. In court, the damages incurred by the victim do not get much attention. If the victim or his lawyer do not actively pursue a claim for damages, this claim will be overlooked or ignored. The main hindrance to victims who want to pursue their interests in court is their absolute lack of information. Consequently, most victims need a lawyer in order to find out what steps to take. As a rule, victims have to pay for their lawyers whereas the accused can get a free state paid defence counsel. The court may order the offender to pay the victim's costs and legal fees but these are usually very small sums. The amounts are fixed by law, just like fines, and with Turkish inflation rates they become pocket-money before long.⁶⁸ The sums are adjusted now and again, but the disparity remains huge. According to lawyers specialized in criminal law, the disparity is no coincidence. They feel it is used to dissuade victims from getting involved in criminal suits. In practice, the criminal justice authorities try to discourage the victim from playing his part as a civil claimant or private prosecutor, despite his legal right to do so.

5.1 Reporting the Offence

Pursuant to the law, victims may report to the public prosecutor, the police or to the justices of peace. In addition to the right of victims to report to these authorities, they may report crimes to the governor (*valiler*), the administrative chief of the district (*kaymakamlar*) or of the sub-district (*nahiye müdürleri*) (s. 151 CCP). Victims may file the report in writing or orally. An oral report, however, has to be recorded by the authority to whom the crime has been reported (s. 151 CCP). In practice, most victims report to the police. Usually, police stations have no waiting rooms. Victims have to wait in the hall-way or in the room where reports are filed. The waiting time is determined by the capacity of the station and by the severity of the crime. Also, no separate rooms are available to question and hear victims and suspects. Although the police always attempt not to bring a suspect and victim of the same crime together in one room, it may occur that a victim has to tell his story while a suspect of another offence is being questioned. All police stations are open 24 hours a day to receive victims' reports.

If a victim has sustained physical injuries, the police accompany the victim to a medical doctor. The police, however, cannot always ensure that a victim will be examined by a

⁶⁷ Information supplied by police officers in the Kartal district, Istanbul, *Kartal Merkez Karakol Amirliği*, 13 October 1997 and in other districts, Istanbul, 15 October 1997.

⁶⁸ For instance, the average fee for a lawyer in a felony case will be around 250 million Lira (EUR 460). The sum mentioned in the law for legal fees is only 10 million (EUR 19). For the defence counsel in a misdemeanour case, the lawyer will ask for 100 million Lira (EUR 190) but the victim can only get 1 million Lira back from the offender (sums of 1997).

female doctor, if she has requested to be treated by a woman. This depends on the medical doctor on duty in the hospital. Concerning the medical profession, it is important to note that medical doctors have a duty to report crimes to the police. They can be punished if they fail to report that a victim came to see them with conspicuous injuries. It is not clear whether how this rule is interpreted, or whether this prevents certain victims from seeking medical help. At the police station, on the other hand, the request of a victim to speak with a female officer is respected, as much as possible. If there is no woman available, the police will try to get one from another police station.

After the victim has reported the crime, he is entitled to a copy of the report but he must ask for it. The copy will not be given to him automatically. In practice, victims hardly ever request a copy of the report because they simply do not know they have the right to do so. Once the report has been filed, the contacts between the police and the victim are maintained. Often victims have to come back to the police station to give additional information or provide additional statements, in particular in complicated and difficult cases.

5.2 Complainant

In some cases specified by law where the injury is perceived to be more private than public, the victim may instigate criminal proceedings by means of a complaint (*sūshī dāva*, ss. 344 – 364 CCP).⁶⁹ Besides crimes such as libel and slander which are private crimes in most jurisdictions, the victim should also file a complaint with respect, amongst other things, breaking and entering a house, physical violence (without the intent to kill) causing physical or mental injuries, certain property offences, and threatening to cause serious injury (s. 344-1 CCP). Because there is such a wide range of offences, the victim does not have to be a person of flesh and blood; companies also qualify to bring legal action (s. 344-3 CCP). It has to be noted that sexual offences are considered to be public crimes. Consequently, the public prosecutor can prosecute without a formal complaint from the victim.

Victims may file a complaint with the public prosecutor or the court, both orally and in writing. A report to the political authorities (governors and administrative chiefs) can only be done in writing (s. 151-4 CCP). Usually though, the complaint is submitted to the public prosecutor (see further § 7.1, B.7).

5.3 Civil Claimant

The victim is entitled to claiming compensation from the offender within the criminal proceedings. The criminal justice system in this respect follows the adhesion procedure, by which a victim's claim can be presented at the trial. If the accused is convicted, the court may render a decision regarding the civil claim for compensation of the victim (s. 358 CCP). The formal conditions are, first, that there should be a causal link between the offence and the injuries and losses suffered by the victim, and, second, that the civil claimant should be directly affected by the offence (see further § 7.2).

⁶⁹ The position of the complainant can be compared with the German *Privatklage*. See F. Golcuklu (1987), p. 251.

5.4 Auxiliary Prosecutor

The victim who chooses to act as an auxiliary prosecutor has the right to actively participate in the criminal process (ss. 365-372 CCP). As an auxiliary prosecutor (*müdahale yoluyla dava*, s. 365 CCP), he is a party to the proceedings and works alongside the public prosecutor. It is a position that can be compared to the German *Nebenklager*.⁷⁰

A victim who wants to become an auxiliary prosecutor has to submit a petition to the court or make a declaration before the clerk at the court's office, who will then prepare an official petition. This petition has to be approved by a judge (s. 366 CCP). From the moment the victim's request is accepted, he enjoys the same rights as the complainant (see § 5.2). Even though a victim may join the proceedings during the trial, it is best to apply for this status at an earlier stage because his petition does not interrupt the proceedings. Furthermore, it is important to note that if the auxiliary prosecutor was not summoned or informed in time, this has no effect on the trial proceedings (s. 368 CCP).

As an auxiliary prosecutor, the victim (or his lawyer) can bring other evidence to court, in addition to the evidence presented by the public prosecutor. He can also adjudicate his claim for compensation (s. 365 CCP). According to lawyers, it is difficult to get access to the public prosecutor's file before the trial.⁷¹ As an auxiliary prosecutor, however, the victim has the power to introduce extra pieces of evidence to the legal file. The victim can do this even before the first court hearing. The only prerequisites are that the victim has to tell the court in writing that he wishes to present evidence and that he has to get the judge's approval. Another advantage of being an auxiliary prosecutor is that it is not required to deposit a bond before participating in the proceedings (s. 366 CCP).

Decisions taken before the intervention of the victim as an auxiliary prosecutor, provided that the public prosecutor has been notified, remain valid (s. 369 CCP). If the auxiliary prosecutor does not attend the trial, he will be notified about the court's judgment (s. 370 CCP, see § 6.2). Finally, the auxiliary prosecutor has the right to take recourse to legal remedy independently of the public prosecutor (s. 371 CCP).

5.5 Witness

If the public prosecutor decides to prosecute the case, the victim will have to act as a witness for the prosecution (s. 238 CCP). This means that victims have to repeat their pre-trial statements in court, even if their testimony is not strictly necessary because there is enough other evidence to prove the case. There are, however, some exceptions to this rule. Firstly, the reading of the pre-trial statements of the witness is permitted and sufficient if the witness has died, has become mentally ill, or cannot be found. The court has to state reasons for permitting the reading of the records (s. 244 CCP). The second category concerns witnesses whose presence in court becomes impossible for a long or indefinite period of time. Then the court may conduct the hearing of such a person through a delegated judge or an interrogatory session. If necessary, the witness will be heard under oath. This also applies to witnesses whose presence in court would constitute hardship because they live at a great distance from the court (s. 216 CCP).

⁷⁰ F. Golcuklu (1987), p. 251.

⁷¹ It is also difficult for lawyers to get access to the file if they act as defense counsel for the accused, despite changes in the law to improve the rights of the accused and to give more powers to his counsel.

If the witness does not testify in court, the public prosecutor and the defence counsel have the right to be present during the hearing outside the court room (s. 186 CCP). However, a prerecorded statement cannot be read in court simply because the witness claims his right to refuse to testify in court (s. 245 CCP). In practice, it will not be easy to refuse to testify in court if the victim wants to get the offender convicted.

Finally, the victim-witness has the right to make a statement in court about the case. Section 251 CCP reads as follows: 'After the introduction and adjudication of the evidence, statements may then be made by the complaining witnesses, then by the public prosecutor, then by the other parties, and after them by the accused. The public prosecutor may reply to the accused, and the accused and the counsel for the accused may reply to the public prosecutor. The complaining witnesses and interested parties may only reply with permission of the court [...]' In practice, the statement of the victim-witness bears some resemblance with the Victim Impact Statement because the victim may tell the court what he has experienced in the aftermath of crime. Concerning the questioning of witnesses, see § 8.2.

PART II:

THE IMPLEMENTATION OF RECOMMENDATION (85) 11

6 THE VICTIM AND INFORMATION

6.1 Informing the Victim

- (A. 2) *The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation.*

There are no legal provisions or guidelines which oblige the police to inform victims about any of these subjects, nor do the police consider it their duty to give information to victims. Concerning assistance, there are hardly any services which would be able to help victims of crime. In the cities where there are services for victims of domestic violence and shelters (see § 3.6), the police ignore their existence. If a victim asks the police for legal advice, he will be referred to the public prosecutor or advised to get a lawyer. The police feel that by giving legal information to victims or by sharing their opinion about the proceedings, their impartiality would be jeopardized.⁷² The police, however, realize that about 50% of victims do not know anything about legal procedures. Notwithstanding, it is only in cases where the victim is very distressed or ignorant about what to do, that the police may offer some advice and practical help, by telephoning the bar association and requesting a lawyer. In fact, lawyers are the only source of (legal) information for victims of crime.⁷³ With respect to other types of practical advice, the police are also very reluctant. They do not like to give advice on how to prevent further victimization because they believe that this will make

⁷² This is not typical for the police. Also in interviews with public prosecutors, they insisted that giving information to victims of crime is a sign of partiality. Consequently, they felt that assisting victims in any way would interfere with their code of ethics. Even though, they do give (legal) information to suspects.

⁷³ Information supplied by police officers in the Kartal district, Istanbul, *Kartal Merkez Karakol Amirliği*, 13 October 1997.

victims anxious about crime. If the police feel there is a risk that the crime will be repeated, they will try to prevent this from happening by putting extra men on the case or on the street. And even though they are fully aware that there is no victim support, the police still do not help victims with writing letters to the court or filling out forms for payments by insurance companies. Only lawyers provide practical help, but the victim will have to pay for such services. If a victim needs medical treatment, the police will send or accompany the victim to a medical doctor. The resulting medical report is included in the case file.

Regarding compensation, if it is evident that the victim is ignorant about what to do, the police inform him that he has to ask the court about compensation for these damages and he will be advised to get a lawyer. The police report, however, does not mention the wish or need of the victim to receive restitution of goods or compensation. If the victim wants compensation, it is entirely up to him or his lawyer to pursue his claim for compensation. There is no State Compensation Fund with a general scope to compensate victims of crime, although there are few exceptions (see § 4.3).

It is clear that exercising a victim's rights may be frustrated by a lack of information and assistance. Nevertheless, the police feel that victims are usually disappointed not so much by police performance but by the criminal process itself. The main reasons for disappointment are said to be that victims consider the punishment to be too low and/or they are left with the financial consequences of the offence. Lack of information is recognized by the police as one of the biggest problems for victims in Turkey. But the police do not consider it their job to inform victims and/or do not feel that they have the expertise to give legal advice (see §§ 3.1 and 8.1).

(A. 3) The victim should be able to obtain information on the outcome of the police investigation.

The police do not inform victims about the outcome of their investigations. This is considered to be the duty of the prosecution service or the court (see § 3.3.1). Victims who contact the police at an earlier time with questions about their case will be referred to the public prosecutor in charge of the investigation.

(B. 6) The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information.

In general, the victim is informed of the public prosecutor's decision to prosecute. This has a practical reason; the victim is the main witness for the prosecution. As a witness, he always has to be summoned to court to give evidence (see § 5.5). This is the responsibility of the court. On the other hand, if a decision is taken not to prosecute, the complainant and the auxiliary prosecutor (see § 5.2 and § 5.4) are notified by the public prosecutor because they have the right to oppose the decision. The prosecution service is legally obliged to notify him. The notification should include information about how, where and to whom the victim can complain about the decision not to prosecute, and within which period of time he should do so (see § 7.1, B.7).⁷⁴ In practice, public prosecutors are said to comply with the law. Other victims, who have not assumed these formal roles, are not informed by the public prosecutor about his decision not to prosecute.

⁷⁴ Information supplied by lawyers (14 October 1997) and a public prosecutor in Istanbul (17 October 1997).

- (D. 9) *The victim should be informed of:*
- the date and the place of a hearing concerning;
 - his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice;
 - how he can find out the outcome of the case.

As a rule, the victim is summoned as a witness for the prosecution (see § 5.5). The date and place of the first court session are mentioned in the summons. If the victim is needed at subsequent hearings, the court will summon him again. If the court feels the victim does not need to give testimony after the first session, the victim will not be informed of the date and location of subsequent hearings. However, if he has a lawyer, the latter is informed and notifies the victim. In addition, the complainant and the auxiliary prosecutor must be informed of the date and place of the trial.

Regarding the victim's opportunities to obtain restitution or compensation, legal assistance or advice, there is no specific judicial body that informs the victim. Neither the police, or the public prosecutor or the judge will explain him what steps he should take. Generally speaking, unless the victim has his own lawyer, he lacks the most basic information about his right to be compensated by the offender.

Victims, and especially those victims who do not act as complainants or as auxiliary prosecutors are hardly kept informed. There are, however, exceptions to this rule. One of these concerns the outcome of the case. It is standard procedure that the court notifies victims who have assumed these roles about the outcome of the case because the victim has the legal right to lodge an appeal against the sentence. Even if the victim feels that the sentence is too low, he has the right to take recourse to a legal remedy.⁷⁵ According to the law, the complainant or auxiliary prosecutor have the right to appeal any decision on the same grounds as the public prosecutor (s. 359 CCP). There are no statistics or other sources of information to assess how often victims use this right.

6.2 Information About the Victim

- (A. 4) *In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim*

The police mention the injuries and losses of the victim in their report to give an indication of the consequences of the crime. It is, however, up to the victim to present his claim for compensation to the court. The public prosecutor is never involved in any claim for compensation made by the victim. Nonetheless, the nature of the victim's damages or injuries may play a role during the trial. The public prosecutor may demand a more severe penalty if the victim has suffered serious injuries or incurred damages. However, generally speaking, the nature and extent of damages incurred does not influence the court's sentence.⁷⁶

⁷⁵ Information supplied by lawyers, Istanbul, 14 October 1997.

⁷⁶ Information supplied by lawyers in Istanbul, 13 and 14 October 1999 and by judges and public prosecutors in Ankara, 20 October 1997.

(D. 12) *All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the quantum of the sentence, take into account:*

- the victim's need for compensation;*
- any compensation or restitution made by the offender or any genuine effort to that end.*

The police record the damages incurred and injuries suffered by the victim but these facts are not intended to serve the purpose of compensating the victim. They are included in the report as evidence of the occurrence of crime. The severity or extent of the victim's damages rarely influence the form or quantum of the sentence. And, as a general rule, the court does not occupy itself with the victim's injuries and losses. Victims who seek compensation have to defend their own interests and put in a request for compensation during the trial. Once a claim for damages has been made, this is no guarantee that the court will be willing to grant damages to the victim. Criminal court judges usually refer the claim to civil court. This is surprising if one considers that civil and criminal cases are heard by the same judges (see § 3.3). Therefore, all judges are able to establish the amount of damages that would be awarded in civil court proceedings and award it within the criminal process.⁷⁷

In the exceptional⁷⁸ case where an offender has made any payments to the victim or otherwise repaired the losses before the trial, the defence counsel will inform the court. Subsequently, the court will take the payment of damages into account as an attenuating circumstance (see § 7.2, D.13). Concerning any genuine effort of the offender to compensate the victim or his willingness to do so, the court may again consider this an attenuating circumstance. The law allows furthermore that the court imposes a less severe sanction if the offender has made a good impression during the criminal process (s. 59 PC). In practice, however, if the offender has committed a serious felony, the promise to compensate the victim will not easily influence the quantum of the sentence.⁷⁹

7 THE VICTIM AND COMPENSATION

Within the Turkish criminal justice system, it is very unusual for victims to claim compensation from the offender. A first explanation is the inadequacy of the provision of information about the victim's rights. The criminal justice authorities, however, maintain that victims know they have the legal right to claim damages in court. They feel the problem is that they do not know how to do this, and thus need a lawyer. A second and most probable explanation why victims rarely claim compensation is that lawyers generally tend not to advise victims to go to criminal court to claim compensation. Instead, lawyers advise their clients to obtain a conviction in criminal court and to use the verdict to claim compensation in civil

⁷⁷ Interviews in Istanbul with police officers (13 October 1997), a lawyer (14 October 1997), public prosecutors and a judge (17 October 1997).

⁷⁸ In Turkish culture, it is very rare that a suspect admits guilt – either by saying so or by paying compensation to the victim – before the court has found him guilty. Suspects are not very inclined to belief that this may lead to a less severe punishment.

⁷⁹ Information supplied by a public prosecutor in Istanbul (17 October 1997) and a public prosecutor and judge in Ankara (20 October 1997).

court.⁸⁰ Lawyers justify their approach by the fact that the civil courts are more inclined to award large sums of compensation. However, the lawyer handling the case for the victim in civil court gets a much higher fee. The fee structure of lawyers, a seemingly unimportant factor, may therefore be a major obstruction in effecting a change on behalf of victims of crime and significantly reduces their opportunity to obtain compensation within criminal proceedings.

7.1 The Expediency Principle and Compensation

(B. 5) *A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender*

The criminal justice system does not adhere to the expediency principle. The public prosecutor is thus not at liberty to dismiss cases whenever he considers prosecution uncalled for. There are specific, clear circumstances which will end public action (s. 164 CCP). Public prosecution is no longer possible if the accused has died, has been granted amnesty or pardon, or if the victim has withdrawn his complaint.⁸¹ The public prosecutor may also drop the charges if the offender, punishable by fine or by the maximum penalty of one month behind bars, deposits part of the fine before the hearing by the court. If this amount is paid before the public prosecutor takes the case to court, the offender is not prosecuted (s. 119 PC).⁸² In practice, the public prosecutor will also take a decision not to prosecute if he feels he does not have enough evidence to prove that a crime has been committed.⁸³ Compensation, however, is not taken into consideration by the public prosecutor, nor is the payment of compensation taken into consideration by the judicial authorities regarding the decisions to grant amnesty or pardon.⁸⁴

Mediation between victims and offenders is not an official police activity. There are no directives or circulars which authorize the judicial authorities to mediate between victims and offenders. According to the police, they do mediate in conflicts between neighbours and within families. They consider it counterproductive not to do so.

(B. 7) *The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to instigate private proceedings.*

After a decision not to prosecute is taken, the public prosecutor is obliged to notify the complainant and the auxiliary prosecutor of his decision. The complainant and the auxiliary

⁸⁰ Information supplied by three lawyers in Istanbul, on 13, 14 and 15 October 1997, who all stated that this is the standard procedure.

⁸¹ If prosecution depends on a complaint, the case will be dismissed or discontinued if the victim drops the complaint (s. 99 PC). Here, a payment of compensation by the offender or his family may play a role in persuading the victim to withdraw the complaint.

⁸² F. Gölçüklü (1987), p. 215.

⁸³ Information supplied by lawyers in Istanbul, 13 and 14 October 1997.

⁸⁴ General amnesty (*genel af*) terminates public prosecutions and sets punishments aside (s. 97 PC). Pardon (*özel af*) may set aside, reduce or change the punishment (s. 98 PC). Contrary to amnesty, a pardon does not remove the effects of the conviction nor will it effect the secondary punishments. Both amnesty and pardon are granted by the National Assembly and the President of the Republic (s. 104 Const.).

prosecutor have been given the right to a legal review. They may object to the Chief Justice in the nearest Aggravated Felony Court (see § 3.3) within fifteen days after notification of the decision not to prosecute. Such an objection has to be accompanied by proof justifying the opening of prosecution and it must be signed by the victim's lawyer, if the victim has hired such services (s. 165 CCP). Despite the fact that this is not required by law, the notice of objection stands a better chance of being accepted if it has been written and signed by a lawyer. Documents written by lawyers are considered more valid.⁸⁵ Of course, this increases the legal costs for victims. If the Chief Justice accepts the objection and finds the petition justified, he will order the prosecution of the case. If the petition is dismissed, the case can only be re-opened if new evidence has been discovered (ss. 164 *et seq.* CCP).⁸⁶

7.2 The Court and Compensation

(D. 10) It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished.

According to the law, the victim has the right to choose whether he wants to present his claim for damages in criminal or in civil court. If the accused is convicted, the criminal court may also take a decision regarding the claim for compensation (s. 358 CCP). The terminology used by the legislature clearly indicates that the criminal court is under no obligation to do so. If the claim for damages is complicated or disputed and leads to delays of the criminal proceedings, the court must refer the victim's claim for compensation to civil court (s. 358-2 CCP). Thus, although it is possible to grant compensation to the victim, there is no strong formal obligation for judges to act accordingly. In practice, it depends on the individual judge whether he allows the claim for damages (see § 7.2).⁸⁷ But most judges prefer to qualify the claim as too complicated or argue that it is not undisputed.

Another impediment to realizing the victim's right to be compensated by the offender is that most judges feel they have too many cases and too little time as it is, and that the victim's claim will only prolong the trial. Already, due to the principle of immediacy several hearings are needed to conclude the case. Nevertheless, it could also be argued that judges are simply unwilling to award a claim for damages in criminal proceedings. Yet, trials take a long time to conclude. Dealing with the victim's claim most probably will not have a significant effect on the duration of the trial. More probably, criminal courts judges see themselves as magistrates dealing with criminal law and are not inclined to grant compensation to victims. In the exceptional case that compensation is claimed in criminal court (see § 7 introduction), judges will as a rule refer the claim for compensation to civil court.⁸⁸ Therefore, the odds are against a victim who wants to obtain compensation from the offender in criminal court.

As said earlier, a third limitation lies with the lawyers that represent the victim. They will generally advise victims to present their claims for compensation in civil court (see

⁸⁵ Information supplied by lawyers, Istanbul, 14 October 1997.

⁸⁶ F. Golcuklu (1987), p. 255.

⁸⁷ Information supplied by Mr. Mahmutoglu and Mrs. Sokullu of the Istanbul University, Department of criminal law and procedure, Istanbul, 15 October 1997.

⁸⁸ As said before Turkish criminal law is based on German Penal Code (see § 4), however, German legal culture also seems to have had an impact. This attitude of Turkish members of the judiciary is an exact copy of their German colleagues. See Chapter 9.

introduction § 7).⁸⁹ It is common practice to start the two proceedings at the same time and postpone the hearings in the civil case until there is a judgment in the criminal process. The average criminal trial takes about one year, but the victim who wants compensation has to wait at least another six months before he has a court decision regarding damages. Therefore, this practice has two disadvantages for victims, it is both time consuming and brings along additional costs for victims. Here, it has to be born in mind that in Turkey many people are self-employed or work in a small company, which means that they have no income if they do not come to work. If they have to travel far, the situation is even worse since travel expenses are not reimbursed.⁹⁰ Hence, it is hardly surprising that it is quite rare for victims to claim compensation during criminal proceedings.

(D. 11) Legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction.

Compensation is not a penal sanction in the sense that it is an independent penal sanction (see § 3.3). The claim for compensation is a matter of private law, even if it is dealt with in criminal court. According to the Penal Code, the court may order restitution or compensation (s. 32 PC) but the court cannot award compensation as a substitute for a penal sanction. In practice, compensation is not often awarded within criminal proceedings but if it is, it is always in addition to another sanction such as imprisonment. The law also empowers the court to order the offender to pay the victim's legal costs (s. 32 PC). Furthermore, the court may postpone any suspension of punishments until the personal rights of the victim, i.e. the right to compensation, are restored or redressed by the convict (s. 93 PC).

(D. 13) In cases where the possibilities open to a court include attaching financial conditions to the award of a deferred or suspended sentence, of a probation order or any other measure, great importance should be given – among these conditions – to compensation by the offender to the victim.

In general, little importance is attached to compensation or restitution (see above). During the trial, the payment of compensation can be regarded as an attenuating circumstance. The offender who returns stolen goods or compensates for losses incurred by the victim prior to the instigation of criminal proceedings against him, receives a less severe punishment. His sentence will be reduced by one-third or two-thirds. If the restitution or compensation takes place during the criminal proceedings, the perpetrator's punishment is reduced by one-sixth to one-third (s. 523 PC).

In addition, the court may take the willingness of the offender to pay compensation into account (s. 59 PC, see § 6.2, D.12).

During the enforcement stage, payment of compensation may play a role if the court is willing to grant a conditional release or otherwise suspend the enforcement of the verdict. Pursuant to the law, the court may postpone suspension until damages are being compensated (s. 93 PC). Turkish law does not provide for probation or parole.

⁸⁹ Information supplied by lawyers in Istanbul, 14 October 1997.

⁹⁰ Information supplied by lecturers of the Police Academy, Ankara. This is also a reason why many persons do not want to act as a witness in court, simply because it costs too much.

7.3 Enforcement of Compensation

(E. 14) If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible.

Compensation is not a penal sanction, it is a decision under private law (see § 7.2, D.11). As a result, the victim is responsible for the enforcement of the verdict. He may get help from his lawyer to collect the money, especially if the legal fees have to be paid from the claim. Or, the victim may send in the bailiffs to collect money from the offender. Of course, the assistance of a lawyer or a bailiff is not free of charge. In practice, it is difficult to obtain money from the offender. This is true for most countries, however, in Turkey, an additional problem is formed by the fact that inflation is very high (at times about 80%) which means that most people have financial problems and any postponement of payment saves them (a lot of) money.

8 TREATMENT AND PROTECTION

8.1 Victim-Awareness Training

Judicial authorities

Public prosecutors and judges are mainly trained on-the-job. To become a judge or a public prosecutor, a law school graduate has to apply to the Minister of Justice in much the same way as he would for any other job. If accepted, one must start as an apprentice and work under the guidance of senior judges. At the end of a two-year period, the trainee may be appointed as a judge or public prosecutor by the Supreme Council of Judges and Public Prosecutors.⁹¹

Given the fact that the judicial authorities only receive training at the universities until the moment of graduation, it is hardly surprising that public prosecutors are insufficiently aware the latest case-law of the European Court of Human Rights, which may hinder the control over police activities. In Istanbul, public prosecutors receive only four days of training on the subject of human rights, in other parts of the country no training is provided. Finally, there are not enough courses for magistrates. As a result, they often have inadequate knowledge of new legislation. Today, academics of Istanbul universities give seminars to update their knowledge. Unfortunately, this is a novelty and not available for magistrates in other parts of Turkey.⁹²

General police training

New recruits are trained at police schools (*polis okulu*) or at the police academy (*polis akademisi*). Even though the general educational level at the police academy is quite similar to that in other countries, the main problem is that there is no practical training, which is left to the police units, or on-the-job training for incumbent personnel. Therefore police officers learn many specific police functions not from specially designed courses but from

⁹¹ The same applies to public prosecutors.

⁹² Yenisey (1997).

the mistakes they make, or by copying (bad) habits from each other.⁹³ The military police is not trained at all in police activities (see § 3.1, and A.1). However, to bring about changes in Turkey is difficult⁹⁴ and the results of change will therefore probably not be noticeable within the first decade.⁹⁵

There are over twenty police schools in different parts of the country. Students are accepted from age 22 to 27 and have to pass a written exam as well as a fitness test. At the police schools the cadets are trained for nine months in basic police skills and basic theoretical legal and social subjects. The training is very theoretical and provides insufficient preparation for everyday police work. Graduates have no rank and will serve as ordinary policemen. At the police academy, the only national and university institution based in Ankara, cadets are trained for middle and senior ranks. They can enter once they have finished a (police) high school and scored the required mark on the national exam. Their four year education program consists of physical training and theoretical training in many different subjects, such as law, public relations, sociology and social psychology.⁹⁶ The education is nonetheless generally considered inadequate to prepare them for their duties. This is partly due to the rather strange philosophy that education has nothing to do with daily police practice. Students receive very little training in practical skills and their general qualification is not backed up by occupational specialization. As a result the training of individual police officers seems to have little positive effect on police practice. Their theoretical knowledge is quickly subsumed by operational police culture.⁹⁷ Moreover, teaching staff often lack police experience and expertise, and are not always selected because of their capacities. Another problem is that the different levels of police training are poorly coordinated.⁹⁸

Until recently, the police curriculum at the academy did not include (extensive) training in social skills and or training on how to deal with the public or victims. Today, however, initiatives are being developed to change this situation. The police realize the necessity to improve its relation with the public at large. Moreover, at the police academy, training of the police has improved considerably over the last few years. Different members of staff have been trained abroad since the early nineties,⁹⁹ more contacts with foreign police academies

⁹³ I. Cerrah, *Public order police training in Türkiye: public order police training and its impact on public order police practices*, presented on the International Crime Conference, June 16-21 1996, Dublin, Ireland. See <http://www.whatsup.com/icc/Papers/Turkey.html>

⁹⁴ A (self proclaimed) characteristic common to most Turks is that they do not like criticism. Consequently, it is particularly difficult to bring about changes since this usually implies a critical attitude.

⁹⁵ Information supplied by the Directorate General of the Police, Ministry of the Interior, Ankara, 22 October 1997.

⁹⁶ I. Cerrah (1996), pp. 2-3.

⁹⁷ I. Cerrah (1996), p. 9.

⁹⁸ For instance, at the police highschool much attention is paid to technical courses, such as mathematics, physics and chemistry, but hardly any to sociological subjects. At the police academy this situation has changed, and attention is now given to other subjects, mainly writing skills. However, these skills have little to do with the requirements imposed by daily police practice.

⁹⁹ About fifty members of the teaching staff – all high ranked police officers with a university degree – were sent to for instance England, Germany and the United States to study, to write their doctorate thesis and to see for themselves how the police functions in these countries. Unfortunately, due to a change in policy and management, this great initiative has stopped. Teachers were summoned to return to Turkey, even if they were in the middle of their Ph.D's.

have been established¹⁰⁰ and study material has been modernised. At police schools, however, the situation is quite different. It is hardly surprising that public prosecutors sometimes feel like training institutions themselves. Frequently, they have to tell police officers how to carry out most basic of police duties, e.g. how to write a report. They have to teach them the legal requirements of a report, and tell them which facts are relevant and which should be included. Public prosecutors find this frustrating and time consuming, also because of the transfer system of civil servants (see § 3.1). When finally these prosecutors taught them everything there is to know, chances are that these policemen will be transferred to another district and the training ritual has to start all over again with the new recruits.¹⁰¹ The recent initiatives to improve police training at the police schools are the result of pressures and criticism from the prosecution service. In rural areas under the control of the gendarme, the situation is described as disastrous by the prosecution service. The problem is that the army is responsible for the training of gendarmes and it is difficult to (officially) criticize the army, an omni-present power block (see Scenery).¹⁰²

The police are generally considered to be insufficiently trained. However, what is truly remarkable is that all criminal justice authorities criticize one others' training and often consider themselves to be inadequately trained. The latter finding in particular demonstrates that there is both a need for more and better training and a great willingness to participate.

(A. 1) *Police should be trained to deal with victims in a sympathetic, constructive and reassuring manner.*

During their training at the police schools or the academy, the police receive no training with respect to the rights and interests of victims of crime. Nor are they taught how to deal with victims who turn to the police for help. In practice, the police see the victim as an important source of information and treat the victim accordingly. The police have never heard of the term 'secondary victimization', nor are they particularly conscious of such a concept in daily practice. This is especially harrowing for victims who belong to vulnerable groups in society, such as female victims of sexual offences or of crimes committed among relatives. The police are known to ask these victims what they did to deserve this.¹⁰³ Therefore it is hardly surprising that these victims do not report easily to the police. Furthermore, talking about such crimes is taboo.¹⁰⁴ For most people it is still a big step to

And what is worse, those who were abroad are now treated like pariahs in their own organization and face an uncertain future. So, it cannot be sustained that students at the Police Academy profit from their experience, new insights, modern knowledge or skills.

¹⁰⁰ While there, I witnessed foreigners visiting the police academy in Ankara and giving lectures.

¹⁰¹ According to public prosecutors interviewed both in Istanbul and Ankara.

¹⁰² Information supplied by the Directorate General of the Police, Ministry of the Interior, Ankara, 22 October 1997. The same applies to the cooperation between public prosecutors and members of the gendarme. If the gendarme makes mistakes, even serious ones, no public prosecutor will readily criticize the persons involved, nor point them out to their superiors. However, criticism of the national police is much more common.

¹⁰³ Information supplied by members of the Faculty of criminal law, Istanbul University, 15 October 1997.

¹⁰⁴ In Turkey, women generally have to remain virgin, until marriage. If a girl has been raped and the crime is prosecuted, chances are that the trial is held in public (see § 8.3). Once it is known that she is no longer a virgin, her future will be seriously affected. Families rarely allow their sons to marry a girl who is no longer a virgin, whatever the reason. Moreover, unmarried women have very low social status. It is critical that the judiciary starts to realize this and show

go to the police. Nonetheless, the police are a lot more sympathetic to victims than to suspects. In their own way, the police care for victims and they assist them in small matters.¹⁰⁵

With respect to police training, it is important to note the contribution of the faculty members of the Institute of Legal Medicine and Forensic Sciences that is involved in the SSA centres (see § 3.7) who train (some) policemen, public prosecutors and judges concerning a proper treatment of victims, and in particular victims of sexual crimes. These training programmes were set up in Istanbul, Ankara and Izmir at the local university based institutes of medical sciences and forensic medicine. Most of the students are police officers who are very enthusiastic about the opportunity to get training. During the course, modern psychological and victimological insights are given a lot of attention. The faculty staff feels it is important to talk about the psychological effects of rape or sexual assaults on victims and the repercussions of the ways the authorities should treat these victims when they seek the help of the police. The course also focuses on more technical aspects such as how to evaluate and interpret lab reports or the statement of an expert witness. This training is not only considered necessary for police officers but also for magistrates.¹⁰⁶ The necessity of training can be illustrated with results of a SSA research which shows that the statement 'rape is satisfying to the victim' is true according to (*inter alia*) 18% of the police and 16% of lawyers. The statement 'the victim deserved to be raped', is valid according to 33% of the police and 17% of the magistrates. And 66% of the police and 38% of magistrates thinks the clothing or behaviour of the victim has provoked the offence.¹⁰⁷

¹⁰⁵ more leniency towards these victims, for instance by holding a trial in camera. For instance, give a victim transport home or let him use the phone at the police station. At the station, there are separate rooms for reporting a crime where victims can tell their story in relative privacy. The only way for victims and offenders to meet at the station is by sheer coincidence in the hallway, if the police brings the suspect in at the moment the victim enters or leaves the station or is waiting in the hallway. Such confrontations are never planned and if possible they are avoided. The only way the police confronts the victim with the offender is in a line-up but then the victim cannot be seen because of the little peep-in window or the one-way screen. In a misdemeanour case, the victim may be confronted openly with the suspect to confirm his identity, if the police do not expect him to be aggressive or otherwise dangerous. The waiting time at the police station is determined by the severity of the offence or the physical or psychological damages suffered but is generally rather short. Information supplied by the Istanbul police, 15 October 1997.

¹⁰⁶ Much to the surprise of the medical doctors involved in the training, judges do not handle any criteria as to the assessment of the credibility of an expert witness. An expert is never asked for his curriculum vitae and his expertise is never questioned. The SSA teach magistrates to ask for credentials and publications and train lawyers how to defend the rights and interests of victims by attacking the reliability or expertise of the expert-witness. With regard to medical tests, most lawyers are for instance unaware of the possibility to ask for a second opinion or contra expertise. This is very relevant to victims of sex crimes because 60% of the lab results of non-academic hospitals are unreliable. As a result the offender will not be convicted for his crime because his guilt cannot be proven by hair, skin or semen samples. If only the lawyers would have asked for a contra expertise by another lab, for instance a military lab, the conviction rate would be much higher. Many ordinary labs cannot perform DNA-testing and if they do the methods are questionable, therefore lawyers should ask a contra expertise by a good lab of a respected university or the army. During the courses also the attitudes of the authorities regarding victims are discussed.

¹⁰⁷ Information supplied by Dr. Yavuz (MD) of the Institute of Legal Medicine and Forensic Sciences, Istanbul, 17 October 1997. The research including this data is under publication.

8.2 Questioning the Victim

- (C. 8) *At all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians qualified to assist them.*

The police, public prosecutors or judges are not trained to question victims in a considerate manner. Therefore, at every stage of the procedure, the way in which the victim is questioned depends on the individual who performs this task. As a rule, victims are questioned at least twice. They have to tell their story at each stage: to the police and usually to the public prosecutor during the pre-trial stage, and to the court during the trial stage. In most cases, he is questioned more than once by the each judicial authority. After reporting the crime, the victim often has to come back several times to the police station to answer additional questions. If the resulting case report is transferred to the public prosecutor and questions still remain unanswered, he will want to question the victim again. It is part of Turkish tradition in criminal proceedings that the public prosecutor personally sees and questions the victim.¹⁰⁸ Police officers and public prosecutors seem to be unaware of the risk of secondary victimization caused by repeated or inconsiderate questioning. To them, the victim is first and foremost a witness who has to cooperate with the criminal justice system.

Children are not questioned by the police because this is regarded as the exclusive competence of the public prosecutor. However, prosecutors are not trained in the particulars of questioning children. There are also no special facilities, such as child interviewing studios.

During the trial, the victim has to appear in court at least during the first hearing. But it is not usual for victims to be summoned to give evidence at a number of occasions. On average, court proceedings last for about one year.¹⁰⁹ In this year, the parties and persons involved have to present themselves at the court twice a month. According to the law, it is the judge who decides whether a victim has to come to court more than once. The presiding judge is authorized to summon some or all of the witnesses or experts for subsequent trial sessions, if the trial cannot be concluded within a single day because there is a large number

¹⁰⁸ Information supplied by lawyers, Istanbul, 14 October 1997, and by a public prosecutor, Ankara, 21 October 1997.

¹⁰⁹ Professor Yenisey of the Marmara University has recently performed a study that more or less corroborates these statements. The study was done in collaboration with Kaiser and Albrechts of the Max Planck Institute in Freiburg, Germany and includes 1000 legal files. According to the study, the time from the report to the sentence of the court is on average one year. The study further reveals that the duration of an investigation is 10 days. Yenisey feels this is often a too short a period. The investigations performed by the police and directed by the public prosecutor in particular lack quality. They spend too little time investigating and the case goes to court too soon. As a result, relatively many suspects are acquitted by the court for lack of evidence in Turkey, compared to for instance Germany. In Turkey, 30% of cases end in an acquittal; 50% in a conviction and the remaining 20% can no longer be prosecuted because of undue delay or because they have become prescribed by lapse of time. According to Yenisey, in a properly functioning criminal justice system the conviction rate of the cases brought before the court is 90%. One of the reasons for such poor performance is that there is no judicial police in Turkey (see § 3.1). Another interesting aspect of Turkish criminal justice practice is that prisoners are generally released after serving 40% of their sentence, whereas in Germany and the Netherlands they are released after serving 2/3 of their time. Yenisey (1997).

of witnesses, experts or defendants or because the hearings are long (s. 207 CCP). The judge may also decide that the victim only has to be present during the first hearing. This will usually happen in simple cases or non-contended cases, when there is no need for the victim to tell his story again.¹¹⁰

The victim, just like the other witnesses, is questioned by the presiding judge. Direct questioning by the parties is never allowed.¹¹¹ The court controls every aspect of the questioning. The court decides whether a question is proper or improper, relevant or irrelevant (s. 235 CCP). And if the court feels that one of the parties is abusing the right to question of experts and witnesses, the presiding judge is authorized to revoke that party's permission to question (s. 234 CCP). In this way, the court can protect victims against irrelevant or hostile questioning. However, in practice, it all depends on the individual judge. The judge may put questions to the victim in a harsh manner. But as a rule, it is considered an advantage for victims if the judge is in charge of questioning and protects the victim from hostile questioning by the defence counsel. For instance, if the suspect is expected to be punished severely, tension in the court room may rise, but the court can function as a stabilising factor. Or, if the defence wants to put more pressure on the victim-witness and tries to put him on the stand, the court can simply refuse to ask questions.¹¹²

In theory, questioning is a very formal ritual: the public prosecutor¹¹³ and the defence counsel have to ask the court if the court will allow them to ask certain questions to the witness. Then they have to present questions to the court and the judge will decide whether he feels these relevant. Hereafter, the judge will address the victim and formulate the questions in his own way. In practice, the ritual is somewhat less formal, however. Some judges abide strictly by the rules, others allow counsel to formulate a question and ask the victim or witness if he understands the question. If so, the victim may answer the question.

8.3 Protecting the Victim

(F. 15) Information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or particular status or personal situation and safety of the victim make such special attention necessary, either the trial before the judgement should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate.

The law comprises few opportunities to protect the victim against publicity which may affect his private life or dignity. Only the Press Act (PA) contains provisions to protect certain victims against undue publicity in the press, such as victims of sexual offences, or incest, and the surviving families of persons who have committed suicide. Concerning sexual offences, it is prohibited to publish photographs of victims or to reveal their identity. News releases about incest are expressly forbidden. The sanction for journalists, and newspapers or magazines they work for, can be imprisonment and/or a fine (s. 33 PA). Furthermore, publication of personal details in suicide cases is prohibited (s. 32 PA). The purpose of this

¹¹⁰ Information supplied by lawyers in Istanbul, 14 October 1997. Civil proceedings take longer than a case in criminal court, in general, they take between a year and a half and two years.

¹¹¹ According to all persons interviewed: lawyers, public prosecutors and judges alike, the presiding judge asks the questions himself to the all the witnesses, including the victim.

¹¹² Information supplied by a public prosecutor in Istanbul, 17 October 1997.

¹¹³ In the peace courts, there are no public prosecutors.

provision is to protect families against sensational tabloids. Finally, the Press Act prohibits the publication of documents on preliminary investigations (s. 30-1 PA). This is a rule deriving from the secrecy principle, protects suspects and victims alike. Documents which have been disclosed during the trial can be published; however, the media are not allowed to interpret their meaning (s. 30-2 PA).

With respect to the trial proceedings, the media, including television cameras, are commonly allowed into the courtroom. If the trial is open to the public, the media are allowed to photograph or film both suspects and victims openly and identification is possible. Their full names can even be disclosed in such broadcasts. The only exception to this rule concerns the publication of the personal details of juveniles which is forbidden (Act on Juvenile Delinquency and the Establishment of Juvenile law). This Juvenile Act protects both juvenile delinquents and juvenile victims.¹¹⁴

As a rule, court hearings are open to the public. Hearings, or parts thereof, can be held behind closed doors if this is necessary to protect public moral and security to hold the trial (partially) behind closed doors (s. 141 Const., ss. 373-375 CCP). In practice, however, this does not seem to happen very often, and victims are usually unaware of this possibility.¹¹⁵ Trials involving children under the age of fifteen, however, are always held *in camera*.

During the questioning of victim-witnesses, the court directs the examination and poses all questions (see § 8.2). Because direct examination by the defence counsel is not permitted, the victim is generally protected from hostile questioning. Also, the court may send the accused out of the courtroom if he fears the victim will not be able to speak freely in his presence (see below, G.16).¹¹⁶

(G. 16) Whenever it appears necessary, and especially when organised crime is involved, the victim and his family should be given protection against intimidation and the risk of retaliation by the offender.

Concerning the protection of victims against intimidation or retaliation by the offender, very few ways exist to offer protection to victims unless they are victims of terrorism (see below). The only protection that can be offered is to order the accused to be removed from the courtroom during questioning of the victim. However, this is only possible if the court suspects that the witness does not (dare) tell the truth in the presence of the accused (s. 240 CCP). There are no other protective measures available to victims. Moreover, victims are not allowed to hide their identity in court by disguising themselves.

Turkish law does not comprise special provisions with respect to organised crime. However, with respect to terrorism, victims and their families can be protected in several ways under a witness protection programme, e.g. their identities can be changed, as well as their houses or work, and they have the right to a monthly income guaranteed by the state (ss. 19, 20 Terrorist Act, see § 8.3). Civil servants who incurred material or moral damages due to terrorist acts, have the right to be compensated by the State (s. 21 TA) or to enter a witness protection scheme (ss. 19-20 TA, see § 4.3).

¹¹⁴ Information supplied by Mr. Mahmutoglu and Dr. Sokulu of the department of criminal law and procedure at Istanbul University, 15 October 1997.

¹¹⁵ None of the lawyers I spoke with seemed to know about this possibility to protect their clients. If a victim is too afraid to testify in public court, they suggest the victim should go to the governor and ask for a gun permit. Or if the victim is a famous or powerful citizen, he may ask for police protection.

¹¹⁶ Information supplied by lawyers in Istanbul, 14 October 1997.

9 CONCLUSION

Turkish criminal law and proceedings is not only influenced by German criminal law, but it is also characterised by German dogmatism. Dogmatism is rarely a good point of departure to find ways to improve the position of victims within criminal proceedings. Furthermore, secondary victimization is not an important issue, if it is known at all among legal practitioners. There only response to crime seems to be the incarceration of the perpetrator; the victim is only one of the instruments to gather evidence against the suspect and is usually left without any assistance from the authorities, unless the crime constituted an act of terrorism. Secondary victimization is exclusively known among academics who have contacts with foreign jurisdictions. It was therefore a most promising sign to see that members of Police Academy's teaching staff were sent abroad to study police science and police practice. However, no structural improvements can be made if no clear policy is developed in this respect.¹¹⁷

Training of the (military) police needs to be upgraded to improve both the position of suspects and victims. In addition, more attention should be given to training of public prosecutors and judges. It is a promising sign to witness that university lecturers and persons of the medical profession are providing training in the three big cities. However, this is only a beginning and should not be considered the solution to the problem of inadequate training of the criminal justice authorities, particularly the police.

Concerning information, victims should be given information about their rights and how to safeguard their interests by the criminal justice authorities, as is stated in the Recommendation. Lawyers should not be the only source of information to victims. The more so, because victims are not entitled to apply for legal aid and the fee structure of lawyers seems to have a negative impact on the right to obtain compensation within the criminal process. One of the relevant questions that need to be asked is how one can explain why a jurisdiction, in which people have generally few assets, and so few people have insurance, pays so little attention to compensating victims during the course of criminal proceedings, or any other alternative conflict or claim settlement procedures.

With respect to questioning, the court's practice to direct the examination of witnesses is most helpful against hostile questioning, provided that judges are aware of the dangers of disrespectful questioning. Concerning questioning of children and other vulnerable victims, the criminal justice authorities should pay more attention to the risk of secondary victimization throughout all stages of the proceedings. Furthermore, repetitive questioning seems to be the rule, and hardly any attention is paid to possible adverse effects. Training may be helpful to reduce the need for repetitive examination to a minimum.

Because of the unawareness of secondary victimization among judges, the protection of victims against undue publicity and intimidation or retaliation is inadequate. The courts should be more willing to hold trials *in camera* to protect the victim from publicity that unduly affects his private life or dignity. Concerning sexual offences, a policy needs to be adopted to hold trials behind closed doors. In an Islamic society, the negative impact of publicity on the female and male victim is particularly great. It leads to stigmatization that may have a considerably effect on the course of their lives. One could consider extending the policy that already exists regarding trials involving children to trials involving adult victims of sexual crimes. Besides, this may be beneficial to the criminal justice system and society as a whole because it may have a significant positive effect on reporting rates.

¹¹⁷ It is worrisome that a change in directorship can end such important training programmes.

The protection of victims of sexual crimes against publicity in the media is however good and properly maintained. Protection against intimidation and retaliation, on the other hand, is almost exclusively available to victims of terrorism. Victims of other types of crime can only be protected by means of the court's authority to order the defendant to leave the courtroom. Civil servants who have become victims of terrorism are also the main group of victims who are entitled to State Compensation. To conclude, formal and actual implementation of the Recommendation is generally substandard and needs upgrading.

Supplements

ABBREVIATIONS:

Const.	-	Constitution
CCP	-	Code of Criminal Procedure
PA	-	Press Act
PC	-	Penal Code
SSA	-	Section of Sexual Assault at the Institute of Legal Medicine and Forensic Sciences
TA	-	Terrorism Act

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Prof. K. İçel, Department of criminal law and procedure, Istanbul University.

F. Mahmutoğlu, Department of criminal law and procedure, Istanbul University.

N. Polat, assistant professor at the department of International Relations at the Middle East Technical University, Ankara.

F. Selami, Department of criminal procedure, Istanbul University.

R. Sokullu-Akincı, Department of criminal law, University of Istanbul.

F. Yavuz, associate professor of legal medicine, Institute of Legal Medicine and Forensic Sciences, Istanbul University.

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Chapter 25

Information: Comparative Analysis and Conclusions

1 INTRODUCTION TO INFORMATION

1.1 Two Main Types of Information

In Recommendation (85) 11, information appears in two main forms. First of all, information features as items of knowledge that the criminal justice authorities must provide to the victim, or that they should make available to him. Guidelines A.2, A.3, B.6 and D.9 are concerned with information in this sense.¹ The Recommendation also explicitly mentions information as data processed into knowledge that should circulate between the criminal justice authorities. The guidelines determine that it should pass from the police to the prosecuting authorities, and from these authorities to the court (guidelines A.4 and D.12).

The ways in which information features in the Recommendation are illustrative of its importance for victims of crime. Information is the lifeblood of the criminal justice system. Only if the victim knows his rights and opportunities within the legal system, can he exercise them. Few victims are knowledgeable of the workings of the criminal justice system, or know their way around it. It is therefore essential that they are informed at an early stage of what to expect, whom they can turn to for assistance, and what they themselves can do to secure their legal rights. In sum, the provision of information to the victim is crucial to the effective use of his rights. But information must also circulate within the system to ensure that the victim's rights are recognized throughout the criminal proceedings. Information provided by the police on the injuries and losses of the victim, for instance, enables the court to award compensation to the victim. If the court does not have access to sufficient information to determine the amount of damages, the claim for compensation will either be dismissed or referred to civil court.

However, it is not only the victim that stands to gain from the successful implementation of the guidelines on information: the entire criminal justice system benefits from a successful provision and circulation of information. In terms of victims, research shows that those kept informed of the developments in the case tend to be more satisfied with the performance of the criminal justice system than those not informed, even if the offender was not caught

¹ For an elaborate discussion of the content of the guidelines, see Chapter 1.

(Shapland (1985), pp. 176-177), or the court's sentence was felt to be too low (Wemmers (1996), p. 208). Furthermore, satisfaction with the performance of the criminal justice system enhances public confidence in the system. A satisfied victim is more likely to cooperate with the criminal justice system in the future than a dissatisfied one.

1.2 Implementation

When comparing the implementation of the guidelines of R (85) 11 touching on information in 22 member states of the Council of Europe, one should bear in mind that local realities (see Chapter 2) may influence how laws, guidelines or policy decisions work in practice, even if the formal implementation is more or less the same. In the country reports (Chapters 3-24) attention is focussed on the local context within which the implementation of R (85) 11 should be assessed. In this Chapter, local realities are mentioned only if they are illustrative of certain differences or of influence on the implementation of the guidelines concerning information.

In order to fully assess the implementation of the Recommendation's guidelines on information, we distinguish between formal and actual implementation (see also Chapters 1 and 2). Formal implementation is relatively easy to trace and evaluate, because it involves checking whether relevant legislation, guidelines or charters exist. Actual implementation is much more difficult to assess. Here, we rely either on the results of research already done in a jurisdiction or, if no data are available, on information supplied by the criminal justice authorities and/or services involved with assisting victims of crime during our visits to the included jurisdictions (see Chapter 2).

1.3 The developmental schemes

The formal and actual implementation of one particular guideline is described and analysed by means of developmental schemes (see Chapter 2). The different steps in the developmental scheme indicate subsequent levels of sophistication. The fulfilment of Recommendation (85) 11's target is represented by the stage which finds itself between the two lines (here stage 2 and represented by the symbol 'R').

Underachievement is represented by the symbol '-'. Best practice is represented by '+' if the guideline is well implemented or by '++' if the guideline is implemented in a very good way.

Structure of a developmental scheme:

1 - underachievement		-
-----R(85)11		
2 - fulfilling the requirements of a specific guideline of R(85) 11		R
-----R (85)11		
3 - best practice		+

In this chapter, the developmental schemes can either incorporate formal and actual implementation, or if the actual stages of development differ greatly from the formal stages, two separate developmental schemes are drawn up to sketch the formal and actual lines of action. The problems encountered in daily practice are usually described as part of the actual implementation. However, difficulties may be described separately. This is mainly

done when the problems are not linked to specific stages of development or are of a more general nature. Also, the local realities may be incorporated into the description of actual implementation or described separately, usually before discussing the actual implementation. After having described the formal and actual implementation of the guidelines, measures are suggested to improve implementation of the guidelines. These formal or practical reforms may be a recapitulation of the best practice encountered in one or more jurisdictions, or they may constitute reforms not yet put into action. Finally, conclusions will be drawn and jurisdictions which have achieved best practice will be indicated.

2 THE VICTIM AND INFORMATION

First of all, the Recommendation mentions the duty of the criminal justice authorities to provide general information about the criminal justice process (guidelines A.2. and D.9). This is followed by the victim's right to be informed of the outcome of the police investigations (guideline A.3), and of the final decision whether or not to prosecute the suspect (B.6). Finally, the authorities should inform the victim about the date and place of a hearing, as well as the outcome of the case.

2.1 Information on the Victim's Rights and Opportunities

Guidelines A.2 and D.9(b) both concern the provision of general information which allows the victim to have a basic knowledge of both the workings of the criminal justice system and his rights and options within the system. We will discuss the guidelines together since D.9 sub b acts as a back up for guideline A.2.

(A.2) *The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation;*

(D.9) *The victim should be informed of: [...]
(b) his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice; [...]*

The actual implementation of these two guidelines is influenced greatly by local realities. Therefore we will first discuss the formal implementation. This is followed by a discussion of relevant local realities after which will describe and assess the actual implementation of the duty to inform the victim of his possibilities of obtaining assistance, practical and legal advice, and compensation.

2.1.1 Formal Implementation

A striking aspect of the formal implementation of the above-mentioned guidelines in the 22 jurisdictions is the large number of different methods of formal implementation. At stage 0, the significant number of member states are indicated which have refrained from creating an informative duty for the criminal justice authorities. Stage 1 features jurisdictions with a limited statutory duty, for instance, those which inform victims of their opportunities for claiming compensation. At stage 2, we find the jurisdictions which have created a general statutory duty but fail to indicate the responsible agent. The third stage of development is

the implementation of a general non-statutory duty which indicates the responsible agent. At the fourth and fifth levels of sophistication, member states have set up general infor-matory obligations of a mixed status (statutory and non-statutory) and a statutory status respectively, indicating the responsible agent.

Developmental scheme for formal implementation guidelines A.2 and D.9:

0 - no obligation	
1 - limited statutory obligation: compensation	
-----	R (85)11 (D.9)
2 - general statutory obligation but no designation of a responsible agent	
-----	R (85)11 (A.2)
3 - general non-statutory duty: pseudo-legislation or directives	
4 - general statutory regulation + specification in guidelines or circulars	
5 - general statutory obligation	
-----	R (85)11 (A.2)

Stage 2 is in accordance with guideline D.9. The levels of sophistication from stage 3 through to stage 5, conform with guideline A.2.

On the one hand, the developmental scheme expresses the importance attached to the creation of formal duties. Without a formal obligation of the police, only guideline D.9 is implemented. In implementing guideline A.2 the status of the obligation of the police should be a priority. It is also important to note that the pseudo-legislative status of the obligation to inform the victim is at a lower level of formal implementation than a statutory duty. This may be quite different, however, when it comes to actual implementation. But from a formal point of view, the distinction is justified. On the other hand, the developmental scheme expresses the relevance of designating a responsible agent. A general statutory obligation with no designation of the responsible agent reflects a lower level of formal development than a formal regulation that clearly indicates the obligation of the police to inform victims of their rights and options for assistance.

Stage 0: no obligation

Nine jurisdictions (*Cyprus, France, Greece, Italy, Liechtenstein, Luxembourg, Malta, Scotland and Turkey*) have not created any formal obligation for the police, or other criminal justice authorities to provide the victim with general information, or to inform the victim of his possibilities regarding compensation, assistance or legal advice. In *France*, for instance, the prosecution service has a limited duty to provide the victim with information about relevant developments in the case, but not to provide other items of information mentioned in the guidelines.

Stage 1: limited obligation

In *Austria, Iceland, Portugal, and Zurich*, a partial statutory obligation for informing victims has been created. Here, the scope is limited in terms of the infor-matory duty and the target group. The *Austrian* police are only obliged to inform the victim about private prosecution, whereas the *Icelandic* police are required to give information on compensation. The *Zurich*²

² We refer to *Zurich* rather than *Switzerland* because this member states consists of many cantons which each have their own legal system. The focus during this study has been on the criminal justice system of Zurich.

police's information duty is limited to victims of violent and sexual crimes and their opportunities to obtain assistance by victim support services. In *Portugal*, the formal informatory duties of the prosecution service only concern the victim's right to claim compensation.

Stage 2: formal duty but no designation of responsible agent

The two countries -*Germany and Sweden*- which are at this stage have not implemented guideline A.2. Their legislation recognizes that the victim should be given information, but does not specify who is primarily responsible for passing it on. In *Germany* in particular, the legislature has put guideline A.2. aside in favour of a stricter adherence to guideline D.9. by placing the primary responsibility with the prosecution service and the courts, rather than with the police.

Stage 3: general non-statutory duty

A general non-statutory duty for the police to provide the victim with information has been created in *England and Wales, Ireland and the Netherlands*. In *England and Wales*, a general obligation is established by means of the Victim's Charter (1996), which is a form of pseudo-legislation, embodying rules that are not directly enforceable in civil or criminal proceedings. However, victims may expect to be treated in accordance with the Victim's Charter. Likewise, the *Irish* Victim's Charter establishes a formal duty. In addition, there are the Police Memo and the HQ circular. In *the Netherlands*, the duty of the police to inform victims is found in the Beaufort, Vaillant and Terwee Guidelines with the status of pseudo-legislation. Contrary to the English Charter, *Dutch* guidelines, which are published in the law gazette, are binding, and citizens may expect to be treated in accordance with the published pseudo-legislation. The 1995 Guideline adherent to the Victim Act Terwee addresses the duty of the police to inform the victim on the subjects as formulated in guidelines A.2 and D.9.

Stage 4: general statutory regulation and specification in guidelines

Denmark has opted for a mixture of statutory and pseudo-statutory obligations. In both countries, the informatory duties regarding legal advice and state compensation are regulated in formal laws, the Victim Compensation Act and Act on Legal Aid.

Stage 5: general statutory obligation

Statutory obligations for the police have been established in *Belgium, Spain and Norway*. In *Spain*, the State Compensation Act and the Act on the Jury Court are relevant. In *Norway*, the relevant provisions can be found in the Code of Criminal Procedure and the Information on Prosecution Act. In *Belgium*, the legislative regulation is backed up by an explanatory guideline or circular. The 1992 Police Act contains the statutory obligation to 'assist victims of crime in particular by providing relevant information', whereas the 1994 Guideline OOP 15bis specifies this as giving information about the criminal proceedings, the victim's opportunities to obtain compensation and/or legal assistance and the various support schemes.

2.1.2 Local Realities

Local realities are quite relevant regarding the implementation of guideline A.2 of the Recommendation. Therefore, before the developmental scheme on actual implementation

is presented, the relevant local realities, such as reporting rates, creation of state compensation schemes and victim support services will be discussed.

Reporting rates

In all member states, practice regarding the provision of information to victims is influenced by the local reality of that jurisdiction. One of these factors is the willingness to report crimes to the authorities. If reporting rates are low, it has, *inter alia*, a negative impact on the number of victims who can be informed about their rights by the police. Certain jurisdictions, such as *Portugal* and *Spain*, have studied reporting rates. In *Portugal*, only about 25% of victims actually report to the authorities. *Spain*, also has low reporting rates. It has, for instance, been estimated that more than 50% of all thefts are not reported. Reporting rates of property crimes are influenced *inter alia* by the level of insurance. If most citizens have property insurance, they will have to report the crime in order to receive payment from the insurance company. These local factors do not have a direct influence on the actual implementation of guideline A.2 and D.9, because the guidelines only address the obligation of the authorities to inform victims who report a crime. The information should be provided by the police during the first contact with the victim after the offence has been committed (guideline A.2), as well as during the later stages of the criminal proceedings (guideline D.9).

State compensation schemes

The creation of state compensation schemes for victims of violent crime is particularly relevant. State compensation schemes have been set up in *Austria, Belgium, Denmark, England and Wales, France, Germany, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Scotland, Spain, Sweden, Zurich*. (See Chapter 26, § 6.4). Obviously, setting up a state compensation scheme is a *conditio sine qua non* for the provision of information on state compensation. In *Cyprus, Greece, Italy, Liechtenstein, Malta* and *Turkey* no information can be provided on state compensation since it does not exist.

Victim support services

Victim support services often originate from groups involved in women's rights and better treatment of women by the criminal justice authorities, or follow in the footsteps of such movements. Good examples of these are the *Dutch* and *Swedish* victim services. Today, in *Italy, Greece* and *Turkey* the victim support movement is still at the level of women's groups. The creation of grass-roots local victim services which give social, legal and practical assistance usually follow the initiatives of women's liberation groups. The most prominent victim support organizations have grown from grass-roots services (*England and Wales, France, the Netherlands*). In *Denmark, Iceland, Malta* and *Spain* victim support is still mainly a grass-roots local or regional service.

The step from local services to nation-wide organizations is made by cooperation between the different victim services. Currently, *Spanish* regional victim support services are moving towards cooperation, e.g. regarding training of volunteers or paid staff, and by sharing experiences. However, they have not yet really joined forces as, for instance, in the *Flemish speaking part of Belgium* and *the Netherlands*. In certain member states, the state decided that it was time for the local services to cooperate (e.g. *France* and *Zurich*). Alternatively, the state launched victim support schemes (*Norway*), or criminal justice authorities (*Luxembourg, Portugal*) set up a national victim support service. To date, eleven jurisdictions out of 22 have set up national victim support organizations, as is shown in the developmental scheme below. However, the levels of maturation differ significantly.

Developmental scheme Victim Support:

- | |
|---------------------------------------|
| 0 - no victim support services |
| 1 - national organization |
| 2 - national coverage |
| 3 - specialized assistance |
| 4 - pro-active policy |
| 5 - policy making, governmental level |

Stage 0: no victim support services

Today, no victim services have been set up in *Cyprus, Greece, Iceland, Italy, Liechtenstein, Malta, and Turkey*. However, in these jurisdictions social services may provide assistance to (certain) victims of crime. In *Malta*, for instance, the social service has established child protection and domestic violence units.

Stage 1: national victim support organizations

As a result of private or public efforts, national organizations exist in *Austria, Belgium (Flanders), Denmark, England and Wales, France, Germany, Ireland, Luxembourg, the Netherlands, Portugal, Scotland and Sweden*.

Stage 2: national coverage

All the above-mentioned victim support organizations have gone national. However, in *Portugal* the southern part of the nation is still lacking a sufficient number of victim support centres. Also, the *Belgium* situation needs some clarification. In spite of the fact that the *Walloon province* does not have one national organization (victim services are linked to local services for offenders), *Belgium* can be said to have achieved national coverage of victim support centres.

Stage 3: specialized assistance

A sign of further maturation is the provision of specialized assistance to the different groups of victims. In *England and Wales* and *Ireland*, specialized services have been set up for victim-witnesses. In addition, Victim Support *England* and *the Netherlands* have created specialized assistance for victims of traffic accidents. Furthermore, separate victim services have been set up for tourists in *Ireland* and *the Netherlands*.

Stage 4: pro-active policy

The second highest degree of maturation has been attained by those services that have established a pro-active approach towards victims. This means that victims are actively approached by victim support workers who ask about their well-being in the aftermath of crime, and whether they would need any practical, psychological or legal assistance. Of course a pro-active policy requires cooperation with the police or public prosecutors. The criminal justice authorities should inform the victim of the assistance provided by victim support and – with the victim's consent – give the victim's name, address, telephone number and the type of crime to the local support scheme. At this point, a victim support worker will contact the victim. A pro-active victim support policy has been established in *England and Wales* and *the Netherlands*.

Stage 5: involvement in policy making at the government level

Only the *Belgian, English and Dutch* victim support services have reached this maximal level of maturation. Here, victim support organizations are a genuine partner of the government in policy-making. Before important decisions are taken, the directors or staff members of Victim Support are consulted. They sometimes even initiate the discussion on further victim-oriented legal reforms or practical measures.³

2.1.3 Actual Implementation

The relevance of victim services is demonstrated in the developmental scheme representing actual implementation (see stages 5, 6 and 7). The effects of low or high reporting rates cannot easily be incorporated into a developmental scale. However, they should be kept in mind when reading the diagram since it does influence the range of information measures. Finally, information on state compensation schemes is not incorporated in the figure since we do not know for certain whether the police systematically provide information on compensation schemes to all victims eligible to state compensation. Reality seems to indicate that information on state compensation schemes is provided least. Whether this is due to certain political strategies in order to keep the state's financial burden as low as possible, is uncertain. In a few jurisdictions, e.g. *England and Wales, France and the Netherlands*, however, the state compensation schemes are very well known, inter alia because of the provision of information by the criminal justice authorities, and thus reach numerous victims of violent crime.

Developmental scheme for actual implementation of guidelines A.2 and D.9:

1 - transfer of information on a limited scale	
-----	R(85)11
2 - oral provision of information on a general scale	
-----	R(85)11
3 - brochures and leaflets	
4 - cooperation between the police and victim support services	
5 - limited referral system to victim support or social services	
6 - follow-up meetings	
7 - systematic referral systems to victim support or social services	
8 - systematic opt-in information and notification systems	
9 - the provision of information is considered a basic police duty	

Stage 1: transfer on a limited scale

The most common strategy is to pass on information orally, sometimes complemented by the use of brochures. However, the scale on which information is provided is essential. In *Austria, Cyprus, Germany, Greece, Iceland, Italy, Malta, Portugal and Turkey*, only certain information is passed on, or only occasionally. *Portugal* is a good example of the former practice: the only information given to the victim concerns his right to claim compensation. The latter practice is mostly due to the fact that the provision of information is not a duty. In

³ Other Victim Support organizations may also occasionally indicate problems to the government or suggest improvements (either in practice or in the law). A good example is the *Portuguese* Victim Support Organization.

these jurisdictions, the victim is usually informed about his options for obtaining legal advice, in the sense that he is advised to retain a lawyer. In practice no other information is provided, unless the victim is assertive and asks the authorities specific questions.

Stage 2: oral transfer on a general scale

Oral information is provided on a larger or more general scale in *Belgium, Denmark, England and Wales, France, Liechtenstein, Luxembourg, the Netherlands, Norway and Sweden*. As a rule, the communication of information takes place when the victim comes to the police station to report the offence. Usually, this is not as effective as one would expect. Many victims – in particular those who are seriously affected by the offence – are unable to understand, let alone remember the information given to them. It is therefore essential that other, additional strategies are developed.

Stage 3: brochures and leaflets

A commonly used strategy is to combine the oral transfer of information with handing over a leaflet or brochure to the victim. The main advantage of this strategy is that the leaflets may be used as a means to structure the information which is orally provided, and that the victim may reread the information at home. The relevance of the latter should not be underestimated. The victim may be quite upset and therefore unable to grasp all the information given to him at the police station. The brochure should, furthermore, contain the addresses of victim centres and social services. Leaflets and brochures are used by the police in *Belgium, Denmark, England and Wales, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Scotland, Spain, Sweden and Zurich*, and by other authorities than the police in *France*.

It is remarkable that written information is used in member states with a varying degree of formal implementation, from statutory to no formal implementation. In all these jurisdictions, the written information is standardized and used as a means to clarify or specify the orally transmitted information. Of these member states, *Ireland, Portugal, Spain and Zurich*, have printed leaflets for specific groups of victims only. The *Swiss* police use a standardized form to inform victims of violent or sexual crimes of social and counselling services available, whereas in *Ireland and Portugal*, only victims of domestic violence are provided with a brochure. *Spain* only has a brochure on the state compensation scheme.

Other member states, such as *Belgium, England and Wales, France, the Netherlands and Scotland*, have made general brochures plus leaflets for specific groups of victims such as victims of sexual violence, or for children and the mentally disabled. *France* uses leaflets in a unique way. They are, as a rule, not handed out by the police but by other criminal justice agents, which means they are less easily accessible to victims. A very positive development is, however, that the legislature has taken the distribution of written information one step further by publishing a book entitled the Victim's Guide. The *French* example has been followed by *Portugal* which has published a guide for female victims of crime, containing both practical and legal information, and specialist information for victims of sexual and domestic violence.

Stage 4: cooperation between the police and victim services

In all member states where national or regional victim services have been created (*Austria, Belgium, Denmark, France, Germany, England and Wales, Luxembourg, the Netherlands, Norway, Portugal, Scotland, Spain, Sweden, Zurich*), the authorities have established some sort of working relationship with victim support.

In addition, in *Iceland and Malta*, the police cooperate to a limited extent with certain

social services which assist victims of crime.

The police retain their obligation to provide the victim with basic information but may refer him to the local victim support scheme for additional – more in-depth – information and assistance. In practice, however, this carries the risk that the individual police officer feels he has discharged his informatory responsibilities once he has referred the victim to the support scheme. Of these fourteen member states, *France* holds again a unique position. The legislature has expressly handed over the task of informing and assisting victims to victim support organizations since he is said to need more information and support than the authorities are capable of providing. In contrast with this official policy, the legislature and the criminal justice authorities have refrained from implementing an automatic referral system to make sure that victims find their way to the local support centre.

Stage 5: limited referral system

The creation of a referral system enhances the level of cooperation between the police and victim support services. In practice, this step is strongly influenced by the local situation and whether nation-wide operating victim services are in operation, but also the scope and sophistication of the victim support services. As a result of the absence of a national victim service, three member states (*Denmark, Iceland, Malta and Norway*) operate a partial referral system to social services that work with victims of crime. In *Denmark, Iceland and Norway*, an automatic referral system has been implemented only concerning victims of serious sexual offences, who will be referred to a Rape Trauma Centre or one of the crisis centres. In *Malta*, where no national victim support organization exists, the police have initiated a victim support unit, staffed by four police officers. The police may also refer victims to the small-scale domestic violence and child protection unit of the *Maltese* social services.

Stage 6: follow-up meetings

Only in *Belgium*, has the legislature provided for police officers to inform the victim again during a follow-up meeting. The follow-up meeting is standardized procedure and takes place within a limited period of time after the crime is reported. A follow-up meeting with the victim also makes the police more easily accessible and gives victims the idea that the police are really interested in their well-being in the aftermath of crime. It is regrettable that in practice the many policemen use the follow-up meeting as a means to obtain additional information from the victim rather than to offer the victim with more information, apart from how to prevent future victimization. Nevertheless, the interest shown by the police in the situation of the victim in the aftermath of crime is a sign of recognition and respect. It is a simple and practical manner to show victims that they are no longer treated as outsiders.

Stage 7: systematic referral system with a general scope

Delegating some of the informatory duties to criminal justice partners, such as Victim Support, may be a sound option. It is important to stress that the automatic referral systems do not exculpate the police from performing their own informatory tasks. Most systematic referral systems are based on an opt-in system. In practice, this means that the victim is asked whether his name, address and telephone number may be given to the local victim support centre. An opt-in system is considered necessary because of the privacy laws. In *Belgium, England and Wales, Ireland, the Netherlands, Scotland, Sweden and Zurich*, a systematic opt-in referral system is used. This means that the victim who reports a crime is asked by the police whether he would like to be referred to Victim Support or another social or legal

service for additional or more detailed information and assistance. Only *Zurich*, has a systematic referral system between the police and counselling services. The other jurisdictions have referral to Victim Support. In *Belgium*, however, victims are referred to victim support and to the appropriate police units.

The referral systems differ considerably in how they are set up. All but one referral system are based on the explicit consent of the victim. In *Scotland*, the referral procedures differ from police force to police force. In *Ireland*, the police fill out an automatic referral sheet which is sent to victim support upon explicit permission of the victim. Likewise, the *Dutch* police systematically pass on personal details to the local victim support scheme after which a volunteer contacts the victim, and, if necessary, makes an appointment. In *Sweden*, after protests of the Ombudsman only the victim's name, address and telephone number may be passed on to Victim Support. Only in *England and Wales* is there an implicit consent referral system in addition to the opt-in system which is based on explicit consent. Implicit consent means that the police automatically pass on personal details of the victim to Victim Support, unless he asks them not to. The implicit consent referral is used only for a specific group of offences, namely theft, burglary, assault, robbery, arson, harassment and damage to the home. Explicit consent is needed for sexual offences, domestic violence and homicide; details are passed on only after the victim has given his explicit permission.

In practice, the explicit consent model seems to function less adequately than the implicit one. This is due to the fact that if the police ask the victim for explicit permission, he usually responds with an evasive: 'I don't know' or 'I'll think about it.' Generally, no referral takes place. In *the Netherlands*, research (B&A Groep, 1998) has shown that the way in which the question is put to the victim is also very relevant. If the police ask the victim whether he needs help from victim support, many decline the offer. However, if the police ask whether the victim objects to giving his name and telephone number to victim support after which a volunteer will contact him, the vast majority do not object and will allow the police referral.⁴

Finally, in *Luxembourg*, although no systematic referral system has been set up, in fact victims are referred to social and victim services. In such a small state a formal system is not considered necessary. The informal manner of referring works quite well. Besides, victims know where the different services are and may even know the people who work there by name.

Stage 7: systematic information and notification systems

In *Belgium*, *the Netherlands* and *Sweden*, the police – in cooperation with other criminal justice authorities – have set up an opt-in information system for victims of crime. During the initial contact, the police provide the victim with the necessary oral and written information. In both jurisdictions, a lot of effort is made by the police and prosecution service to provide information to victims in a systematic and structural manner. In *the Netherlands*, the police use a computerized system to write down the reports which automatically show certain questions which should be asked and points that should be discussed. In addition, several legal districts use a flowchart to explain the criminal proceedings to the victim. *Sweden* has a standardized procedure for providing information: the police use a special form with a list of items to be presented. The police tick a box to indicate that a specific item of information has been provided to the victim. A very positive development in *Belgium* is that in certain legal districts the police are given a pocket-booklet containing all kinds of

⁴ Also in *Zurich*, researchers have shown the importance of how the question is formulated.

useful addresses and telephone numbers of social services and victim support centres. In addition, *Belgium* and *the Netherlands* have also set up an opt-in notification system which operates throughout the criminal justice process. The *Dutch* police ask the victim whether he would like to be kept informed of relevant developments in the case, whether he would like to receive compensation either from the offender or the state, and whether he would like to receive help from Victim Support. In *the Netherlands*, after testing the Victim Act and Guideline (Act Terwee) in two pilot districts,⁵ the percentage of victims supplied with general information rose from 41% to 61%. The results, in terms of assistance, also show that 55% of victims reporting a crime are given information about victim support and other forms of help, versus 38% before implementation. However, the information on obtaining compensation yielded little improvement (Wemmers, 1994, pp. 27-29). The *Belgian* legislature made it possible for all victims to register as an injured person. After registration, the victim will not only be kept informed of relevant developments, but also has several participatory rights formerly restricted to victims acting as civil claimants.

Stage 8: the provision of information is a basic duty

The duty of the criminal justice authorities to inform victims about their rights and options should be considered part of the ordinary job requirements and daily tasks. In other words, the provision of information to victims should be considered a basic duty. Only in *Belgium* and *the Netherlands* has the legislature expressly stated that informing victims is a basic police duty. This means that informing and assisting victims is technically part of the official evaluation of a particular police officer

2.1.4 Problems and Causes

A number of problems concerning information are linked to the absence of a formal obligation to inform victims. However, even in member states where a statutory or pseudo-legislative duty has been created certain difficulties persist. We will first describe the main problems encountered in the member states without a formal obligation, followed by those countries with a formal obligation. Secondly, the attitudes and perceptions of the criminal justice authorities designated to inform the victim seem to play a decisive role. Finally, common problems concerning information strategies will be discussed.

Absence of a formal obligation to provide information

In member states without a formal obligation to provide information, a common problem is the discretionary power of the individual police officers whether to pass on certain types of information. In these jurisdictions the transferral of general information largely depends on the attitude of the individual officer towards the provision of information to victims. Moreover, there are no incentives to promote informatory activities of the police. Clearly, this does not have a positive effect on the provision of information to victims, and in particular to victims of ordinary crime. Assessment of the country reports shows that police officers show a general willingness to provide certain types of information to victims – i.e.

⁵ In the Netherlands a great deal of effort has been put into evaluating the introduction of the Victim Act Terwee and the accompanying guidelines. Before its national implementation on 1 April 1995, these measures were first introduced on 1 April 1993 in two pilot-districts to enable the legislature to evaluate its effects. The experiences with the Act and guidelines were monitored, and in 1994 an implementation study was published.

how to obtain legal advice and practical assistance – if they classify the offence as serious, or particularly harmful. They usually tend to consider violent crimes and sexual offences as such. In itself, this is a fortunate development because the police show empathy towards the most vulnerable victims of crime. However, this practice conflicts with the right to information of the other victims. One would expect that formalizing the obligation of the police (or alternatively other criminal justice authorities) would solve the difficulties described above. In practice, however, this does not appear to be the answer. Not all the authorities abide by the rules. Public prosecutors and judges in particular do not seem inclined to inform the victim of his rights and possibilities. *German* research (Kaiser (1992), pp. 147-149) shows that from the relatively small group of victims whose case will be prosecuted and tried in court, only about 25% are actually informed. This is only a fraction of the number who would be reached by the police if they were to inform the same percentage of victims who report a crime. By establishing a formal duty for authorities other than the police, one misses out on all victims whose cases will not enter the judicial investigative or prosecution stage. This number is greatest in jurisdictions adhering to the expediency principle. This means that a successful transfer of information requires the involvement of the police. The available studies reveal a more fundamental problem. Informing every victim who contacts the criminal justice authorities is perhaps too ambitious. No jurisdiction is yet able to give basic information to all victims, in spite of the legislature's valiant efforts. There is no simple answer to the question why no jurisdiction is able to achieve a 100% score in providing information. This seems to indicate that actual implementation has an upper limit of approximately 70 to 80%, or, perhaps further measures need to be taken to enhance the actual provision of information (see § 2.1.4).

No designation of a responsible agent

It is extremely relevant that the legislature designates an agent who is responsible for the provision of information to victims, preferably the police. In *Germany* and *Portugal*, where no responsible agent is designated, confusion and failing to take one's responsibility is a particularly great danger. However, certain problems are closely linked to the responsible agent. Ideally, the agent should be knowledgeable and motivated. Furthermore, he should be given the time and means to fulfill his informatory duties. In practice, however, this is still not the rule.

Three common factors will be discussed here that affect his awareness of the need to inform the victim and on his motivation to perform his duties:

lack of knowledge of victim's rights

The first crucial factor seems to be the lack of awareness and/or knowledge about victims' rights and existing legislation. In *Sweden*, for instance, victims of sexual and/or violent offences such as rape, serious assault and (aggravated) robbery are entitled to state-paid legal aid by a victim's advocate. Often, the police and public prosecutors have insufficient knowledge of the Act on the Victim's Advocate and tend, therefore, either to say nothing to these victims, or tell them that they are not eligible for such assistance, even though they qualify according to the law. Also, in *Portugal* the police seem to be frequently unaware of the formal rules. For instance, they are often ignorant of the special rules regarding female victims of sexual crimes or domestic violence.

attitudes towards information

The attitude and perception of the criminal justice authorities about the need to inform

victims of their rights and opportunities plays a decisive role even if a formal obligation has been established. If the police seem primarily interested in fulfilling their obligation in a symbolic manner by obtaining the signature of the victim to prove that the written information has been handed over – as is common practice in *Portugal* and *Spain* – the return will be low. Concerning the other authorities, a *German* study conducted in the early 1990's, showed that 28% of the judges and 32% of the prosecutors feel it is unnecessary (Kury (1994), pp. 75-76). As a result, 26% of the judges and prosecutors never inform the victims; 44% only give information at the request of the victim; and only 10% consistently provide the victims with information. Besides the authorities, victims were also interviewed in this study; only 25.7% of the respondents claimed to be sufficiently informed,⁶ whereas 57.1% of the respondents said they would have liked to have received more information (Kury and Kaiser (1991), pp. 599-601).⁷

The country reports demonstrate that this is not a typical *German* phenomenon; the attitude and mentality of prosecutors and judges is a common problem in all other member states.⁸ Attitudes and mentality can be expressed in many ways. The duty to inform victims may be 'simply forgotten.' The authorities may not accept the statutory duties on information. Or, they may feel that no suitable moment or opportunity occurred to give out the information.⁹ The mentality and attitudes of police officers, prosecutors and judges is shaped by training, the traditional preoccupation with law enforcement tasks, and the minimal attention to the 'softer' tasks such as informing victims of their rights.

Changing the mentality of the criminal justice authorities towards victim-oriented tasks seems a matter of perseverance, and a long-term process. This process may be influenced by victim-oriented training programmes within official curriculums of the police and judiciary (see Chapter 27). Occasionally, however, it can be influenced by other factors, such as a crisis. *Belgium* is an excellent example. Here, the criminal justice authorities can no longer afford not to inform the victim or to not take him seriously. A better treatment of the victim, including provision of information, is the only means to restore the public's confidence in the criminal justice system.

perception of the victim of crime

Both the legislature's perception of the victim and his need for information, and that of the criminal justice authorities are critical to an effective provision of information to victims. The most striking perception of the victim is that of the 'alleged' victim (see Chapter 1). In most jurisdictions, individual members of the criminal justice authorities may see the victim first of all as an 'alleged' victim. Without a doubt, this has significant negative effects on his position within the criminal justice system and on the individuals'

⁶ To assess what 'sufficiently informed' actually means, they were asked about their individual knowledge of their rights. It turned out that 40% were aware of their right to inspect the court files, 25.7% knew they could apply for information regarding the outcome of the proceedings and only 20.6% had heard about their right to claim compensation during the criminal proceedings.

⁷ The results of this study were based partly on questionnaires sent to judges, prosecutors (attorneys) working in the area falling under the jurisdiction of the Higher District Court of Karlsruhe, and partly on victim surveys.

⁸ The attitude of the authorities not only influences the obligation to inform victims but also their right to receive compensation within the criminal process (see Chapter 26).

⁹ See Chapter 9, § 6.1, D.9.

perception of the need to safeguard his rights and interests. However, in certain jurisdictions, such as the common law jurisdictions or those heavily influenced by common law (*Cyprus, England and Wales, Ireland, Malta, Scotland*) and *Greece*, victims are routinely considered as alleged victims. For instance, *Greek* public prosecutors and judges hold the opinion that the relevance of safeguarding the rights of victims only comes into play after a court's guilty verdict, which both determines the status of the offender as well as that of the victim. The need to inform an alleged victim of his rights and opportunities is generally perceived as very low during the pre-trial and trial stage. A second expression of an imperfect perception of the authorities in its broadest sense is that victims are seen as a homogenic group with the same needs and wishes. In most jurisdictions, no specific categories of victims are isolated as primary target groups in the provision of information, though certain groups, like victims of sexual crimes, may receive more attention than others. A third perception of the victim with far-reaching effects is that the legislature only recognizes the right of certain victims to be informed. In a great number of jurisdictions¹⁰ only victims who play a formal role in the criminal proceedings are given basic information. The fact that in these states the prosecution service and the courts are responsible for the provision of information is closely linked to this view of the victim and his need for information.

Information strategies

With respect to information strategies, problems seem to occur in all areas. Most of all, the comprehensibility of oral or written information, the distribution of written information, and the inefficiently organized referral systems are particularly nagging.

comprehensibility of information

Portuguese practice clearly demonstrates the relevance of checking the content and comprehensibility of oral, and especially written material with the local context, such as the public's level of knowledge of the workings of the criminal justice system, technical terms, or even the average educational level.

It is quite useless to provide the victim with information in a manner that he cannot understand. In particular the use of legal terms and references to the law should be avoided as much as possible. Or at least the legal terms and relevant sections of the law should be explained.

distribution of leaflets and brochures

Distribution of informatory leaflets for victims may be problematic due to inadequate logistics. Leaflets are not always in the best places or the stock is not replenished. In *France*, for instance, leaflets are available mostly in court buildings. *Swedish* research (Lindgren (1994), p. 44) showed that whereas many victims claimed to be insufficiently informed, the missing information could be found in a leaflet that the police should have handed out.

¹⁰ For instance Austria, Belgium, Germany, France, Liechtenstein, Norway, Portugal, and Sweden.

organization of referral systems

The transfer of duties from the criminal justice authorities to victim services may also be badly organized. The transfer should not take place without a system which maximizes the chance that the victim will be informed. This is not as obvious as it seems, as may be illustrated by the *French* information policy. The very point of departure of the legislature is that victim support is primary responsible for informing the victim, because the police are believed not able to provide all what is needed by the victim. This line of reasoning is, in itself, not problematic. The problem in *France* is that the police do not inform victims and that no referral system to victim support is put in place. This is particularly debatable if one considers the French local context in which the local victim services are private organizations which all operate under different names.

If a systematic referral system is set up, the conditions under which referral may take place should be made clear, particularly concerning privacy regulations. Potential difficulties can be illustrated by the operation of the *Swedish* referral system, and the *Scottish* situation. In *Sweden*, the first automatic referral system operated without considering the protection of data or the wishes of the victim in this respect. The police liaison officer simply passed on the victim's personal details to victim services. This referral system was much criticised, inter alia by the Ombudsman. Now, the liaison officer only passes on the name, address, and telephone number of a victim after he has given consent. Today, a similar discussion is taking place in *Scotland*. No national automatic referral policy has been established because of expected problems with data protection laws, and the procedures concerning the victim's consent to the transfer of data.

In conclusion, these are a variety of reasons victims of crime are not adequately informed in practice. These problems may lead to a catch-22 situation. Many victims are seldom or inadequately informed of their rights when they report a crime. Therefore they are frequently unable to assume the role which would validate their claim to information. Unless they can afford to pay a lawyer or find their way to a victim support worker who can explain what their rights and options are within the criminal justice system, they will not have the know-how to participate in the proceedings.

2.1.5 Measures to Improve the Provision of Information

The numerous measures that can be taken to improve the provision of information can be subdivided into a) formal and organizational reforms, and b) practical measures.

A Formal and organizational reform measures:

Introducing full formal informatory duties for the police

The first requirement for the best possible transfer of information by the criminal justice authorities to the victim is the creation of a formal duty which designates the responsible agent, preferably the police. The exact status of the formal duty does not make much of a difference. However, the issuing of only non-statutory guidelines without embedding them in an Act does seem to reduce both the importance attached to the non-statutory duty and the awareness of the authorities of the existence of these directives, as in shown in the *Dutch* situation. In the *Netherlands* after implementing the Victim Act and Guideline Terwee in two pilot districts, the percentage of victims supplied with general information, including

assistance went up significantly. However, the increase in the number of cases receiving information on obtaining compensation were insignificant (Wemmers (1994), pp. 27-29). This constitutes a more general problem faced by all member states. The police find it quite difficult to give information to victims about legal rights, such as the right to claim compensation or the right to free legal aid. Most probably this is due to the fact that the police are not adequately trained to explain the ins and outs of criminal proceedings, and therefore prefer not to mention it or simply advise the victim to get a lawyer.

Raising awareness of legal reforms or victim-oriented measures

Wrong decisions on who qualifies for certain measures and a lack of awareness of the rights and interests of victims may be combatted with the creation of formal duties, training and standard working procedures. Also, ideas based on the perception of the victim as an 'alleged' victim until the court's verdict may be counteracted by training. However, it is crucial to realize that a change in mentality and attitude is something that requires more than training alone. If only recruits are trained, most effects will be neutralized on the work-floor. Therefore, training of incumbent personnel is necessary to bring about a change of culture and work methods within the criminal justice system (see Chapter 27, A.1).

Embedding informatory duties within the criminal justice system

The question whether the responsibility to inform victims has been properly integrated into the criminal justice system is very relevant. The practice in member states such as *Austria* demonstrates that without such an embedding the provision of information often remains dependant on the goodwill of individual police officers in spite of a statutory obligation. Providing information to victims should therefore be considered a basic police duty. Recognizing it as a basic task is an expression of an official appreciation of a victim-friendly or costumer-oriented attitude. Only in *Belgium* and *the Netherlands* has the legislature expressly stated that informing victims is a basic police duty. This means that informing and assisting victims is part of the official evaluation of a particular police officer, and thus should be included in his assessment prior to a promotion.

Organizational and financial incentives

Finally, the introduction of organizational incentives is a great asset to actual implementation. The Ministries of Justice and the ministries responsible for the police forces should act as pioneers, irrespective of whether the Departments have opted for a bottom-down or bottom-up approach to implementation of formal duties. Furthermore, financial incentives provided by the Ministries of the Interior or the Justice Department should be introduced. The police should no longer be exclusively rewarded with more means and manpower for crime-fighting activities. Victim-oriented activities, such as an adequate provision of information, should be rewarded in the same way as more traditional activities. This will not only enhance the status of the provision of information, but also formally put the activities alongside the more traditional duties, such as crime fighting. Only then can the best possible degree of implementation be achieved. The allocation of financial means for implementation of victim-related activities has taken place in *Belgium*, *the Netherlands*. The additional means or separate funding should be adequately earmarked as being exclusively earmarked to pay for victim assistance by the authorities, e.g. to pay for brochures or specialists who provide information to victims (help and information desks or reception desks as set up in *Belgium*). Without proper earmarking, the risk is great that money will disappear in the pool for general funding. For the authorities who have to carry out formal

duties, it is most relevant that the allocation of means is not only related to crime fighting activities. If victim assistance generates additional and separate resources, the top of the police and prosecution service are accountable for putting these to use. In practice, the earmarking of funds for victim related activities is usually inadequate. The second highest level, i.e. high ranking officers within the police and prosecution service, has the responsibility of determining policies, making proposals, and supervising implementation. Here, the commitment of police management and high ranking public prosecutors is critical, and should not be pro forma. It is recommended that, at this level, target figures for implementation are formulated and monitored. Such processes have been set in motion in *the Netherlands*.¹¹

Information strategies

A first step that should be taken is to use comprehensive and easily understandable leaflets. Secondly, the responsibility for the provision of (detailed) information should be shared with other services. The police should provide basic and general information and refer victims to other services for specific information.

However, careful thought should be given to the potential conflict with regulations of privacy laws. To protect the privacy of victims, referral systems should be based on a consent model. The police should preferably ask the victim if he objects to giving his name and telephone number to a service, such as Victim Support. If a referral system is set up, it should be done so as to maximize the chance that all victims will be referred to a service where they receive all the necessary information and assistance. These services are excellent partners for the police, given the important role they play in providing victims with the necessary information. But legal aid, social, and counselling services can also become partners in an automatic referral network. Setting up a network is recommended in order to establish a solid cooperation between the police and its partners.

Feedback systems

From an organizational point of view, it would be advisable for victim or social services to give feedback to the police so that they may know the results of their referral. On the one hand, feedback of positive results will not only improve the functioning of the referral system, but also motivate individual police officers to commit themselves to the system. However, even in *the Netherlands* where a network of all partners in the criminal justice system has been set up to advance the provision of information and assistance to victims, no systematic positive feedback is provided to the police and prosecution service. On the other hand, providing feedback about problems can help to upgrade the information and referral systems. Within the *Dutch* network of criminal justice partners, feedback of difficulties takes place in the steering committees, in which representatives of the various partners have a seat. The discussion of difficulties and the combined effort to overcome problems has proven to be a great asset to the implementation of the Victim Act and Guidelines Terwee.

¹¹ In the Netherlands, the lack of earmarking of funds destined for victim related activities is a recognized problem (B&A Groep, 1998, pp. 23-24).

B Practical measures

Leaflets

It is obvious that written information is relevant to victims of crime, it should therefore be available at places frequented by the highest possible number of victims, such as police stations, hospitals or in the waiting rooms of local GP's. Also, an effective distribution network should be set up within the authorities, and the leaflets replaced if they run out of stock. Moreover it would also be a good idea to initiate cooperation between the Ministry of Justice, or any other body that publishes the leaflets, and the Ministry responsible for the police, in order to facilitate and organize the provision of leaflets to victims when they report the offence.

Schematic (computerized) information aids

A schematic information aid will help individual police officers to remember what information should be provided to victims. One may even consider specified plans for different categories of offences. Information aids are currently in operation in *Sweden* and *the Netherlands*. In *Sweden*, the police have introduced a special form which contains a list of items that must be discussed with the victim. The form helps to establish an informatory routine. The police officer must tick a box for each piece of information that he passes on. Although a completed form is no guarantee that the information has actually been given, it will help jog the memory of police officers. Furthermore, *Swedish* police officers are supposed to indicate on the police report whether the victim has received the required information.¹² In *the Netherlands*, a similar but semi-computerized system has been put in place. The *Dutch* police use a computerized victim-form on which several items of information are indicated. This form is attached to the automatized form on which the report is taken down. It is a functional and practical aid to help police officers fulfill their informatory duties with the required consistency. In addition, the *Dutch* legislature has instituted a back-up procedure. The prosecution service has been given the formal obligation of checking whether the police have informed the victim. They are supposed to check the police report to see if the form is included and indicate what information has been given, and what follow-up information the victim would like to receive during the criminal proceedings. If the victim form is missing, or not completely filled out, the public prosecutor should make sure that the required information is provided to the victim.

Criminal proceedings diagrams

The criminal proceedings diagram is a practical tool for the police to use in explaining what will happen to the case after the report. To date, only certain *Dutch* police regions use a flowchart. Usually, police officers find it quite difficult to explain criminal proceedings to victims. The diagram may be used as a means to visualize in a schematic manner what the different steps are; at what point decisions are taken that concern the victim; and at what point the victim should undertake action to secure his rights, for instance regarding compensation. In an appendix to the diagram, additional information on the different procedural moments can be included as well as the proceedings on compensation – both from the offender and the state – and free legal aid. This aid should be available at the desks where crimes are reported.

¹² S. 21 ch. 23 Swedish Code of Judicial Procedure and s. 20 of the Preliminary Investigations Proclamation.

Services booklets

A services booklet would help police officers refer victims to organizations or services where they can get additional information or practical assistance. It should contain the addresses, telephone numbers and names of contact persons of all relevant sourced in the local legal district. Services that should be included include the local victim support schemes, medical and mental health services, counselling services, social housing corporations, shelters, child protection services, mediation schemes, legal aid services, the local Bar Association, and the State Compensation Board. In *Belgium*, certain police districts use this. It would be a good idea for every jurisdiction to provide police officers with such a booklet.

A state-paid victim advocate or allowing the victim to be accompanied by victim support workers

Although not strictly related to the implementation of guidelines A.2 and D.9, a final way to inform and assist the victim during the criminal proceedings is to appoint a state paid victims' advocate. In most countries, victims may apply for free or subsidized legal aid. However, these lawyers do not necessarily have the required expertise to assist victims. The appointment of a victim advocate is common practice for victims of sexual offences in all Nordic jurisdictions. They are usually highly motivated and can liaise between the victim and the system. A disadvantage may be that such advocates are a great expense for the state. In some jurisdictions where victim support services operate, the victim may be assisted and accompanied by a victim support worker. Victim support workers are familiar with the different aspects of the criminal process, and are able to explain the proceedings to the victim. Today, this option is mainly used for victims of serious crime, such as sexual crimes, in *England and Wales, Ireland, the Netherlands, Portugal and Scotland*.

2.1.6 Conclusions and Best Practice

Formal Implementation

The scheme presented below indicates that the member states which are operating at stages 0 and 1 are clearly in default. The obligation to inform the victim only of his right to obtain compensation is inadequate. Moreover, those which fail to designate the police as the responsible agent do not adhere to guideline A.2. The other member states at levels 3 through to 5 are all formally operating in accordance with guidelines A.2 and D.9(b). The best practice regarding formal implementation is achieved in the jurisdictions which have made it a general statutory duty of the police.

Developmental scheme for formal implementation of the guidelines A.2 and D.9 (b):

0 - no obligation: <i>Cyprus, France, Greece, Italy, Liechtenstein, Luxembourg, Malta, Scotland, Turkey</i>	-
1 - limited statutory obligation: compensation: <i>Austria, Iceland, Portugal, Zurich</i> -----R (85)11 (D.9)	-
2 - general statutory obligation but no designation of a responsible agent: <i>Germany, Sweden</i> -----R (85)11 (A.2)	R
3 - general non-statutory duty: pseudo-legislation or directives: <i>England and Wales, Ireland, the Netherlands</i>	R
4 - general statutory regulation + specification in guidelines or circulars: <i>Denmark</i>	R
5 - general statutory obligation: <i>Belgium, Spain, Norway</i> -----R (85)11 (A.2)	R

Actual implementation

The jurisdictions that only provide information on a limited scale should make sure that all victims are at least provided with what they need to secure their legal rights and opportunities. The best practice is achieved in the member states that use a systematic referral system. Considering the provision of information as a basic police duty is also extremely relevant.

Developmental scheme for actual implementation of guideline A.2 and D.9 (b):

1 - transfer of information on a limited scale: <i>Austria, Cyprus, Germany, Greece, Iceland, Italy, Malta, Portugal, Spain, Turkey</i> -----R(85)11	-
2 - oral provision information on a general scale: <i>Belgium, Denmark, England and Wales, France, Ireland, Liechtenstein, Luxembourg, the Netherlands, Norway, Sweden</i> -----R(85)11	R
3 brochures and leaflets: <i>Belgium, Denmark, England and Wales, France, (Ireland: domestic violence), Luxembourg, the Netherlands, Norway, (Portugal: domestic violence), Scotland, (Spain: state compensation), Sweden, (Zurich: social and counselling services)</i>	+
4 cooperation between the police and victim support services: <i>Austria, Belgium, Denmark, France, Germany, Iceland, England and Wales, Luxembourg, Malta, the Netherlands, Norway, Portugal, Scotland, Spain, Sweden, Zurich</i>	+
5 - limited referral system to victim support or social services: <i>Denmark, Iceland, Malta, Norway (Spain)</i>	+
6 - follow-up meetings: <i>Belgium</i>	++
7 - systematic referral systems to victim support or social services: <i>Belgium, England and Wales, Ireland, the Netherlands, Scotland, Sweden, Zurich</i> + in practice: <i>Luxembourg</i>	++ ++
8 - systematic opt-in information and notification systems: <i>Belgium, the Netherlands, Sweden</i>	++
9 - the provision of information is a basic police duty: <i>Belgium, the Netherlands</i>	++

If one compares the developmental schemes concerning formal and actual implementation, it is very remarkable that two jurisdictions which have no formal duty score very high in practice (stage 7: *Luxembourg, Scotland*). However, the other seven jurisdictions score very low. The fact that no obligation is created seems to be a significant factor concerning the actual

provision of information. A similar conclusion can be drawn regarding a limited duty: only one in four jurisdictions performs well in practice (*Zurich*). If a general obligation is created, the designation of a responsible agent becomes a critical factor. *Germany* performs badly because no agent is responsible, whereas in *Sweden* a very high score is reached only because the police informally assume responsibility and take it seriously. Of the seven jurisdictions that established a formal obligation for the police to inform victims, the lowest score reached by three of them is stage 5: a limited referral system. This is due to local realities that prevent a further reaching duty. The other jurisdictions have all adequately implemented the guidelines. The creation of a formal obligation is thus a highly critical factor. *Belgium* receives the designation 'best practice' because it both reaches the highest score possible concerning formal and actual implementation of the guidelines. *The Netherlands* and *Sweden* also constitute examples of best practice, because actual implementation is of greater consequence to victims of crime than formal implementation of the guideline.

2.2 Information on the Outcome of the Police Investigation

(A.3) *The victim should be able to obtain information on the outcome of the police investigation.*

What is remarkable about guideline A.3 is that it contains the absolute minimum requirement. In practice, this means that without introducing any victim-oriented measure, the jurisdictions are all in conformity with the guideline, simply because the victim is always allowed to contact the criminal justice authorities and make inquiries. Many jurisdictions consider this too minimalist an approach. They have introduced measures that allow the victim to learn the outcome of the police investigation in other ways. Although not all reforms can be considered adequate, they do represent a more active attitude of the authorities than is strictly called for.

2.2.1 Formal and Actual Implementation

The actual implementation (including related problems) of guideline A.3 is closely related to the different stages of formal development. Therefore, one developmental scheme has been devised to discuss both the formal and actual implementation in the 22 jurisdictions. No stage 0 is included in the developmental scheme because all jurisdictions offer information to victims who play a role in the proceedings.

Developmental scheme for implementation of guideline A.3:

-----R (85)11	
1 -	summons + initiative victim
2 -	contacting system
-----R (85)11	
3a -	right to inspect the file: lawyers
3b -	right to inspect the file: certain victims
4a -	partial duty: negative outcomes
4b -	partial duty: certain victims
5 -	opt-in notification system: negative and positive outcomes
6 -	formal obligation: all outcomes, all victims

Stage 1: summons and/or the initiative of the victim

Notification of a positive outcome of the police investigation is commonly done through a summons to appear in court, usually in order to testify. Likewise, all member states allow the victim to contact the authorities to learn the outcome of the police investigation. Consequently, all member states find themselves at least at the first stage of the developmental scale. In practice, the main problems with the use of a summons are the limited number of victims reached as well as the moment of informing them. The summons is only sent to victims who have an active role in the proceedings, such as witnesses or auxiliary prosecutors. Furthermore, it is important to stress that a summons is sent shortly before the trial proceedings take place. It is not unusual for it to take months or even years before the case is tried in court, which means that the victim has to spend an unnecessarily long time waiting for the outcome.

Contacting the criminal justice authorities to hear the results seems a good remedy. However, in reality this option is problematic as well, especially in jurisdictions which are governed by the secrecy principle. In addition, the police frequently use evasive tactics and public prosecutors are either difficult to trace, or not inclined or available to answer questions of individual victims. This is particularly true in jurisdictions where the secrecy principle governs the pre-trial stage. In practice, the police refer victims to the prosecution service, or to make a formal request, by letter or via an attorney. Referrals are common practice in *France, Greece, Liechtenstein, Luxembourg, Portugal and Turkey*. Without a report number, the victim has to go through the time-consuming procedure of getting a report number, and tracing the responsible public prosecutor. But even with a report number, it may be hard to obtain information from the public prosecutor. It is not uncommon for them to refuse to speak to victims, ignore their requests for information, or refuse to provide them with information about an ongoing investigation. The other method is commonly used in *Iceland*. Having to write a letter or contact a lawyer in order to get information is a completely unnecessary barrier. The practice stems from fear of giving the victim information which is still under an embargo. However, victims, as a rule, want only general information: Have the police found evidence? Has someone been arrested? etc. Such questions do not require detailed answers. In fact, not one jurisdiction disallows giving general answers to victims.¹³

Stage 2: contact or liaison system

To facilitate the otherwise cumbersome procedure for victims who want to make their own inquiries, several jurisdictions have implemented a contact system.¹⁴ In all jurisdictions, with

¹³ Interestingly, in smaller states such as *Liechtenstein* and *Luxembourg*, information about the outcome of the police investigation is also not very easily obtained due to the secrecy principle, even though, in a small-sized state it is easier to get in touch with the right person. But the same is true for setting up a method to facilitate contacting the authorities. It seems quite remarkable that in the smaller member states (*Cyprus, Liechtenstein, Luxembourg and Malta*) no standard practice has been set up to notify the victim or facilitate his contacts with the authorities. One would expect that here it would be easier to set up since most authorities know each other. However, according to legal practitioners in the smaller states, setting up a formal practice is uncalled for because victims can very easily contact the police or the prosecution service. The 1998 *Maltese* survey seems to confirm this belief: only 6.2% of the victim complained about a lack of information. However, the *Portuguese* experience shows that under certain circumstances victims do not express complaints about the functioning of the legal system.

¹⁴ This resembles the English practice with the designation of the Officer in the Case.

the exception of *Cyprus, Greece, Spain, Turkey*, the police provide victims with a copy of the report, as well as the name and telephone number of the police officer handling the case in all jurisdictions. In *Spain*, however, the lack of such a system is partly due to the functioning of the criminal justice system. Here, the examining magistrate, not the police, gives the report a number.

In practice, some jurisdictions, such as *England and Wales* and *Ireland*, go even further than handing over a copy of the report. The police give victims a card with the name and telephone number of the police officer in the case, who is the main contact for the victim throughout the criminal proceedings. However, the way in which the victim is actually informed of the progress or the outcome of the police investigation is left to the discretion of the individual police officer. In 1996, an *Irish* study on victim satisfaction was performed. The ratings show that 27.8% of the victims are satisfied to very satisfied with the information on the outcome of the police investigation; but 47.1% were dissatisfied to very dissatisfied (K. O'Dwyer (1998), p.26). The contact system is clearly not a panacea for all problems. But a contact person may be of great help to victims. One of the reasons for the disappointing results may be that it is, in practice, difficult to get hold of the officer in the case. This may be due to the variable work schedule, and the way the flexible-duty system covers busy times.

Stage 3: right to inspect the file

Four jurisdictions have established the right to inspect the files (*Austria, Belgium, Germany, Liechtenstein*). In *Germany*, the right to the legal file is constructed in an indirect manner. The victim's lawyer has been given the right to inspect the files on the victim's behalf (stage 2a). In *Austria, Belgium*, and *Liechtenstein*, the right is restricted to certain victims. In *Austria*, for instance, the civil claimant and the private prosecutor may inspect the files during the pre-trial stage (stage 2b).

In practice, this right is not without complications. First of all, it is not an appropriate method. It is far too cumbersome a procedure to get (usually rather simple) answers. Secondly, not every victim has the right to inspect the file. Moreover, access to the file can quite easily be denied by the authorities with reference to the ongoing investigation. This may mean that the victim has to wait until the investigation is complete, or he may not be granted access at all. Thirdly, access to files can cause problems: the legal file usually contains much more information than the victim is entitled to. Therefore, the inspection of the file should always be supervised, or relevant parts of the files should be preselected for inspection. The *Belgian* situation indicates that the privacy of persons included in the file, such as the suspect and witnesses, may be jeopardized if the victim's access is not properly directed. Great care should therefore be taken by the authorities in giving victims the right to their legal file. In *Belgium*, however, it is not generally used to learn the outcome of the investigation since victims are notified by the authorities.

Stage 4: partial obligation

Seven jurisdictions (*Belgium, France, Portugal, Spain, Sweden, Zurich, and Turkey*) have opted for a partial notification duty. This is set up in two distinct ways: either as a notification duty for negative outcomes only, or a notification of both negative and positive outcomes but only for certain victims. *Portugal, Sweden* and *Turkey* fall into the first category (stage 3a). Here, the victim only has a right to be informed that the case will be dismissed or discontinued. The other states have opted for a partial notification for certain types of victims. *Spain* and *Zurich* only notify victims of violent or sexual offences of the outcome of the police

investigation, whereas in *France* and *Belgium*, victims who play a certain formal role are notified. In *France*, the public prosecutor is obliged to inform civil claimants of developments in their case which includes the outcome of the police investigation. In *Belgium*, the civil claimant and the injured person are notified of the outcome of the investigation (stage 3b).

In implementing the policy of informing victims of a negative outcome, it is interesting to note that certain jurisdictions, such as *Denmark* and *Iceland* employ a similar information strategy in practice. The police use a standard letter to inform the victim that his case has been closed. In *Iceland*, however, practice shows that many cases are merely put aside rather than officially closed and filed, meaning that the case is on hold in the hope that additional leads will surface. The victim is not systematically informed of this decision.

In practice, the jurisdictions who do inform victims of negative results encounter several problems. Not every victim is entitled to this information, only those who have assumed formal roles. Furthermore, if the case is handed over to the prosecution service in order to bring about an indictment, victims are not informed of this important decision. Besides, jurisdictions which have set up a partial notification system regarding negative outcomes only, do not notify all victims according to the formal requirements. Still a considerable number of victims are not told that the police investigation will not lead to prosecution of the suspect.

Likewise, if only certain victims are informed of positive and negative decision, many victims do not get the information they are entitled to. In practice, the notification duty regarding victims of violent or sexual crimes seems to work more satisfactorily than if it is linked to the formal role of the victim. This is mainly due to the fact that police officers and public prosecutors are more empathetic towards these victims than towards victims of 'ordinary' crimes such as theft. They are therefore more willing to take the time to talk to these victims, and to acquaint them with any developments in the case. Interestingly, the notification duty regarding civil claimants and registered persons works better in *Belgium* than in *France*. This difference can be explained by the recent and compelling attention for the position of victims in the criminal justice system in *Belgium*.

Stage 5: opt-in system

Three jurisdictions (*Belgium, England and Wales* and *the Netherlands*) have established a general notification duty for the police based on an opt-in model. This means that every victim who opts-in to the system will be notified of the positive and negative outcomes of the investigation. *Germany* has set up an opt-in system at the level of the courts and the prosecution service.

An opt-in system is used to prevent victims who do not wish to be told the outcome of the police investigation from getting that information. It may, however, have certain disadvantages, such as complicating the system of who to inform and about what. (The opt-in system is used for several items of information.) Also, the danger exists that the police forget to ask the victim whether he would like to be informed. If so, it will be assumed that the victim is not interested since the record does not show his wish to be notified. More importantly, victims who opt-in have high expectations. However, given the fact that information systems are unlikely to be perfect, an opt-in system cannot but fall short of expectations. This is demonstrated by the results of *Dutch, German* and *English* studies on the workings of the opt-in system. In states where no research has been carried out, there are no indications that results are better. Most probably, the percentages of notified victims are even lower. In *Germany*, only 25.7% of the victims knew they could opt-in (Kury (1992), pp. 147-149). In *the Netherlands*, after the introduction of the Victim Act and Guideline Terwee,

the number of victims asked by the police whether they wished to be notified of developments in their case increased from 33% to 51% (Wemmers (1994), p. 27, B&A Groep (1998), p. 121). The actual provision of the information about developments in the case did not increase as much. Although the vast majority of the victims, namely 80%, expressed the wish to be kept informed, only 35% were notified (Wemmers (1994), p. 32). The situation is not much different in *England* where 40% of the victims are informed (British Crime Survey). This lack of information is bound to have a negative impact on victim satisfaction with the criminal justice authorities. This leads us to conclude that it is perhaps unnecessary to model an information system on a minority of victims who are not interested in learning the outcome of the police investigations.

In practice, the opt-in systems operate in a different manner. In *Belgium*, due to a recent legal reform, victims who have reported a crime may register themselves at the courts as an injured person. As such they are entitled to several types of information, inter alia on the outcome of the police investigation. In *the Netherlands*, the 1995 Guideline Terwee makes a distinction in the way victims of misdemeanours, victims of serious crimes and victims of other crimes should be kept informed, if they so wish. Regarding misdemeanours, the police ought to inform victims on the progress of their case only if the offender is already known at the time of reporting the crime. If, on the other hand, the offender is unknown at the time, the police should tell the victim that normally no criminal investigations will be undertaken, but that they will be notified if a suspect is apprehended. In cases of serious crime, the police have to inform victims of the relevant developments, preferably in person. In any event the police should notify victims of serious crime if the offender has been found. For the remaining categories of offences, police officers should indicate what activities will probably be undertaken and keep the opted-in victims informed. The *English Victim's Charter* (1996) on the other hand obliges the police to inform the victim of any crime if the suspect has been caught, cautioned, or charged. The victim will then be asked if he wishes to receive further information about the progress of the case. Throughout the case, the police are the main point of contact for information for the victim.

Stage 6: general formal obligation

To date, no responsibility for general notification without an opt-in system has been created in any of the jurisdictions. This is the reason why stage 5 is marked in italic.

However, given the problems linked to the other, existing information systems, it may be interesting to consider introducing a formal duty for the police to notify all victims who have reported a crime of the outcome of the police investigation.

2.2.2 Measures to Improve the Provision of Information

Improvements can be achieved by the following reforms:

Repeal of the summons as a way to learn the outcome

The use of the summons as a manner of informing victims of a successful investigation is unsatisfactory and should be abandoned. The summons is sent long after and is not sent to all victims. It should only be used to inform victims of the date and place they are expected to appear in court. Jurisdictions are advised to employ other means to inform victims of a positive outcome. All jurisdictions that have established a formal duty to inform victims have, at least partially, abolished the summons as a means to learn the outcome of the police investigation (*Belgium, England and Wales, France, the Netherlands, Portugal, Spain,*

Sweden, Zurich). Of these jurisdictions, *Belgium, England and Wales* and *the Netherlands* have created a general opt-in system to notify every victim who wishes to know the outcome of the investigation.

Creating a contact or liaison system

To improve the chances that victims may successfully contact the authorities to learn the outcome of the police investigation, or the most recent developments in their case, jurisdictions should at least provide victims with a copy of the report which indicates the report number and the name of the police officer who registered the report. In addition, one might consider introducing a liaison system. The officer in the case is the victim's contact person throughout the criminal proceedings.

In addition, it seems advisable to set up a filing system for ongoing investigations. It should inter alia indicate that a file is referred from the police to another authority, e.g. the prosecution service. The name of the authority who handles the file should be added to the information included in the file. Or, at least the number under which the file is referred from the police to the other judicial agent. This would allow the police or the liaison officer to more efficiently track information on a case under investigation.

Repeal of inspection of the file to learn the outcome

Pursuant to the actual implementation of the legal right to inspect the files, and the problems it causes, only one conclusion can be drawn. Inspection of the legal file is an unsuitable manner with which to provide victims with information about the outcome of the police investigation. This model does not give victims easy or infallible access to the information to which they are entitled. It should not be a legal option for victims to learn the outcome of the investigation. Jurisdictions which have given the victim a direct or indirect right to inspect the files, should seriously consider opting for another information model. Of the four jurisdictions which use this strategy, only *Belgium* has repealed the right to inspect a file as a means to learn the outcome of the police investigation. Instead, they have created an opt-in system open to all victims to learn the outcome.

A less rigid interpretation of the secrecy principle

It is important that barriers preventing victims from successfully acquiring information about the outcome of the police investigation of their own accord are removed. Particularly in judicial systems where the victim has to initiate the communication, he should be given easy and efficient access to the authorities.

The secrecy principle is often a genuine barrier for victims who want to learn the outcome of the case. However, it does not need to hinder the provision of information on the outcome of the police investigation, as is clearly shown by the jurisdictions which operate a contact or opt-in system (*Denmark, England and Wales, Iceland, Ireland, Malta, the Netherlands, Norway, and Scotland*). Naturally, the police may withhold (detailed) information if that information is classified or may jeopardize further investigations. However, the secrecy principle does not prevent the police telling the victim whether they have found evidence against the offender, and if so, whether a suspect has been identified.

A general notification duty

In jurisdictions with a partial notification duty for negative decisions only, we recommend extending it to a full and general notification system. It is most certainly incorrect to presume that a duty to inform victims of positive outcomes of police investigations is

superfluous. Without this obligation, the length of time that the victim is hanging may be considerable, especially, if the only manner of notification is the summons. Also, attention should be given to those cases that are neither dismissed, nor prosecuted but are simply put on hold. Victims should also be informed of this decision in order to prevent unreasonable expectations and insecurity about the progress in the case. Likewise, jurisdictions which have a partial notification system for victims of serious crime should consider introducing a general notification strategy.

Clearly, a formal obligation to notify victims of both successful and unsuccessful police investigations may cause logistical problems due to the large number of victims that must be informed.¹⁵ If an opt-in system is preferred, one should realize that this entails certain difficulties. In particular, the flaws in the initial stages (asking victims whether they would like to opt-in) and the complications of filtering out those who are not interested in information. Furthermore, it is questionable whether it is really necessary to make this selection on the basis of an opt-in system. The vast majority of victims (probably 80% or more) want to be kept informed about relevant developments in their case. Also, it is unlikely that the communication of information to victims who do not wish to be kept informed would adversely affect the well-being of the victim or his satisfaction with the criminal justice system. Finally, irrespective of the choice for an opt-in or a general notification system, the use of an automatized data system with built-in information checks is recommended. Such a system will automatically indicate which victims should be informed of a certain development. In many countries computerised data systems for filing cases are already in operation. These systems can be expanded with information checks that ensure a standardized and automatic provision of certain types of information. In *England*, several police forces now use computerised systems to keep victims informed of major developments in the case. The main advantage of computerized systems is that the risk of forgetting to inform a victim is greatly reduced.

2.2.3 Conclusions and Best Practice

Due to the fact that the requirements are set at a minimal level, all jurisdictions operate formally in accordance with guideline A.3. Every victim may obtain information on the outcome of the police investigation. None of the jurisdictions categorically deny the victim this information, though in jurisdictions which adhere to a strict secrecy principle, the victim may need determination and perseverance to get information. Therefore, in order to genuinely safeguard the right of victims to know the outcome of the police investigation, and thus to operate not only in accordance to the letter but also to the spirit of the guideline, additional measures should be implemented. The first step should be to set up a contacting system. Victims should be systematically provided with the report number, the name and telephone number of the police officer in the case at the time of reporting (stage 2). Those jurisdictions which would like to go one step further should establish a formal duty for the criminal justice authorities to notify victims. Best practice is achieved in jurisdictions which operate an opt-in notification system. All jurisdictions could, however, consider a general notification system, in which every victim is informed.

¹⁵ Another cause for logistical problems is the fact that the victim may have moved. This is a widely recognized problem for witnesses. It is unlikely that for victims, who are often also witnesses, this problem will be much different. No easy solutions can be offered to solve it. Maybe victims should take responsibility and inform the authorities, e.g. the police, of the fact that his address has changed.

Developmental scheme for implementation of guideline A.3:

-----R (85)11	
1 - summons + initiative victim: <i>all jurisdictions</i>	R
2 - contacting system: <i>all jurisdictions, with the exception of Cyprus, Greece, Spain, Turkey where the victim is not automatically given a copy of the report</i>	R
-----R (85)11	
3a - right to inspect the file: lawyers: <i>Germany</i>	+
3b - right to inspect the file: certain victims: <i>Austria, Belgium, Liechtenstein</i>	+
4a - partial duty: negative outcomes: <i>Portugal, Sweden, Turkey</i> + in practice: <i>Denmark, Iceland</i>	+
4b - partial duty: certain victims: <i>Belgium, France, Spain, Zurich</i>	+
5 - opt-in notification system: negative and positive outcomes: <i>Belgium, England and Wales, the Netherlands</i>	++
6 - <i>formal obligation: all outcomes, all victims: none</i>	++

The implementation of the guideline by means of an opt-in system in *Belgium, England and Wales* and *the Netherlands* can be qualified as best practice.

2.3 The Final Decision Concerning Prosecution

(B.6) *The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information.*

The provision of information on the final decision whether to prosecute is not only determined by victim-oriented legal reforms but also by the local realities of a jurisdiction. We will therefore first discuss certain local realities before assessing the formal and actual implementation of the guideline.

2.3.1 Local realities

First of all, it is relevant to give an outline of the countries that adhere to the expediency principle or the legality principle. These principles determine the time frame in which a negative decision should be communicated to the victim. Also, it is relevant to know who is responsible for taking the final decision and whether this agent is also responsible for informing the victim.

The principles of expediency and legality

Jurisdictions which are governed by the expediency principle allow the criminal justice authorities, usually the prosecution service, not to prosecute a case in which there is sufficient evidence against the suspect for policy reasons. Member states which adhere to this principle are: *Belgium, Denmark, England and Wales, France, Iceland, Ireland, Luxembourg, the Netherlands, Norway* and *Scotland*.

The legality principle states that if there seems to be sufficient evidence against the suspect, he should be accused and tried. In *Austria, Cyprus, Germany, Greece, Italy, Liechtenstein, Malta, Portugal, Spain, Sweden, Zurich* and *Turkey* the frequency of decisions not to prosecute is significantly less than in the states adhering to the former category. In *Germany*, however, certain aspects of the expediency principle have been introduced (see Chapter 26).

The final decision to prosecute

Among the 22 jurisdictions, we see a great variety of agents who are competent to take the decision whether to prosecute, either on technical or policy grounds:

- The prosecuting authorities

In the vast majority of jurisdictions, the final decision on prosecution is generally taken by the prosecuting authorities (*Belgium, Cyprus, Denmark, England and Wales, France, Germany, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Scotland, Sweden, Zurich and Turkey*).

- The prosecuting authorities and the examining magistrate

In *Austria* and *Liechtenstein*, in addition to the public prosecutor, the examining magistrate may also take the decision to prosecute.

- The prosecuting authorities and the judicial council

In *Greece*, the public prosecutor may only decide not to prosecute concerning complainant offences. With respect to all other offences, the final decision is taken by the judicial council.

- The prosecuting authorities and the magistrate's court

Likewise in *Malta*, who takes the final decision to prosecute depends on the crime. The prosecution authorities – the police and the Attorney General's office – are competent regarding crimes punishable with imprisonment up to and including six months and four years. The final decision in all other cases is taken by the magistrate's court.

- The pre-trial magistrate or pre-trial court

Finally, there are two jurisdictions (*Italy* and *Spain*) where the prosecution service is never allowed to take a decision concerning prosecution. This decision must be taken by the pre-trial magistrate in *Italy*, and by the pre-trial court in *Spain*.¹⁶

Informing the victim

The agent responsible for informing the victim should preferably be the same as the one who has taken the final decision on prosecution. He will best be able to explain his decision to the victim. However, in two jurisdictions these authorities are not responsible for communicating the decision. In *England and Wales* the prosecution authority takes the final decision on prosecution though the police notify the victim. This has, however, the advantage that the victim has one main point of contact. In *Greece*, the prosecution service relays the decision on prosecution of the judicial council to the victim. The fact that another authority informs the victim may be a complicating factor that has a negative impact on implementation.

2.3.2 Formal and Actual Implementation

It is interesting to note that, apart from the jurisdictions who communicate both positive and negative decisions, not one member state has established the obligation to notify victims of a positive decision only. These are, as a rule, communicated through indirect means, namely the summons to appear in court (see § 2.2.2 and § 2.2.3). Furthermore, the developmental scheme shows that the interpretation of the requirement to inform the victim of the final decision on prosecution varies greatly among the jurisdictions. Thirteen jurisdictions

¹⁶ The police can, however, stop the investigation at an earlier stage. They may, for example, caution the offender.

have interpreted it as a duty to inform the victim of negative decisions only, and seven jurisdictions inform victims of both negative and positive decisions.

Developmental scale implementation guideline B.6:

- | | |
|---|----------|
| 0 - no information on the final decision concerning prosecution | |
| 1 - information on <i>negative</i> decisions only | |
| 1.1 - limited duty: letter to the victim's lawyer | |
| 1.2 - limited duty: letter to victims with formal role | |
| 1.3 - limited duty: letter to victims with legitimate interest | |
| 1.4 - general duty: letter to opted-in victims | |
| 1.5 - general duty: letter to all victims | |
| 1.6 - personal notification system: victims of serious crime | |
| 2 - information on <i>negative and positive</i> decisions | |
| 2.1 - limited duty: letter to victims with formal role | |
| ----- | R (85)11 |
| 2.2a - general duty: letter to opted-in victims | |
| 2.2b - general duty: letter to all victims | |
| 2.3 - + personal notification system: victims of serious crime | |
| ----- | R (85)11 |

Stage 0: no information

In one jurisdiction, *Scotland*, the guideline has not been implemented. However, a notification duty may be set up in the near future as a result of reform bills. In *Spain*, the arrangements are slightly different because the decision is taken by the pre-trial court. The victim should therefore attend the pre-trial hearing to learn the final decision. The court is not obliged to inform the victim of his decision if he does not show up. Similarly, in *Malta* the final decision for crimes with sentences of more than four years' imprisonment is taken by the court of magistrates.

Stage 1: information on negative final decisions only

Eleven jurisdictions have established a formal duty to notify the victim or his lawyer of the final decision not to prosecute (*Austria, Denmark, England and Wales, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Sweden and Turkey*).

Stage 1.1: the victim's lawyer is informed

Luxembourg is the only member state where the lawyer, not the victim is notified of the decision not to prosecute. If the victim is not legally represented, he will not be informed.

Stage 1.2: letter to victims with a formal role

In *Austria, Iceland, Greece, Liechtenstein* and *Turkey* the right to be notified is determined by the legal rights attributed to a victim in a particular capacity. In *Austria* and *Iceland*, the injured and private party have the right to be notified. In *Greece* and *Liechtenstein* the victim who assumed the role of civil claimant is informed. The decision not to prosecute directly affects their right to claim compensation in criminal proceedings and/or the right to privately prosecute the defendant. In *Turkey*, only the complainant is notified because he has the right to oppose this decision.

Stage 1.3: letter to victims with a legitimate interest

This variation is encountered only in *Denmark*, where the right to information is given to victims with a legitimate interest. The category 'victims with a legitimate interests' includes that of 'victims with a formal role'. Victims who have an interest in the case may not yet have assumed a formal role, e.g. the role of civil claimant, or they may not even want to. In fact, they may even need information on the final decision to prosecute in order to be able to make the decision to assume a formal role within the criminal proceedings.

In *Cyprus* and *Malta*, in spite of an absence of a formal rule, the victim is usually informed by telephone of the decision not to prosecute. This is possible because these are both small jurisdictions with relatively low crime rates. In *Malta*, this practice mainly involves crimes in which the prosecuting authority is competent to take the final decision to prosecute.

Stage 1.4: letter to opted-in victims

In *England and Wales* and *Italy*, the victim will only be notified if he has indicated beforehand his wish to be informed. In *Italy*, the victim has the right to ask the pre-trial judge to be informed prior to a dismissal of the case. This information is essential to his right to request that other or further investigations be carried out, if he does not agree with the decision not to prosecute.

Stage 1.5: letter to all victims

In *Ireland* and *Sweden*, every victim is informed of a decision not to prosecute. *Swedish* law is the most specific in this respect. It requires that every victim who reported a crime, submitted a claim for damages, or made a request to be kept informed about the investigation, should be notified of a decision by the public prosecution authorities not to initiate an investigation, to close an investigation or to waive prosecution.

Stage 1.6: notification in person

In two jurisdictions (*England and Wales* and *Sweden*), and certain *Norwegian* legal districts, the authorities also inform victims of serious crime personally, in a face-to-face meeting. In *England*, the Victim's Charter (1996) and the Statement on the Treatment of Victims and Witnesses by the Crown Prosecution Service (1993) both say that, on request, the Crown Prosecution Service (CPS) will meet the family of someone killed as a result of a crime, to explain the decision not to prosecute. Interestingly, in practice only ten victims have asked for a personal interview. The reason for this low number is that it is not publicized. In a criminal justice system that was previously characterised by avoiding all personal contact between the public prosecutor and the victim, this needs to be done.¹⁷ In *Sweden*, victims of serious or violent crimes can meet the public prosecutor in person to obtain information on the decision not to prosecute, if they so wish. In certain *Norwegian* legal districts, victims of sexual crimes and other serious offences are invited to come to the police station to hear why the suspect will not be prosecuted.

Stage 2: information on positive and negative final decisions

Belgium, *France*, *Germany*, *Norway*, *Portugal*, *the Netherlands* and *Zurich* notify victims of both negative and positive decisions.

¹⁷ The All Party Penal Affairs Group feels that the right to a meeting with the CPS should be extended to victims of other serious violent or sexual crimes.

Stage 2.1: letter to victims with a formal role

In *Zurich*, only the victim who joined the criminal proceedings as a party, such as the civil claimant, is notified. In *Germany*, only the complainant is notified. In *Belgium*, the notification duty pertains to the victim registered as an injured person as well as the civil claimant. In *Portugal*, the notification duty is differentiated. All persons who are entitled to act as complainants, civil claimants or assistant prosecutors are notified of a decision to prosecute. The legislature has introduced this requirement in order to safeguard the effective use of the victim's legal rights. A negative decision should only be relayed to the assistant prosecutor and the civil claimant. However, in practice, information is provided to many crime reporters as well. The *Portuguese* criminal justice authorities have assumed this approach to allow the victim to make use of his legal right to oppose this decision.

Stage 2.2a: letter to opted-in victim

Only in *Belgium* and *the Netherlands* has an opt-in notification system been created to inform the victim of the final decision to prosecute. (The system, which includes several items of information that have to be provided to the victim, has been described under guideline A.3).

Stage 2.2b: letter to all victims

France and *Norway* have perhaps the most sophisticated systems. But it is difficult to ascertain whether in practice they reach more victims than the opt-in system, due to a lack of evaluation studies. In *France*, the prosecutor must inform the victim of a decision to dismiss the case, to allow him to summon the offender to appear in court, or to constitute himself as a civil claimant before the examining magistrate and request the opening of a judicial investigation. A decision to go ahead with the prosecution must also be relayed to the victim, to enable him to join the proceedings as a civil claimant in order to claim compensation. In *Norway*, the victim who reports the crime and any victim's lawyer should be informed of both negative and positive decisions.

Stage 2.3: notification in person regarding victims of serious crime

In *the Netherlands*, a meeting with victims of serious crimes takes place if the suspect is to be prosecuted. According to the Guideline Terwee, the public prosecutor should invite the victim of a serious offence into his office and ask him whether he would like to speak to him prior to the trial in order to get an explanation on the proceedings.

2.3.3 Problems and Causes

The problems which prevent an adequate implementation of guideline B.6 are linked to the means of communication and the operation and success of the notification strategies.

Notification strategies

Notification strategies are closely linked to the interpretation of the final decision to prosecute. With respect to communicating the decision, some member states apparently argue that informing the victim by means of a summons to appear in court is in compliance with the Recommendation, or is at least sufficient to safeguard the rights of the victim. However, this interpretation which is contrary not only to the letter of the guideline but also to its spirit and should be abandoned as a means to communicate the decision (see § 2.2.2 and § 2.2.3). The notification strategy of informing victims of negative decisions is

very useful, if not indispensable. Victims have the right to know that their case cannot or will not be prosecuted at the earliest possible stage. However, as is the case with information concerning the outcome of the police investigation, the formal and actual implementation of this strategy is not without complications. In many of the jurisdictions which use this system, only victims who play a formal role in the criminal proceedings are informed of the decision not to prosecute. This leaves numerous victims ignorant of this decision.

The strategy of notifying only victims who play a formal role or have opted-in to the system of both positive and negative final decisions may cause difficulties. Not every victim who reported a crime will participate in the trial proceedings, nor will he always be asked to opt-in to the notification system (see guideline A.3).

The (means of) communication

In practice, the most common means of communication – a letter – gives rise to certain problems which do not occur on the same scale in personal or telephonic contact. First of all, the language used in the letter may constitute a problem. Also, the content of the letter may be a factor. The fact that the letter does not contain the reasons for taking a negative decision is a problem in practice. In *Ireland*, the law even forbids the authorities to explain why a case is dismissed. This may be quite upsetting for the victim. In other jurisdictions, like the *Netherlands* and *Norway*, the authorities must state the reasons behind a negative final decision which may give rise to other difficulties. A brief or standard reference to the sections of the law on which the decision was based is usually felt to be insufficient, and the explanation should not be put in legal jargon that is incomprehensible for the average victim.

In addition, the designation of who is responsible for the communication of the information may cause difficulties if an explanation is given to the victim. In most jurisdictions, the authority which takes the decision also relays it to the victim. In only a few jurisdictions does an authority other than the decision-making agent notify the victim. This practice may have serious disadvantages. The authority responsible for notifying the victim may be unable to answer his (detailed) questions. Moreover, the communication lines are unnecessarily long, which may cause delays and inaccuracies. In *Iceland*, where the police were initially expected to pass on the public prosecutor's decision to the victim, changes were made after protests by the Director of the State Criminal Investigation Police, who felt that the authority taking the decision should also communicate it to the victim.

Finally, only a few member states (*Austria*, *France*, *the Netherlands* and *Turkey*) oblige the criminal justice authorities to tell the victim in the same letter what actions he may undertake if he does not agree with the decision not to prosecute the suspect (see Chapter 27, guideline B.7). *Austrian* practice is interesting in that the victim is told that he may oppose a negative decision by acting as a private prosecutor, but at the same time he is warned that if the proceedings do not end in a conviction, he may end up having to pay legal costs and perhaps even compensation to the wrongfully accused. This practice may, on the one hand, have a deterrent effect, but on the other hand it will prevent disappointments and unforeseen financial consequences.

The success of notification strategies

A final problem concerns the effectiveness of the notification strategies. There are only a few studies on this subject (for studies concerning the opt-in system, see A.3). A *Dutch* study

shows that, despite the legislature's efforts, only 29%¹⁸ of the victims are, in fact, informed of the final decision on prosecution. It seems that as the case progresses, the transfer of information to the victim becomes progressively worse. In fact, this is quite surprising because the number of victims that have to be notified decreases, whereas the relevance of obtaining information increases. One would expect that the criminal justice authorities would make a real effort to inform victims of the crucial question whether the case will be prosecuted or not. Certainly the monitoring of the implementation of the Act Terwee in *the Netherlands* seems to prove this point. Whereas 61% of the victims receive information from the police about the proceedings, only 35% hear about the outcome of the investigation and only 29% of the victims are informed about the final decision of the public prosecutor (Wemmers (1994), pp. 28, 32). There are no practical indications that would justify the assumption that this situation would be significantly better in other jurisdictions where no such implementation studies are performed.

2.3.4 Measures to Improve the Provision of Information

The provision of information on the final decision to prosecute can be improved by establishing a general duty to notify all victims who report a crime to the authorities. Furthermore, this same authority should take and communicate the decision. Finally, a standardized (opt-in) system should be designed to notify victims.

A general duty

The criminal justice system should make sure that victims are informed of both negative and positive final decisions on prosecution. The duty to inform victims of a negative decision only is very relevant but not enough to safeguard the legal right of victims to obtain compensation from the offender and to duly prepare their claim, or to participate in the criminal proceedings.

One responsible agent for taking and communicating the decision

Jurisdictions in which the notification duty is placed with an authority other than the one making the decision should consider following the *Icelandic* example. Generally speaking, it is preferable that a decision is communicated to the victim by the body that has originally taken the decision rather than delegating it to another agent, such as the police. The decision-making authority best understands its own decision and can explain this to the victim.¹⁹ *England and Wales* and *Greece* should therefore reconsider their approach in which one body takes the decision and another relays it to the victim.

Communication and information strategies

The communication of the final decision concerning prosecution can be improved in many jurisdictions. The most common way of notification is standardized letter. This allows the authorities to inform a great number of victims with minimal investment in time and personnel. But the letter should meet two conditions: it should not be written in legal jargon, and it should inform the victim of his rights during the trial proceedings and how

¹⁸ The remaining victims were not notified but assumed their case was still under consideration. See Wemmers, 1994b: p. 47.

¹⁹ The same conclusion has been reached by the English Ministry of Justice in its 1999 report regarding the Victim Statement experiment.

to exercise them. It is equally important that the public prosecutor account for his decision. Therefore, the decision not to prosecute should not be given without reason, even if this is done with the best intentions, e.g. in *Ireland*, where the justice authorities may decide not to prosecute because the victim cannot endure the cross-examination. Not sharing this information with victims represents a very paternalistic approach. Moreover, an unreasoned decision based on such grounds hardly allows the victim to contradict this view or ask for a legal review of the decision not to prosecute. To allow for a properly reasoned decision, the lines of communications should be the shortest possible. This means that the responsible agent should communicate its own decision. In general, a standard explanation indicating in what cases a dismissal is allowed by law is not the best communication strategy. The reasoning may be standardized but it should not only contain a reference to a certain section of the law. In practice, it would be possible to create two different kind of letters concerning the decision not to prosecute. One should refer to the technical waiver, and explain that the reason not to prosecute is based on a lack of (sufficient) evidence, the other should explain the policy waiver. The letter should preferably contain a telephone number where victims may ask for a more detailed justification of the decision.

In cases of serious crime, personal relaying of information may be called for. The information may be relayed by telephone or, preferably, in a face-to-face meeting between the decision-making authority and the victim. Jurisdictions in which the authorities are not yet allowed to personally inform the victim of the final decision should consider introducing it, particularly where a negative decision is concerned because here the victim, or the relatives of a deceased victim, should have the opportunity to speak with the authority that decided not to prosecute the suspect and to hear his reasons for the decision. Personal communication may prevent an unfavourable attitude and abject feelings of victims towards the criminal justice system. Informing victims of serious crime of the decision to prosecute may also be relevant, since this allows the prosecutor to explain the trial proceedings to the victims, and what they can and should expect of the hearing.

Computerized notification system

With respect to the effectiveness of the notification systems, it must be stressed that in order to reach the highest number of victims a standardized and automatized system is needed (see also § 2.2.3). It is recommended that the criminal justice authorities make use of information technology to set up a pro-active system. Through automation a data system may be developed that generates letters of key decisions, such as a waiver on technical or policy grounds. On the basis of a relational data base that integrates all information flows within the criminal justice system, it is possible to notify the victim of important decisions and developments in his case, such as the final decision concerning prosecution.

2.3.5 Conclusions and Best Practice

Best practice is attained by the jurisdictions which have implemented the formal obligation for the authorities to inform all victims of the final decision concerning prosecution, both positive and negative (*Belgium, France, Germany, Norway, Portugal, the Netherlands and Zurich*).

Developmental scale for implementation of guideline B.6:

0 - no information on the final decision not to prosecute: <i>Scotland, (Spain: pre-trial court, Malta: magistrates' court)</i>	-
1 - information on negative decisions only	-
1.1 - limited duty: letter to the victim's lawyer:	-
1.2 - limited duty: letter to victims with formal role: <i>Austria, Iceland, Greece, Liechtenstein, Luxembourg, Turkey</i>	-
1.3 - limited duty: letter to victims with legitimate interest: <i>Denmark</i> + in practice: <i>Cyprus, Malta: less serious crimes</i>	-
1.4 - general duty: letter to opted-in victims: <i>England and Wales, Italy</i>	-
1.5 - general duty: letter to all victims: <i>Ireland, Sweden</i>	-
1.6 - personal notification system: victims of serious crime: <i>England and Wales, (certain Norwegian districts), Sweden</i>	-
2 - information on negative and positive decisions	-
2.1 - limited duty: letter to victims with formal role: <i>Belgium, Germany, Portugal, Zurich</i>	-
-----R (85)11	
2.2a - general duty: letter to opted-in victims: <i>Belgium, the Netherlands</i>	R
2.2b - general duty: letter to all victims: <i>France, Norway</i>	R
2.3 - + personal notification system: victims of serious crime: <i>the Netherlands</i>	R
-----R (85)11	

It is possible, however, that *France* and *Norway* have the highest levels of sophistication among these countries since everyone who reports a crime is, in theory, notified of the final decision concerning prosecution. But no studies have been carried out to verify this. Finally, setting up systems to inform victims of serious crime in person are very relevant, and represent examples of best practice at the same time (*England and Wales, the Netherlands, Norway and Sweden*).

2.4 Information on the Place of a Hearing

(D.9) *The victim should be informed of:*

(a) *the date and place of a hearing concerning an offence which caused him suffering:*
[..]

The implementation of this guideline is influenced by local realities, as well as the legal reforms introduced in the 22 jurisdictions. We will start with a description of the most relevant local factors, namely the existence of summary proceedings and the opportunity to plea bargain. Another important local reality is the time of a hearing. In spite of the fact that the guideline only mentions the date and place of a hearing, the indication of the time should be as precise as possible to avoid unnecessarily long waits. In certain jurisdictions, a time of a hearing cannot be given to victims.

2.4.1 Local realities

Summary proceedings, plea bargaining or presenting a guilty plea

The implementation of the notification strategies may be negatively influenced by summary

or simplified proceedings. The *French* simplified (speedy) trial procedures are widely recognized as a stagnating factor for the notification of victims about the time and place of a hearing, particularly, the procedures for offenders who are caught red handed and tried the same day or the day after their apprehension. Although it seems relatively easy to notify victims of the trial, the authorities often 'forget' and justify this by referring to the time factor. The consequences of such omissions are grave; it means, in fact, that the victim is deprived of his right to claim compensation from the offender within the criminal process.

Plea bargaining is another source of difficulties. It is an option which is mainly available in common law jurisdictions. In *England and Wales*, the accused may agree to plea guilty in exchange for a sentence discount. Similarly, in *Ireland*, a guilty plea is sometimes rewarded by a sentence discount. After a guilty plea, there is no need for a full trial. As a result, the victim is never involved in the proceedings and little incentive exists to inform the victim of such hearings. Furthermore, if he is by chance informed of the date, there is no way of telling the victim at what time the case will be heard.

The time of the trial

The uncertainty regarding the time of the hearing may be a factor which is inherent to the functioning of the legal system. In *Ireland, Belgium, Cyprus and Malta*, cases are not dealt with according to a predetermined roll. In *Ireland, Cyprus and Malta*, they are more or less called out arbitrarily. In the latter two countries, this problem is most apparent in the lower courts. Even public prosecutors complain about it. They come to court with a stack of files and only when the court calls out a case do they know which file they should take out of the pile. At the same time, they cannot give any time indication to witnesses as to when their case will be dealt with by the court. This practice causes endless waiting times in the hallways of the court. Finally, in *Belgium* the question of what case is tried first by the court is resolved by the age of the defence lawyer. Scheduling cases according to the seniority of the defence lawyer is an age-old tradition which increases waiting times and gives rise to many complaints by the (less senior) defence lawyers, accused persons, witnesses and others involved in the proceedings.

2.4.2 Formal and Actual Implementation

The most important instrument in the implementation of the duty to inform victims of the date and place of a hearing, is the use of the summons. It is used in all jurisdictions, though some member states have introduced additional means to notify victims.

Developmental scheme for implementation of guideline D.9 (a):

- | | |
|--|--|
| 1 - summons | |
| 2 - + limited formal duty: certain victims | |
| -----R (85)11 | |
| 3 - + formal duty: opt-in system | |
| 4 - + formal duty: all victims | |
| -----R (85)11 | |

Stage 1: summons

In all jurisdictions, victims who have to testify during the trial proceedings are informed of the date and place of a hearing by means of the summons. In general the summons is a very

reliable – standard and automatic – notification instrument. However, a summons is not sent to every victim who reports a crime. Given the fact that sixteen of the 22 member states have developed either no information strategies or only partial ones, it is relevant to know whether the victim, as a rule, will be summoned as a witness for the prosecution in these countries. In *Cyprus, Denmark, England and Wales, Ireland, Italy, Greece, Malta, Norway, Portugal, Scotland, Spain, Sweden and Turkey*, the victim is, as a rule, obliged to give evidence in court. In these jurisdictions, a *de facto* notification duty exists to inform all victims of the date and place of the hearing.

In *England and Wales, Ireland and Scotland*, a great number of cases end in plea bargains after which no court proceedings take place. The *de facto* duty to summon every victim-witness to court is, in practice, a more reliable instrument than a notification duty, with the exception of notifying victims who have a formal role in the criminal proceedings, such as civil claimants and assistant or private prosecutors.

However, the most common way to inform victims has its disadvantages. Apart from the obvious problem that victims without a formal part to play during the trial are not summoned to court, the summons is sent shortly before the trial hearing. It is therefore surprising that this is recognized in only a few jurisdictions as a problem. In *Luxembourg and Norway* in particular, the legal practitioners interviewed in the course of this study recognize that the victim may have (too) little time to exercise his rights, i.e. to claim compensation or to make arrangements at work or home to be present during the trial. This is a particular hindrance if the summons is the first and only indication that a suspect has been apprehended who will be tried (see § 2.3). In such circumstances, the time the victim is allowed for the preparation of the defence of his rights is considerably less than that of the accused. This is not to say that they should be allowed equal time, but sufficient time should be given to the victim to make use of his legal rights.

Stage 2: summons and limited formal duty

Germany and Portugal notify certain specific groups of victims only. Here, the authorities send written notification to victims who assume the role of (auxiliary/private) prosecutor or civil claimant. In practice, this obligation functions rather well because these victims have an autonomous right to be notified of the date and place of the trial.

Stage 3: summons and opt-in system

In four jurisdictions – *Belgium, England and Wales, the Netherlands and Zurich* – information is provided by means of an opt-in system. In *England and Wales*, and *the Netherlands*, the legislature has established the duty to inform all victims who have indicated their wish to be notified to the police. The *Belgian* and *Swiss* legislature have organized the opt-in system in a different manner. In *Belgium*, the victim must register at the courts as an injured person, whereas in *Zurich* the prosecution service inquires after the wishes of the person who has suffered harm directly caused by the offence. Only in *England and Wales* and *the Netherlands* are standard and computerized letters sent to victims of crime to notify them of the date and place of the trial.

Stage 4: summons and duty to inform all victims

The highest level in formal implementation has been reached in *France and Ireland* where every victim who has reported a crime to the authorities should be notified. In *Ireland*, the notification duty is the most far reaching, in the sense that not only the date and time of the hearing will be provided but also the likelihood that the victim will have to testify. If the

victim is likely to testify, the proceedings should be explained to him.

The actual working of the notification schemes may cause serious problems for a great number of victims. In *France*, for instance, in spite of a formal obligation to inform all victims of the date and place of a hearing, they do not receive this information with any consistency. Unless the victim has constituted himself as a civil claimant or has to testify, he will usually not be informed.

2.4.3 Measures to Improve the Provision of Information

Solutions have to be sought to tackle the difficulties linked with the use of the summons as a means of notification and the scope and workings of the notification duties. Concerning the latter, ample thought should be given to problems caused by the attitude of the criminal justice authorities and by other local realities.

The summons

The problems that are created by the use of the summons can be solved on the one hand by not exclusively using the summons to inform victims of the date and time of a hearing, and on the other hand, by giving victims more time between notification and the actual trial. The summons is a highly reliable but not ideal notification instrument since it does not reach all victims interested in learning the date and time of the trial. Victims who do not (yet) play a formal role in the proceedings should also be notified of the date and time of the hearing, if only to make sure that they have the opportunity to make use of their legal rights. Most jurisdictions allow the victim to be active during the trial proceedings, e.g. by presenting a claim for compensation during the trial, and do not oblige him to tell the authorities before the trial. Chances are that victims who would want to act as civil claimants cannot do so because they are not notified of the date and time of the trial. The authorities should therefore notify all victims who reported the crime of the time and place of the trial in order to safeguard the opportunity to exercise their legal rights. Instead of using a summons, member states should consider informing all victims by means of a standard letter as is the practice in *England and Wales*, and *the Netherlands*.

Simplified procedures

With regard to the special procedures, such as simplified trial procedures or plea bargaining, the authorities should inform the victim of the use and consequences of such procedures. This is especially true regarding the simplified procedures since the victim has the right to claim compensation during the trial. Without due notification of the date and time of the hearing this right is, in fact, void and nothing more than a dead letter. If there is no time to notify victims by mail, the criminal justice authorities should make use of other ways to reach the victim, for instance by telephone or by having a police officer contact the victim. It would seem that in cases where the offender is caught in the act, it would be rather simple to inform the victim that the hearing will take place the same or the next day. In the latter case, the victim can be given a telephone number and a phone-in time to inquire about the scheduling of the hearing. However, the best way to solve the existing difficulties would be to avoid such procedures if the victim wishes to claim or obtain compensation from the defendant.

The scope and functioning of the notification duty

The scope of the notification duty should include every victim who reports an offence to the authorities, and should not be limited to certain groups of victims.

Moreover, the imperfect workings of the notification strategies can be remedied as described in § 2.3.4. Again, as long as the notification duty is not carried out in a systematic or automatized manner, current difficulties will persist.

Communication of the date and place of the trial

All victims whose case will be tried in court have the right to learn the date and place of the trial. The authority who is responsible for sending the summons to those with a formal role in the proceedings – e.g the public prosecutor’s office or the clerk of the court – should be responsible for sending additional letters to all other victims to inform them of the date and place of a hearing.

Moment of notification

If victims are informed of the date and time of a trial, due consideration should be given to the time a victim will need to participate in the trial proceedings, for instance, to prepare his claim for compensation from the offender. Victims should, therefore, be informed of the date and place of a trial as soon as possible. The criminal justice authorities should not wait until a few days before the trial to notify victims. In those member states where no exact time of a hearing can be provided, the legislature should consider replacing the traditional and outdated forms of organization by the introduction of fixed rolls to call out cases. This would not only benefit the victim, but also the other participants and interested persons.

2.4.4 Conclusions and Best Practice

On a formal level, best practice is achieved by member states which have set up formal duties to inform all victims (*France and Ireland*), followed by those jurisdictions who notify victims who opt-in to the information system (*Belgium, England and Wales, the Netherlands and Zurich*). In practice, however, it may very well be that only victims with a formal role in the proceedings are notified of the date and place of a hearing. Due to a lack of studies, it is impossible to determine the success of the formal general notification schemes. However, it may be the case that the actual implementation in *England and Wales* and *the Netherlands* is at the same level of sophistication or higher since here the notification system is automatized as well as standardized. Computerization is probably the best safeguard for notification.

Developmental scheme implementation guideline D.9 (a):

1 - summons: <i>all jurisdictions</i>	-
2 - summons + limited formal duty: certain victims: <i>Germany, Portugal</i>	-
-----R (85)11	
3 - summons + formal duty: opt-in system: <i>Belgium, England and Wales, the Netherlands, Zurich</i>	R
4 - summons + formal duty: all victims: <i>France, Ireland</i>	R
-----R (85)11	

2.5 Information on the Outcome of the Case

- (D.9) *The victim should be informed of: [..]*
 (c) *how he can find out the outcome of the case.*

Guideline D9(c) does not require that its member states notify victims of crime of the outcome of the case. Victims should simply be able to learn the court's decision. It is, in fact, surprising that the Recommendation did not take the right of the victim to learn the outcome of the case one step further by formulating a formal duty for the criminal justice authorities to notify victims who are involved in the criminal proceedings, or have a (legitimate) interest in the case.

2.5.1 Formal and Actual Implementation

Guideline D9 under (c) states that the victim should be informed of how he can find out the outcome of the case. In other words, telling the victim how he may find out the court's decision would be enough to be in compliance with the guideline. But none of the 22 member states have put an official policy in place to systematically inform the victim of how he may obtain the sentence on his own initiative. Therefore, the member states are either not acting in accordance with guideline D.9 (c), or they have gone further than required by the guideline and have set up formal notification systems. This state of affairs is represented in the developmental scale by placing R (85) 11 between stages 0 and 1.

Developmental scheme for implementation of guideline D.9 (c):

0 - no information

-----R (85)11

1 - partial notification system: participating victims

2 - + notification system: victims of serious crime

3 - + opt-in notification system

Stage 0: no information

In two member state (*Scotland, Malta: cases of the criminal court*) the victim will either have to attend the sentencing hearing or contact the court's registry or the prosecution service on his own initiative to hear the outcome of the case. In *Malta*, victims whose cases are dealt with in the criminal court trying the more serious offences are not notified of the outcome of the trial. In practice, victims run the risk of remaining unaware of the outcome in his case, or they may learn the outcome quite some time after the publication of the verdict in the press. Even if they have testified in court, they have not been given the right to be notified of the verdict (see stage 1). Moreover, this state of affairs presupposes that the victim has learned the date and place of the trial. Usually, he will be summoned to testify, however this may not always be the case.

Stage 1: partial notification system

The greatest number of jurisdictions have implemented a partial notification system for victims who play a formal role in the trial proceedings: *Austria, Belgium, Cyprus, Denmark,*

*France, Greece, Iceland, Ireland, Italy,*²⁰ *Liechtenstein, Luxembourg, Malta (magistrates' court),*²¹ *Norway, Portugal, Sweden and Turkey.*

In these jurisdictions, these victims have a fair chance of being informed, but others have to take action themselves to find out the court's verdict and sentence. With respect to the victim-witness the situation is particularly pungent. He is summoned to testify in court against the accused, which may be a painful and distressing event. He is, however, never rewarded for his contribution to the course of justice by being kept informed of the court's decision. This practice constitutes not only a breach of the fundamental rules of good manners, it also goes against the fair and justified expectations of victim-witnesses. Understandably, they often feel left out in the cold. This may not only have a (very) negative impact on their confidence in and satisfaction with the criminal justice system, but also on their willingness to cooperate with the legal system in the future.

In practice, the partial notification system safeguards the civil claimant's and the auxiliary or private prosecutor's right to obtain the outcome of the case. These victims receive a copy of the verdict, or that part of the verdict relevant to their claim for compensation. At the same time, a significant number of victims who report a crime to the authorities but do not play a role in the trial proceedings may remain unaware of the outcome of the trial. They either have to attend the pronouncement of the sentence, contact the clerk of the court or the prosecutor's office, or read the papers. This would not be such a big problem if these jurisdictions (and those adhering to stages 0 and 2) had a general plan of action to inform victims on how they can get the results of the trial. Today, however, the criminal justice authorities still refrain from telling victims the outcome, or who they can contact in a systematic manner. This causes particular problems for victims without legal representation or without the assistance of a victim support worker. Even worse, they may have to learn the outcome from the media.

Stage 2: notification system for participating victims and victims of serious crime

This level of sophistication is reached by two member states, *Spain* and *Zurich*. They have created a notification system for victims of sexual and violent offences, in addition to the notification of victims with a formal role in the proceedings. In practice, the duty to inform victims of serious offences seems to function quite well. The main incentives for the police to notify this group of victims are the formal duty as well as the general willingness of the authorities to do their utmost for victims of sexual and violent crimes.

Stage 3: opt-in notification system

The highest level of formal implementation is reached by three jurisdictions: *England, Germany and the Netherlands*, which have set up an opt-in notification system. The opt-in system functions in addition to the general obligation to notify victims with a formal status of the outcome of the proceedings by means of a copy of the entire verdict or that part that

²⁰ The *Italian* notification system is different from all other states since verdicts are always deposited at the court's registry where everyone who is interested has access. Only if the verdict is not deposited within fifteen days is the victim who acted as a party in the proceedings (civil claimant, private prosecutor) notified, though not of the outcome of the trial but of the day of deposition.

²¹ In *Malta*, if the case is tried in the court of magistrates, the victim who acts as an injured party has a formal position and the formal right to be informed of the outcome of the case (s. 410). As mentioned earlier, if the case is tried in criminal court (court for serious crimes) the victim is not notified. As a witness, he has not been given the right to hear the verdict.

concerns their claim for compensation.

The actual implementation of the opt-in system varies considerably between the three member states which use it. In *Germany*, the civil claimant will be sent a copy of the court's verdict of his claim because he has assumed a formal role in the proceedings. In addition, an opt-in system has been created for the injured person (the person directly affected by the crime) who may submit an application to be informed of the results of the judicial proceedings 'as far as this is relevant to him'. This phrase is interpreted as exclusively concerning decisions against which the victim may lodge an appeal. It implies that the victim should have played a formal role either as an assistant prosecutor (*Nebenklager*), a private prosecutor (*Privatklager*) or a civil claimant.²² The court which has taken the decision must pass it on to the victim as soon as the decision becomes final, and in such a manner that it is easily understood.²³ In *the Netherlands*, the opt-in system operates in a different way. One of the points of departure of Dutch victim policy is that the victim does not have to be present during the proceedings. The clerk of the court's office automatically notifies the victim of the outcome of the trial, if he wishes to be kept informed. He sends the victim a copy of the judgment on his own accord. In *England and Wales*, the victim is not sent a copy but a letter by the Crown prosecution service or the courts to inform him of the outcome of the case, if he wants to be informed. In cases where the victim has been killed, raped or sexually assaulted, the notification strategy is taken one step further. Apart from notifying victims who opted-in to the notification scheme, the police keep the victim, or his surviving relatives, informed of developments if an appeal has been lodged. Information is then passed on about the date of the hearing in appeal, as well as the verdict of the appellate court.

2.5.2 Measures to Improve the Provision of Information

A solution for most of the current problems would be to create a systematic notification system to inform victims of the outcome of the case. All victims who have been involved in the case, inter alia as a reporter of a crime, a witness or a civil claimant, should be given the right to be told by the authorities of the outcome of the case. All member states should consider creating a formal obligation for the court's registrar to send a copy of the outcome to the victims in the case, irrespective of their formal role. In practice, this should not be too difficult since the name and address of the victim – either as the reporter of the crime, civil claimant, private/assistant prosecutor, or witness – is contained in the legal files and official records.

2.5.3 Conclusions and Best Practice

Member states which inform victims with a formal status as well as victims of violent and sexual crimes (*Spain* and *Zurich*, stage 2), and those with an opt-in system (*England and Wales*, *Germany*, *the Netherlands*, stage 3) have reached the highest levels of sophistication. We cannot really distinguish between these two notification systems, because the opt-in systems may reach fewer victims. If one considers the working of the *German* opt-in system (see guideline A.3, § 2.2.1), it may be true that *Spain* and *Zurich* have a higher degree of actual implementation. Moreover, their system provides the best guarantee that victims of violent and sexual

²² 'This information is given in cases where victims can appeal the decision of prosecutors or judges which is very often the case in serious crimes against the victim', Kirchhoff, 1992; p. 146.

²³ Kaiser, 1992; pp. 20-21.

crimes will be notified. The functioning of the opt-in systems in *England and Wales* and the *Netherlands* is probably better than in *Germany* but there are no data on the latter jurisdiction's system to support this.

In conclusions, the notification systems represented by stages 2 and 3 constitute best practice.

Developmental scheme for implementation of guideline D.9 (c):

0 - no information: <i>Scotland, Malta (criminal court)</i>	-
-----R (85)11	
1 - partial notification system: participating victims: <i>Austria, Belgium, Cyprus, Denmark, France, Greece, Iceland, Ireland Italy, Liechtenstein, Luxembourg, Malta (magistrates' court), Norway, Portugal, Sweden, Turkey</i>	+
2 - + notification system: victims of serious crime: <i>Spain, Zurich</i>	+
3 - + opt-in notification system: <i>England and Wales, Germany, the Netherlands</i>	++

3 INFORMATION ABOUT THE VICTIM

Information features in Recommendation (85) 11 not only as knowledge that should be made available or provided to the victim, but also as information about the victim that must exchange between the criminal justice authorities. In particular, information on the losses and injuries of the victim should go from the police to the prosecution service (guideline A.4). The same information should be made available to the court in order to decide on the victim's claim for compensation (guideline D. 12). The circulation of information lays the foundation for the realization of the victim's rights to be compensated by the offender for his losses and injuries.

3.1 Information from the Police to the Prosecution Service

(A.4) *In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim.*

The guideline emphasizes that the police should give a clear and complete statement of the victim's injuries and losses. However, the obligation is qualified by the phrasing 'as much as possible'. This phrase is added because the police are always dependant on the cooperation of the victim and medical doctors. As we will demonstrate below, the problems are mainly caused by the fact that victims often find it very difficult to give the police, or any other authorities, e.g. the courts, the information they need. Regarding medical evidence, the police often have fewer problems giving a clear and complete statement.²⁴

²⁴ With respect to the evidence regarding injuries, the problems are of a different nature. Often proof of injuries is easily obtainable: it simply requires a statement from a medical doctor. If a statement is made, it is clear and complete and always included in the file. Occasionally, however, evidence on the victim's injuries may be very difficult to obtain. It may take a lot of time before the final consequences of the injuries can be established, or, too much time may have gone by for medical doctors to provide the criminal justice authorities with conclusive evidence. In particular, in sexual crimes the loss of medical evidence cannot easily be retrieved if the victim does not report the crime immediately, or contact a doctor. Similar problems may

3.1.1 Formal and Actual Implementation

A relevant question concerning the police duty to give an adequate statement on the victim's injuries and losses is, first of all, why is the statement generally included in the legal file? If the statement is, as a rule, included to substantiate the charge, the need to be as precise and complete as possible is often lacking. A general indication of any losses an injuries will do. To remedy this practice, making the police responsible for giving as complete a statement as possible is paramount (stage 3). This is not to say that all difficulties will be solved by a formal duty. Additional measures should be introduced in that regard (stages 4 – 7).

Developmental scale for implementation of guideline A.4:

- | | |
|--|---------------|
| 1 - statement included to substantiate charge | |
| 2 - partial obligation: victims of sexual and violent crimes | |
| 3 - general obligation for the police | -----R (85)11 |
| 4 - + control by the public prosecutor | |
| 5 - + formal responsibility of the public prosecutor | -----R (85)11 |
| 6 - victim-form or victim letter to facilitate the cooperation of the victim | |
| 7 - cooperation between the police and victim or legal services | |

Stage 1: statement to substantiate the charge

In the vast majority of the jurisdictions, *Austria, Cyprus, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Norway,*²⁵ *Portugal, Scotland, Sweden, Zurich* and *Turkey*, the statement of the injuries and losses suffered by the victim are included in the police report to substantiate the occurrence of the crime. Concerning the victim's injuries, every jurisdiction requires that the file should include a medical report. Most states allow any medical doctor to make the report, for instance, the victim's family doctor. Some jurisdictions, however, such as *Austria, England and Wales* and *Portugal*, only accept medical reports issued by specially designated medical doctors, such as members of a legal-medical

occur in jurisdictions which have made special requirements for the medical report. The victim may have gone to his own family doctor quite some time before reporting the crime, but his evaluation of the injuries is not valid in court. In addition, many victims of sexual crimes do not realize the potential loss of evidence if they do not see a (legally indicated) medical doctor straight away, but take a bath or shower first. The evidence may be irretrievable by the time the victim is referred to the doctor who is officially qualified to make the report on the victim's injuries. Police officers find it extremely frustrating to know that it is too late to retrieve evidence, and that the offender cannot be convicted unless he confesses. However, confessions are hard to come by. To surmount difficulties concerning statements on medical evidence in rape cases, the use of rape suites which have been set up in *Norway, England and Wales, Northern Ireland* and *Scotland*, or the *Icelandic Rape Trauma Centres* is recommended (see Chapter 27, § 3.2.3). Furthermore, to avoid the problem of inadmissible evidence, the legislature should accept statements from all medical doctors, even if it is argued that it is common knowledge that victims should see a specific medical doctor or an institute of legal medicine.

²⁵ In *Norway* the situation differs from the other jurisdictions mentioned here. The police have informally assumed the duty (see stage 3) of sending a letter to victims to request their cooperation (see stage 6).

institute, police physicians, or doctors working in public hospitals.

In practice, statements on the losses and injuries of the victim as part of the evidence are given by the police to the prosecution service in all jurisdictions. If this is not the case, the prosecution service returns the report to the police to obtain such a statement in view of the substantiation of the charge. However, this police statement does not necessarily mean that a clear and precise description of the injuries and losses is given. In fact, a police statement which is included in the file in order to document that a crime has been committed is usually insufficient for the prosecution service to assist the victim with his claim for compensation, and/or for the court to award compensation to the victim. However, the tendency to be more accurate when the crime is more serious is evident in all jurisdictions. But the 'seriousness' of the crime depends on the perceptions and attitudes of the individual officers towards a particular offence.

A common problem is that police statements are inadequate. This may be due to problems in gathering of the evidence. Secondly, the police often do not include the statement to substantiate the victim's claim but as an indication that a crime has taken place. In other words, the police do not compile the information with a view to assisting the victim to secure compensation from the offender. Thirdly, the police do not tend to give the subject much attention. Frequently, the police consider establishing the precise worth of the losses and the severity of the injuries to be the duty of the courts or the responsibility of the victim (and his lawyer). In practice, this attitude of the police creates suspicion on the part of the judges who tend to believe that victims want to profit from the situation by claiming more than they are entitled to. A police statement is viewed as a more independent account of the damages. In some countries, such as *Portugal*, this leads to the situation that a victim's claim is never entirely awarded by the court. Usually, it is reduced by a third or more. It goes without saying that this attitude negatively affects the honest victim's right to be awarded full compensation for his losses and injuries.

Stage 2: partial obligation regarding victims of sexual and violent crimes

The *Spanish* legislature is the only one which has created a partial formal obligation for the police to give an accurate statement regarding victims of sexual and violent crimes resulting in serious bodily injury. In practice, the obligation seems to function adequately. The formal duty combined with the empathy most police officers feel towards these particularly vulnerable victims plays a significant role here.

Stage 3: general obligation

In *Belgium*, *England and Wales* and *the Netherlands*, the legislature has created a general obligation for the police to give a clear and accurate statement of the injuries and losses of the victim. In *Norway*, the police have informally assumed this duty. In *the Netherlands*, the obligation is the most far-reaching. The police must determine not only the nature and extent of the damages and injuries, they must also include all relevant information on the subject: information on the financial position of the victim; the capacity and willingness of the offender to pay compensation; as well as the activities undertaken to settle the question of compensation between victim and offender. Moreover, in *England and Wales*, and *the Netherlands*, the legislature obliges the authorities to take this information into account when making the decision on prosecution (see Chapter 26). In practice, a formal obligation for the police to make an accurate statement can make quite a difference. In *the Netherlands*, research has shown a significant improvement after the introduction of the formal duty for the police. The number of times a statement on the victim's injuries and losses was included

rose from 27% to 72% (Wemmers (1994), p.40). Here too, however, the police are still greatly dependent on the victim to provide the necessary information and items of proof. Without this cooperation, the police statement is bound to be as general and inaccurate as in jurisdictions without a general obligation. The only difference is that the police may try harder to obtain the required information.

Due to a lack of studies, we can only guess at the probable causes of any remaining inadequacies. With respect to the statement on material losses, the police seem not to be as thorough and meticulous as they should or even could be.²⁶ It is quite possible that they do not look as thoroughly into the matter because they do not have the time nor the manpower to investigate every single case. Another cause may be that detailed information is not easily obtained because victims have difficulty understanding what items of proof they should provide. This phenomenon is widespread, irrespective of whether the jurisdiction has created a formal obligation or not. Everywhere, policemen complain about the lack of cooperation from victims and the difficulties with making victims understand what kind of proof they should provide. An additional difficulty is that many victims cannot find or no longer possess the necessary receipts of stolen or perished goods, and do not know what sums to bill.

Stage 4: additional control of the public prosecutor

To enhance police performance, *English* and *Dutch* public prosecutors should check the police statement on the victim's injuries and losses for accuracy. No studies have been done to measure the effect of an obligation for the public prosecutor to exercise control over police statements on the victim's injuries and losses. On the whole, practice seems to indicate that it has some effect. However, public prosecutors do not exercise their powers with any consistency. Still, a lot of statements are inadequate, and do not contain precise data on the victim's losses and injuries. According to interviewees, prosecutors do not always send incomplete statements back to the police to order a more complete statement, nor do they tend to remedy the shortcomings themselves. One may therefore wonder whether the actual implementation of stage 4 (and stage 5) is realistically any higher than that of stage 3.

Stage 5: additional formal responsibility of the public prosecutor

In *the Netherlands*, this obligation has been taken one step further: the prosecution service has been given the final responsibility for an accurate and complete statement. The fact that public prosecutors have the obligation to check police statements on completeness or have a formal responsibility to do so, does not seem to significantly effect police performance. Victims must still provide the authorities with the documents on which they may found their statement. This is probably the main reason why the control mechanism and the attribution of formal responsibilities to the prosecution service do not seem as effective as expected. If the police statement is incomplete and the victim does not respond adequately to requests

²⁶

To illustrate the fact that even with a formal obligation the police do not always fulfill their duties regarding the facilitation of the payment of compensation by the offender to the victim we mention the following example: In *the Netherlands*, the police are obliged to include information on the financial capacity of the offender in the report. The 1995 implementation study shows, however, that in 82% of the cases, the police ignore the offender's ability to pay compensation (before the formal duty the figure was 98%). The introduction of a formal duty thus makes a difference, but compliance with the law is apparently strongly influenced by other factors.

for items of proof, neither the police, nor the prosecution service have the time or the manpower to remedy this shortcoming.

Stage 6: victim-form or letter to facilitate cooperation

In *England and Wales*, the *Netherlands* and *Norway*,²⁷ the police or the prosecution service request the cooperation of the victim by either giving or sending him a form to fill out, or a letter requesting evidence to substantiate the claim. It is important to note that in *Norway*, the police do not have the formal duty to undertake this activity. They have, nonetheless, assumed the responsibility of sending the victim a letter in which he is requested to furnish the police with detailed proof of his claim for compensation. The *Dutch* police use a special form to help the victim provide the necessary information. The form tries to indicate in a simple but concise manner what items of proof the authorities need to make an accurate statement on the victim's losses and injuries. The victim must answer specific questions and attach items of proof (Wemmers (1994), p. 40). Contacting the victim to seek his cooperation is a very important step and a definite mark of sophistication.

In practice, however, these policies do not have the desired effect. In *Norway*, the response to the letter is generally poor. This is probably due to the fact that victims do not understand what the items of proof are, or how to calculate their losses. They are not unwilling but they need additional assistance. Therefore the next and final step is critical to improving police statements.

Stage 7: cooperation between the police and victim support or legal services

In the *Netherlands*, the forms were poorly filled out until it was decided that Victim Support and the legal aid centres should step in to assist the victim. The *Dutch* police have sought the cooperation of victim support and legal advice centres to complete the victim-form on injuries and losses. In some districts, the police refer victims to the local support centre where he is actively assisted in preparing the claim. In other districts, the same service is provided by legal advice centres. Alternatively, a systematic referral model is established between the police and legal advice centres which have agreed to check the claim for compensation of the victim, and if necessary indicate to the victim what items of proof should be added to the statement. The cooperation agreements, which are financially supported by the Ministry of Justice, is crucial. However willing the police may be to fulfill their duties, they remain, to a large extent, dependant on the ability of the victim to indicate his losses and injuries. Practice has shown that most victims do not understand exactly what the police need to give a complete statement. The police, on the other hand, do not have the time to sit down with every victim to explain what they need to give an accurate statement, or to check the victim-form.

Today, the police systematically refer victims to victim support or legal advice services if they are having difficulty listing their losses and injuries. The services assist the victim with filling out the form and with the required calculation of the losses suffered. In practice, this works very well and is a service that is very much appreciated by the victims. Therefore, setting up a cooperation agreement between the police and victim support services or legal aid centres is at the highest level of sophistication and constitutes best practice regarding

²⁷ Although the *Norwegian* police have an actual rather than a formal obligation to include a complete statement, their example has nevertheless been included to demonstrate a possible cause. In the *Netherlands*, the formal obligation is found in the Guideline Terwee, in *England and Wales* in the 1996 Victim Charter.

the statement on the victim's losses.

3.1.2 Measures to Improve the Provision of Information

Finding a remedy for the fact that the police statement contains insufficient information is not easy. Clearly, the police should do more than just give an indication of the losses and injuries to substantiate the charge. Part of the solution may be to create a formal duty for the police to meticulously list the victim's losses and injuries. Moreover, it should be considered a basic police task. The attitude of higher ranking officers together with that of public prosecutors may also play a crucial role. They can and should insist on accurate statements on the impact of the offence, and make this an integral part of the job specification and evaluation (see solutions under guideline A.2).²⁸ Inaccurate or incomplete statements should be returned to the police. However, neither the introduction of a formal duty for the police, nor the duty to direct and check them are the ultimate answers. Therefore it is important to establish some sort of systematic referral system between the police and victim services and/or legal advice centres to assist the victim in preparing a list of his injuries and losses, as well as calculating and proving his losses.

3.1.3 Conclusions and Best Practice

In four of the 22 member states (*Belgium, England and Wales, the Netherlands and Norway*), the police make additional efforts to give as clear and accurate a statement as possible. Only the first three jurisdictions have a formal duty. In all other states, information about the injuries and losses is usually made available to the prosecution service by means of a police statement which is not primarily meant for awarding compensation to the victim but for substantiating the charges.

The *Dutch, English and Norwegian* approach of sending victims a letter to seek their assistance with making as complete and precise a statement as possible is very relevant to actual implementation. The *Dutch* solution of working with victim support services and legal aid centres to surmount the difficulties with the statements of the victim's losses and injuries is at the highest level of sophistication and constitutes best practice.

²⁸ Apart from organizational incentives, it might help to explain why it is important to give as complete a statement as possible on the victim's losses and injuries. Firstly, it may be more efficient to make someone pay for his crime than giving him a low or suspended prison sentence. Also, making an accurate statement of the losses and injuries can be considered a good public relations strategy. The police stand to gain the goodwill of victims if they take the statement seriously. It may, in addition, lead to more goodwill with the prosecution service because it would greatly facilitate the duty of the public prosecutor to provide the court with the necessary information for making a compensation order. Moreover, it would definitely lead to a higher number of compensation awards. Finally, providing the necessary information saves valuable time in court. Judges would have to spend less time trying to establish the losses and injuries if they could rely on the police statement. And on a macro-level, dealing with the punishable act and the victim's claim for damages at the same time is more efficient and more cost-effective than having to have a criminal and civil court hearing to deal with the same facts, losses and injuries; in fact the criminal court already knows the facts and circumstances causing the victim's losses and injuries.

Developmental scale for implementation of guideline A.4:

1 - statement included to substantiate charge: <i>Austria, Cyprus, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Portugal, Scotland, Sweden, Zurich, Turkey</i>	-
2 - partial obligation: victims of sexual and violent crimes: <i>Spain</i>	-
-----R (85)11	
3 - general obligation for the police: <i>Belgium, England and Wales, the Netherlands</i> + in practice: <i>Norway</i>	R
-----R (85)11	
4 - + control by the public prosecutor: <i>England and Wales, the Netherlands</i>	+
5 - + formal responsibility of the public prosecutor: <i>the Netherlands</i>	+
6 - victim-form or letter to facilitate cooperation of the victim: <i>England and Wales, the Netherlands, Norway</i>	+
7 - systematic referral by the police to victim and/or legal services: <i>the Netherlands</i>	++

In conclusion, the highest overall levels of implementation are reached in *the Netherlands, England and Wales and Norway*.

3.2 Information from the Authorities to the Court on the Victim's Need for Compensation

- (D. 12) *All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the quantum of the sentence, taken into account:*
(a) the victim's need for compensation; [...]

The obligation to make all relevant information concerning the injuries and losses suffered by the victim available to the court is closely linked with the previously discussed obligation for the police to make a clear and complete statement on the victim's damages (§ 3.1, guideline A.4). In 18 of the 22 member states, the police are not formally obliged to make a clear and accurate statement. It is therefore hardly surprising that as a rule the court cannot deduce the victim's need for compensation from their statement on the victim's losses and injuries.

3.2.1 Formal and Actual Implementation

In order to provide the court with all the relevant information it needs to decide upon the form and quantum of the sentence, most often the victim is responsible for demonstrating and substantiating his need for compensation. Only in a minority of the jurisdictions, a formal duty has been introduced for the public prosecutor. This is not necessarily a victim-oriented reform, it may also be caused by the functioning of the criminal justice system. If the victim has no participatory rights during the trial proceedings, as is the case in the common law jurisdictions, the authorities must take responsibility for informing the court to facilitate the payment of compensation to the victim by the offender.

In the actual implementation, however, it is important to note that if guideline D.12(a) had indicated the authorities as responsible agents, the developmental scheme would have looked very different. The authorities often do not take the task of informing the courts of

the victim's need for compensation very seriously. Implementation of this guideline would then certainly not be better than indicated under guideline A.4. Finally, the participatory right of the victim to inform the court is a sound option. It should, however, not be over-rated since many victims find it particularly difficult to indicate their need for compensation in a manner that will satisfy the court. Far too often, if they are not assisted by a lawyer, or in any other way, with presenting and substantiating their claim, the court will not or cannot take their need for compensation into account.

Developmental scheme for implementation of guideline D.12 (a):

- | | |
|---|---------------|
| 1 - hardly any information is needed by or provided to the courts | -----R (85)11 |
| 2 - participatory right of victim | |
| 3 - formal duty public prosecutor | |
| 4a - formal duty public prosecutor + participatory right victim | |
| 4b - formal duty public prosecutor + Victim (Impact) Statement | -----R (85)11 |

Stage 1: hardly any information is needed by or provided to the courts

In *Cyprus, Greece and Malta*, no specific rules exist regarding the provision of information to the court on the injuries and losses suffered by the victim. In *Cyprus and Greece*, usually (some) information on the injuries and losses is available to the court from the police statement included in the file, but it is not used to take the victim's need for compensation into account. *Greek* criminal courts have no need for such information because they always award a small and symbolic sum regardless of his losses or his need for compensation. If the victim wishes to receive more compensation he must go to civil court. In *Cyprus*, the courts can only order compensation if the crime consists of an act which consists of willful harm to property. But also in these cases, compensation – and the victim's need for compensation – plays no role whatsoever in trial proceedings. In *Malta*, information on the victim's damages or need for compensation is only rarely needed. The Maltese courts can only award compensation as a condition to a suspended sentence or a probation order. As a result, the court will need only to be informed of the victim's need for compensation in cases where these sanctions are applied. In practice, this happens only occasionally. In conclusion, the difficulties regarding the provision of information on the injuries and losses of the victim, and his need for compensation are primarily due to the fact that compensation plays only a minor role in *Cypriot, Greek and Maltese* criminal proceedings.

Stage 2: participatory rights of the victim

In 15 of the 22 member states (*Austria, Belgium, Denmark, Germany, Iceland, Italy, France, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Zurich and Turkey*) the victim and/or his lawyer have been given participatory rights to substantiate the claim for damages and to provide the court with the necessary information about the losses and injuries sustained and his subsequent need for compensation. In *France*, however, the latter is not necessary because the court can only award the exact amount of damages suffered. He cannot alter this based on the financial capacity of the offender, or the victim's need for compensation.

In practice, the public prosecutor will, as a rule, refer to the statements of the police

which are included in the legal file. Only in very serious cases, will the public prosecutor elaborate on the impact of the crime. However, this is usually not sufficient for the court to award any compensation. Therefore, the victim should make use of his participatory rights and submit evidence to the court. In reality, victims often have trouble presenting their claim. As a result, most jurisdictions have developed the practice of advising the victim to bring a lawyer. In certain member states, such as *Luxembourg*, the court will even adjourn the trial to allow the victim to hire the services of an advocate to prepare his claim and assist him during the trial proceedings. This is a genuine sign of actual development and sophistication.

A common problem in all jurisdictions where the victim informs the court on losses and injuries is that he is the beneficiary of the claim for compensation. As a result, the courts frequently presume that the victim will try to take advantage of the situation. Therefore, it would be preferable for the authorities themselves to accept the duty of making objective data available to the court so that it can take the victim's need for compensation into account when sentencing.

Stage 3: formal duty of the public prosecutor

In *England and Wales*, *Scotland* and *Spain*, the prosecution service is responsible for the provision of information to the court. In these three member states, the victim cannot play any role during the trial proceedings. The public prosecutor is the only one who is allowed to inform the court. In the former two jurisdictions, the victim cannot participate in the proceedings due to the common law system. In *Spain*, however, it is a deliberate choice not to allow the victim to speak in court.

In practice, the lack of participatory rights may put the victim in a very awkward position. In all three jurisdictions, it frequently occurs that the prosecution service does not give account of the victim's damages and sufferings. At such instances, the lack of participatory rights of the victim is particularly striking. Many victims are utterly aggrieved by the fact that the public prosecutor does not think of informing the court of the victim's need for compensation, and that they cannot act to remedy this. Theoretically speaking, the court may ask the public prosecutor to give additional information on how the offence affected the victim, both financially and psychologically, and his subsequent need for compensation. In *England and Wales*, however, the court rarely uses this option. But the court may rely on the pre-sentence impact reports drawn up by the probation service. In *Spain*, the public prosecutor must provide the court with information on the victim's damages and need for compensation. In practice, however, public prosecutors only tend to inform the court if the victim is present in the courtroom, in spite of the formal obligation to inform the court and claim compensation on behalf of the victim.

Stage 4a: formal duty and participatory rights of the victim

In five jurisdictions (*Denmark*, *Luxembourg*, *the Netherlands*, *Norway* and *Zurich*), the prosecution service has the primary responsibility for informing the court of the victim's injuries and losses. In addition, the victim may make use of his participatory rights to inform the court either orally or in writing, e.g. by means of a victim form or letter (see § 3.1). The main advantage of this practice is that the victim can renounce his participatory rights and leave the presentation of the claim to the public prosecutor. In practice, however, it is usually not advisable for the victim not to be present in court. Normally, the public prosecutor only presents the facts, and the victim's need for compensation, as contained in the legal file. The records however are not always as clear and complete as the court requires (see guideline

A. 4, § 3.1.1). Moreover, the prosecution service usually has no first-hand information on the victim's need for compensation because they have little to no contact with the victims. The relevance of first-hand information may be inferred from the fact that in countries where the police act as prosecutors in the lower courts, this seems to have a positive effect on the successful transfer of data to the court about the injuries and losses of the victim as well as his need for compensation. The police prosecutors have more direct knowledge of all aspects of the case, and may therefore be able to provide the court with (additional) information that is not included in the legal file. As a result, the claim may be dismissed or referred to civil court. Therefore, it is usually wise to make use of his participatory rights. He may then elaborate orally on the information contained in the file, and indicate the victim's need for compensation, which often has a positive effect on the outcome of the court's decision.

Stage 4b: formal duty and a victim (impact) statement

In *Ireland*, the prosecution service may draw information from an other source in addition to the police file, namely the Victim Impact Statement. In addition, in five *English* legal districts Victim Statement²⁹ experiments have been set up, so that the court may also rise the statement when deciding upon the quantum of the compensation order. The Victim Statement experiments will most probably be expanded on a nation-wide scale.³⁰ In the common law jurisdictions, a victim (impact) statement is needed because the victim has no participatory rights whatsoever. It follows that the court can never ask the victim about his need for compensation, if the victim is present in the courtroom, as can be done in all other jurisdictions. In practice, the *Irish* Victim Impact Statement is filled out by the police, a psychiatrist or psychologist. The form contains different very specific sections on economic loss, physical injuries, moral suffering and effects, life changes and other relevant information. The Victim Impact Statement in its written form is added to the legal file for the court to take into consideration. Because it is not filled out by the victim it has the status of an independent assessment of the impact of the offence on the victim. In daily court practice, Victim Impact Statements are frequently provided to the court in cases involving sexual or violent offences. For other crimes, the police seem to be less efficient in making sure a Victim Impact Statement is provided to the court. In practice, the Victim Impact Statement is thus only partly successful. The *English* Victim Statement form may be completed by the victim or a police officer on his behalf. Unfortunately, only about 30% of the eligible victims wish to fill in the Victim Statement form. This is probably due to the fact that the effects of the Victim Statement on the court's decision-making are still unclear.

3.2.2 Measures to Improve the Provision of Information

Part of the solution to the problems concerning the victim's need for compensation is to make sure that the police statement on the victim's injuries and losses is accurate and

²⁹ In *Ireland*, the most common term, Victim Impact Statement, is used. In *England* the term Victim Statement is preferred to differentiate their implementation of the Statement from practice in the United States of America, Australia and New Zealand.

³⁰ In *England and Wales*, the impact of the crime on the victim is also recorded in a pre-sentence report since 1995. In fact, however, this report contains no more information about the victim's injuries and losses or his need for compensation than already found in the legal file. The main reason for the inadequacies of the pre-sentence report is that the probation officers do not have personal contact with the victim.

complete. This is especially true, because the public prosecutor tends to rely heavily on the information contained in the legal file. Since the problems and hence the solutions pertinent to guidelines A.4 and D.9 are so closely intertwined, the reader is referred to § 3.1.4. Furthermore, since the victim is a vital link in providing the court with information about his need for compensation, he should be allowed to exercise participatory rights to demonstrate and clarify his claim in court. Finally, the Victim (Impact) Statement is a potentially excellent instrument for informing the court of the victim's need for compensation. It would be advisable to introduce it in the continental jurisdictions as well.

3.2.3 Conclusions and Best Practice

Formal best practice is achieved by jurisdictions at stages 3 and 4 on the developmental scale (*Denmark, England and Wales, Ireland, Luxembourg, the Netherlands, Norway, Scotland, Spain and Zurich*). In practice, the highest level of sophistication is attained by jurisdictions which allow the victim and the public prosecutor to inform the court of the victim's need for compensation (*Denmark, (five districts in England and Wales), Ireland, Luxembourg, the Netherlands, Norway and Zurich*). This constitutes an additional safeguard to enable the court to assess the victim's needs. A Victim Impact Statement that is made by a third, uninterested party, may even be preferable to participatory rights. It may, for example, prevent any suspicion from the part of the courts. Judges are often suspicious of information on losses that is provided by victims. The introduction of the Victim Impact Statement is, therefore, a valuable initiative.

Developmental scheme for implementation of guideline D.12(a):

1 - hardly any information is needed by or provided to the courts: <i>Cyprus, Greece, Malta</i> -----R (85)11	-
2 - participatory right of victim: <i>Austria, Belgium, France, Germany, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Zurich, Turkey</i>	R
3 - formal duty public prosecutor: <i>England and Wales, Scotland, Spain</i>	R
4a - formal duty public prosecutor + participatory right victim: <i>Denmark, Luxembourg, the Netherlands, Norway, Zurich</i>	R
4b - formal duty public prosecutor + victim (impact) statement: <i>(certain districts of England and Wales), Ireland</i> -----R (85)11	R

3.3 Information from the Authorities to the Court on any Compensation or Restitution made by the Offender

(D. 12) *All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the quantum of the sentence, taken into account: [...]*

(b) *any compensation or restitution made by the offender or any genuine effort to that end.*

3.3.1 Formal and Actual Implementation

In none of the 22 jurisdictions have formal regulations been developed to inform the courts of any payments of compensation or restitution by the offender to the victim. In some jurisdictions, such as *Belgium, Germany, France and the Netherlands*, this is mainly due to the fact that prosecution will, as a rule, be waived after the victim has been compensated for material and moral damages.

Guideline D. 12 (b) is the only guideline that has not inspired the legislative authorities to set up safeguards to ensure that the court is informed of any compensation or restitution made by the offender. As a result only a developmental scheme on actual implementation is presented.

Developmental scheme for implementation of guideline D.12(b):

-----R (85)11
1a - defence counsel
1b - public prosecutor and defence counsel
-----R (85)11

With respect to the provision of information to the court on any compensation or restitution by the offender, or any genuine effort to that end, two main approaches can be distinguished. However, in practice they do not differ to an extent that would allow us to indicate a preference.

Stage 1a: the defence counsel informs the court

In all jurisdictions, the defence counsel may inform the court of any payments or restitutions made by his client to the victim. In practice, the provision of information to the court by the defence counsel on any payments of compensation or restitution is a very reliable strategy. Providing such information to the court is part of the defence strategy, and will, as a rule, lead to mitigation of the sentence.

The problems that occur are generally related to local realities. In certain jurisdictions, for example, defence lawyers do not encourage their clients to compensate the victim or restitute goods. They believe that this is a bad defence strategy because it implies the admission of guilt. *Icelandic, Italian, Greek, Norwegian, Swedish and Turkish* defence lawyers, in particular, discourage their clients from making amends before the trial. However, they may tell their clients to pay compensation after the trial and before the sentencing hearing in order to get a lesser punishment, though not all courts are inclined to mitigate the sentence. For instance, in *Turkey*, the courts only mitigate the sentence if the crime committed is a misdemeanour or a less serious offence. In more serious cases, the courts are not easily

persuaded to lower the sentence. This practice will, of course, not encourage defence lawyers to advise their clients to make amends. Likewise, offenders are not readily inclined to compensate the victim or make restitution in jurisdictions which apply mandatory sentences for certain crimes.

Stage 1b: the public prosecutor and the defence counsel inform the court

In six jurisdictions (*Belgium, Germany, France, the Netherlands, Portugal and Spain*) both the public prosecutor and the defence counsel may inform the court. Practice indicates that public prosecutors will not often make use of this right. If compensation has been paid – for instance after mediation – the offender will, as a rule, not be prosecuted. In *Portugal* and *Spain*, the prosecution service cannot decide not to prosecute after a payment of compensation by the offender to the victim. But it is still quite rare for offenders to pay compensation or retribute any goods before the trial. Only in cases where there is no chance of winning the trial, will defence lawyers positively advise their clients to (offer to) pay compensation in order to get a more lenient sentence.

3.3.2 Conclusions and Best Practice

Of all the flows of information, this is the only guideline of Recommendation (85) 11 that has not been formally implemented in any of the jurisdictions. There is no need for formal rules, because the defence counsel will make sure that the courts hear of any compensation or restitution made by the offender, or any genuine willingness to do so. Besides, in jurisdictions governed by the expediency principle (see § 2.3.1), numerous crimes will no longer be tried if the matter of compensation has been settled. In practice, there is probably not much difference between the two manners of implementation because relying on the defence counsel to inform the court is a very dependable strategy. However, we could also argue that the efforts of the criminal justice authorities to inform the court should be rewarded. In that case, the jurisdictions represented at stage 1b have achieved best practice.

Developmental scheme for implementation of guideline D.12(b):

-----R (85)11	
1a - defence counsel: <i>all jurisdictions</i>	R
1b - public prosecutor and defence counsel: <i>Belgium, Germany, France, the Netherlands, Portugal, Spain</i>	R
-----R (85)11	

4 CONCLUSIONS

In the majority of the jurisdictions, the flow of information from the authorities to the victim, as well as between the authorities to safeguard victims' rights do not yet meet the criteria as established in Recommendation (85) 11.

The victim and information

In half of the jurisdictions the police provide the victim with general information on their rights and interests. But only two jurisdictions have created a systematic opt-in information system (guidelines A.2, D.9). In three jurisdictions an opt-in system has been set up to

provide victims with information on the outcome of the police investigation, irrespective of a positive or a negative outcome (guideline A.3). In four of the 22 jurisdictions, the victim stands a good chance of hearing both the final decision not to prosecute and the final decision to continue the criminal proceedings (guideline B.6). Likewise, only six jurisdictions have set up standard procedures to notify victims of the date and place of a hearing concerning an offence which caused them suffering (guideline D.9(a)). The implementation of the right to obtain the outcomes of the police investigation and of the trial only reaches a near perfect score (20 out of 22) because Recommendation (85) 11 does not impose an active information strategy on its member states but allows the jurisdictions to leave the initiative with the victim (guideline D.9(c)).

The exchange of information about the victim between the authorities

With respect of the exchange of information, only four of the 22 included jurisdictions have created safeguards to make sure that the police give as clear and complete a statement as possible on the victim's injuries and losses (guideline A.4). The provision of information to the court on the victim's need for compensation is enhanced by the fact that 15 member states have granted participatory rights to the victim that allow him to inform the court. Only eight jurisdictions oblige the public prosecutor to take the victim's need into account when addressing the court (guideline D.12). Concerning the duty to inform the court of any compensation or restitution made by the offender, the standard of guideline D.12(b) is met in all jurisdictions because the defence counsel will inform the court of any such actions of the defendant. A perfect score is only reached because guideline D.12(b) contains a requirement that is beneficial for the defendant as well as for the victim.

The findings of this study further fuel the discussion on the current position of victims within the criminal justice system and the availability of procedural justice for victims. By introducing the guidelines on information, the Council of Europe aimed to improve the relationship between victims and the criminal justice system. To date, however, in their contacts with the justice authorities, victims are still frequently confronted with a system that neglects their interests in this respect. Only a fraction of the victims of crime actually receive information, or are notified of essential developments in their case. It is not surprising that they interpret this as a lack of interest on the part of the criminal justice authorities. The lack of adequate information and notification systems will certainly have a significant negative impact on the victim's satisfaction with the workings of the criminal justice system. Furthermore, the lack of information deprives many victims of the chance to exercise their rights. Therefore, they cannot safeguard their interests by making use of the legal rights granted them by the national legislature.

This state of affairs is all the more harrowing because the provision of information does not infringe on the rights of offenders, nor does it give them any influence in decision-making processes. It is essentially a simple task that recognizes the victim's position in the criminal justice system, as well as their interests in the case. If the relationship between the authorities and citizens is to improve and the number of non-reported crimes to diminish, the implementation of the information guidelines must reach a higher level of formal and actual effectuation.

APPENDIX:
TABLE ON INFORMATION

	A.2 formal	A.2 actual	A.3	B.6	D.9a	D.9c	A.4	D.12a	D.12 b
Austria	-	-	+	-	-	+	-	R	R
Belgium	R	++	++	R	R	+	R	R	R
Cyprus	-	-	R	-	-	+	-	-	R
Denmark	R	+	+	-	-	+	-	R	R
England and Wales	-	++	++	-	R	++	+	R	R
France	-	+	+	R	R	+	-	R	R
Germany	-	+	+	-	-	++	-	R	R
Greece	-	-	R	-	-	+	-	-	R
Iceland	-	+	+	-	-	+	-	R	R
Ireland	R	++	R	-	R	+	-	R	R
Italy	-	-	R	-	-	+	-	R	R
Liechtenstein	-	R	+	-	-	+	-	R	R
Luxembourg	-	++	R	-	-	+	-	R	R
Malta	-	+	R	-	-	-	-	-	R
Netherlands	R	++	++	R	R	++	++	R	R
Norway	R	+	R	R	-	+	+	R	R
Portugal	-	+	+	-	-	+	-	R	R
Scotland	-	++	R	-	-	-	-	R	R
Spain	R	+	+	-	-	+	-	R	R
Sweden	-	++	+	-	-	+	-	R	R
Turkey	-	-	+	-	-	+	-	R	R
Zurich	-	++	+	-	R	+	-	R	R

The table provides an immediate overview of the adherence of the jurisdictions to the information guidelines. Read vertically, it shows the implementation of a particular guideline, read horizontally, the performance of the individual jurisdictions.

For each guideline, the jurisdictions are individually given a score of: poor (-), in compliance with Recommendation (85) 11 (R), good (+) or very good (++). 'Poor' is to say that the standard set by the guideline is not met in that jurisdiction, 'compliance' refers to the implementation in accordance with the Recommendation, 'good' means that a better standard is achieved than required by the Recommendation, and finally, 'very good' indicates that an excellent level of sophistication has been achieved. For the sake of clarity, some of the guidelines are scored separately for formal and actual implementation. For the remaining guidelines there is an integrated score.

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Chapter 26

Compensation: Comparative Analysis and Conclusions

1 THE EXPEDIENCY PRINCIPLE AND COMPENSATION

(B.5) *A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender.*

1.1 The Principles of Legality and Expediency

Traditionally, a distinction is made between the principle of legality and the expediency principle. According to the principle of legality, all offences that come to the attention of the authorities, where there is sufficient evidence to make a case, should be prosecuted unless determined otherwise by law. The principle of legality embodies mandatory prosecution of *prima facie* cases. Conversely, the expediency principle leaves it to the discretion of the prosecuting authorities whether or not to prosecute a particular offence. This principle allows for the development of policies regarding the investigation and prosecution of offences, and for plea or sentence bargaining.

In practice, the principle of legality is often relaxed by a variety of exceptions to the rule of mandatory prosecution. For example, the *German* Code of Criminal Procedure embodies the principle of legality, but discretionary guidelines, prosecutor sentences, the waiver of misdemeanours and sentence bargaining are now all well-established in Germany. On the other hand, there are also substantial differences in the practical significance of the expediency principle. For example, even though the *Scottish* and *Maltese* criminal justice systems formally adhere to the expediency principle, in practice they prosecute almost every *prima facie* case that comes to the attention of the authorities.

Because of these discrepancies between theory and practice, all jurisdictions are included in the initial analysis of the implementation of guideline B.5, even those that formally adhere to the principle of legality.

1.2 Interpretations of the Guideline

Guideline B.5 encompasses two strategies. First of all, if the offender has already compensated the victim prior to the trial, or has done his best to do so, this may be a reason for the prosecutor to drop the prosecution. In line with this, the prosecutor may also agree to drop the prosecution on condition that the offender pays compensation. Secondly, if the offender has *not* yet compensated, or tried to compensate, the victim, this may be a reason for the prosecutor to go ahead with the prosecution where otherwise he might have dropped it.

In the following, we will first establish the developmental scheme for guideline B.5, and then discuss the performance of the individual jurisdictions.

1.3 Developmental Scheme

Developmental scheme guideline B.5:

0 - no consideration of question of compensation	-
-----R (85) 11	
1a - compensation that has been paid is reason <i>not</i> to prosecute	R
1b - compensation as condition for dismissal	R
2 - that <i>no</i> compensation has been paid is reason to <i>go ahead with</i> prosecution	R

3 - power of authorities to mediate between victim and offender	+
4 - positive duty of authorities to attempt to obtain compensation from offender for victim	++

Across the comparative board, the following stages of development can be distinguished regarding the implementation of the body of thought of guideline B.5. At stage 0, no consideration whatsoever is given to the question of compensation of the victim in relation to a discretionary decision whether to prosecute.

At stage 1, compensation features as a reason to discontinue a prosecution. This can occur in two forms. First of all, where the offender has already compensated the victim before the prosecutor took the matter of prosecution into consideration, the prosecutor may dismiss the case. Secondly, where compensation has *not* yet been paid at the time the prosecutor takes the case into consideration, the prosecutor may dismiss the case *on condition* that the offender pays compensation.

A criminal court can only award compensation through an adhesion procedure or as a compensation order if the case is brought before the court by means of a prosecution. It is for that reason that guideline B.5 invites jurisdictions to keep in mind that the victim's interest in receiving compensation may be a reason to go ahead with a prosecution where otherwise the prosecutor would be inclined to dismiss the case. This is stage 2 in the developmental scheme. A good example of a situation where this interpretation could be applicable is in relation to offences listed *ad informandum*.¹ The public prosecutor could reconsider prosecuting these offences in their own right where there is a victim with a compensation claim.

¹ An *ad informandum* offence is not included in the indictment but may be taken into account by the court when determining the sentence, with the permission of the defendant. See Chapter 17, § 7.1 under B.7

At stage 3, the police and/or prosecutor not only take the question of compensation of the victim into consideration when deciding whether to prosecute, but also have the power to personally mediate between the victim and the offender, or to refer the case to a mediation specialist. At a final level of sophistication, stage 4, the authorities even have a positive duty to try to arrange compensation between the offender and the victim. The standard set by guideline B.5 embodies stages 1 and 2.

1.4 The Stages of Development in Practice and the Performance of the Individual Jurisdictions

Stage 0: No consideration question of compensation

In nine jurisdictions, the question of compensation is not taken into consideration in any way in relation to the decision whether to prosecute.² Of these nine jurisdictions, six either adhere to the principle of legality or have a very limited discretionary power and therefore cannot be accused of failing to implement guideline B.5 because the guideline only addresses the situation in which a discretionary decision is taken.³ The three remaining jurisdictions where compensation is not taken into consideration are *Denmark, Iceland and Ireland*. In these jurisdictions, the decision to prosecute is a discretionary one and they can therefore be said to fail to meet the standards set by guideline B.5. In *Denmark*, there has even been a regression in this respect. Initially, the Administration of Justice Act contained a provision that compensation could be attached as a condition for withdrawal of summons but this provision was removed from the Act in 1992.

Stage 1a: compensation that has already been paid is reason for dismissal

England and Wales and *Norway* are jurisdictions with the expediency principle that allow for the dismissal of a case where compensation has been paid, or a serious effort made to that end. In *England and Wales*, where compensation is awarded in the form of a penal sanction, Home Office guidelines allow that 'if the offender has made some form of reparation or paid compensation, and the victim is satisfied, it may no longer be necessary to prosecute in cases where the possibility of the court's awarding compensation would otherwise have been a major determining factor'.⁴ In practice, in 1993 only 6% of discontinuances in *England and Wales* were attributable to the fact that the offender agreed to compensate the victim.⁵ In *Norway*, a case that has been settled by one of the Conflict Resolution Boards is considered closed.

Besides jurisdictions with the expediency principle, there are also jurisdictions that formally adhere to the principle of legality that allow for the 'dismissal' of cases where the offender has compensated the victim, albeit via an ingenious construction that ostensibly leaves the principle of legality intact. For example, in *Austria* the Penal Code provides that in case of a minor offence, if – among other things – the offender has compensated for any damages, the offence is no longer punishable. Technically speaking, the act is decriminalized rather than that the offence is dismissed by a discretionary decision but in practice the effect is the same.

² *Cyprus, Denmark, Greece, Iceland, Ireland, Italy, Malta, Spain and Turkey.*

³ *Cyprus, Greece, Italy, Malta, Spain and Turkey.*

⁴ Explanatory note 4C to Home Office Circular 18/1994 on the cautioning of offenders.

⁵ D. Crisp and D. Moxon, *Case Screening by The Crown Prosecution Service: How and Why Cases Are Terminated*, Home Office Research No. 137, London: HMSO, 1994.

Stage 1b: Compensation as condition for dismissal

In several jurisdictions compensation may be imposed as a condition for dismissal of the case. The prosecutor retains the right to go ahead with the prosecution if the condition is not met by the offender. In *Belgium, France, Germany, Luxembourg, the Netherlands and Portugal*, the public prosecutor may propose a dismissal on condition that the offender compensates the victim. In practice, however, there are considerable differences in the way this option is used, and the frequency. In *Portugal*, compensation is hardly ever used as a condition for dismissal. In *Luxembourg*, it is mostly used spuriously in cases where, even though the victim has suffered damages, no public action would normally have been taken. This use of compensation as a condition for dismissal leads to net-widening instead of diversion.⁶ In *Germany*, in 1996, compensation was imposed as a condition for dismissal by prosecutors in only 1.7% of all cases dismissed under s. 153a-1 of the Code of Criminal Procedure. By contrast, in the same year judges imposed compensation as a condition for dismissal in 7.8% of all cases dismissed by the courts.⁷ In *Belgium, France and the Netherlands*, much (legislative) energy has been devoted in the last decade to the matter of pre-trial compensation of the victim, with variable success, see stages 3 and 4.

It is interesting to note that in *England and Wales* there is an explicit prohibition for the authorities to one-sidedly impose compensation as a condition for cautioning. The reasoning behind this is that a caution is not a form of sentence, whereas compensation awarded by the criminal court in England and Wales is a penal sanction. Compensation in the pre-trial stages may only be made on a voluntary basis.

Stage 2: Lack of compensation as reason to prosecute

This interpretation of the guideline has been implemented only sporadically. In the *Swiss canton of Zürich*, in *Sweden* and in *Luxembourg* minor offences may not be dealt with in any other way than by prosecution if the injured party has made a claim for compensation, or has indicated that he intends to do so. Furthermore, marginal reference is made to stage 2 in the *English Code of Crown Prosecutors* which says that the fact that the victim has suffered damage is recognized as a public interest factor in favour of prosecution.

Stage 3: authorities have power to mediate

A third level of sophistication is that the authorities have a personal power to mediate between the victim and the offender, or to personally refer the case for mediation to a specialized institution. In *Belgium*, the authorities may attempt penal mediation on the basis of the 1994 Act and Guideline on Penal Mediation. In practice, the amount of cases that are eventually dismissed in this way are marginal compared with the total number of cases that are dismissed per annum, although the use of penal mediation has been stimulated by appointing assistants with a special responsibility for arranging mediation. In *France*, the prosecutor has had the power to mediate between the victim and the offender since 1993. In practice prosecutors send the files they consider eligible for mediation to mediation

⁶ Similar net-widening is observed with the Norwegian Conflict Resolution Boards. These boards are regularly asked to mediate in cases where the offender is too young to be held criminally responsible.

⁷ M. Kilchling and M. Löschnig-Gspandl, 'Legal and Practical Perspectives on Victim/Offender Mediation in Austria and Germany', Paper presented at the International Conference "Integrating a Victim Perspective within Criminal Justice", College of Ripon and York, St. John at York, July 17-18, 1998, p. 18. Due to be published in the *International Review of Victimology* in the course of 2000.

specialists. Between 1993 and 1996, the number of cases dismissed under the condition of paying compensation and after a mediation agreement increased by 20%. This represents 7% of the total number of cases that are dismissed.⁸

In some of the jurisdictions that formally adhere to the principle of legality the authorities may also have the power to bring about mediation between victims and offenders. This is the case in *Germany* and in *Austria*. In *Germany*, 71% of all cases selected for Victim-Offender Mediation (known as Täter-Opfer-Ausgleich, TOA) are selected by the public prosecutor.⁹

Conversely, in *England and Wales* national standards stress that the police should under no circumstances become involved in negotiating or awarding reparation or compensation.

Stage 4: authorities have positive duty to try to arrange mediation

The Dutch Terwee guideline of 1995 compels both the police and the prosecution to actively seek to bring about compensation for the victim. The ambition behind this provision is to stimulate the authorities to make optimal use of the existing opportunities regarding compensation for the victim and claim-settlement, and to thereby, among other things, increase the number of victims for whom compensation is secured. But in practice the effects so far have been disappointing. Attempts of the public prosecutor to arrange compensation for the victim have risen by only 3%, from 14% of the cases in which victims wanted to receive compensation to 17%. Claim settlement by the police went from 7% to 12%.¹⁰ However, the experiments and pilots conducted in the Netherlands have been instructive in establishing the preconditions for successful pre-trial claim-settlement. The first of these preconditions is that one functionary should be responsible for mediation rather than expecting all police officers to invest their time and energy into claim-settlement. Secondly, this person should have the power to offer the offender a deal that the case will not be prosecuted or that an out-of-court settlement will be reached on condition that the victim is compensated. Thirdly, the total amount of damages should be small. Regarding mediation by the prosecution service, most of the problems encountered in the pilot centred around the selection of the cases eligible for mediation, rather than the mediation itself. Careful thought should be given to the criteria for eligible cases, for example that mediation is attempted where the offence is a common one, and where the victim has suffered material loss. Subsequent selection of eligible cases should be carried out systematically according to the criteria that have been established.

1.5 Conclusions

Three jurisdictions that embrace the expediency principle fail to meet the standard set by guideline B.5, namely *Denmark*, *Iceland* and *Ireland*. All other jurisdictions that adhere to the expediency principle find themselves at various stages of the developmental scheme, above

⁸ F. Casorla, 'L'approche du magistrat', in: *International Review of Penal Law*, vol. 68, 1997, p. 93 (based on publications of the Ministry of Justice of September 1996, *L'activité pénale des juridictions en 1995*).

⁹ A. Hartmann and H. Stroezel, in: D. Dölling u.a., *Täter-Opfer-Ausgleich in Deutschland, Bestandsaufnahme und Perspektiven*, Bundesministerium der Justiz, Forum Verlag Godesberg, Bonn 1998, p. 157.

¹⁰ J.M. Wemmers c.s., *Evaluatie Terwee: slachtofferonderzoek Wet en Richtlijnen Terwee*, WODC, Den Haag, 1994, pp. 32-33 and 45-46 (N.B. Wemmers' report deals with the pilots conducted prior to the nation-wide introduction of the *Terwee* legislation).

the bottom line established by the guideline. Several jurisdictions that adhere to the principle of legality have also developed initiatives in line with the guideline. The common law countries embrace a strict adversarial system. Fundamental principles of procedure at present prevent these jurisdictions from progressing beyond stage 2. In these jurisdictions, police and prosecutors must avoid any semblance of partiality, and cannot, therefore, become involved in negotiations between the victim and the offender. Furthermore, stage 1b, where compensation is imposed as a condition for dismissal, cannot be implemented because of the penal nature of the compensation order in these jurisdictions, which may not be attached to the caution because a caution is not a form of sentence.

In the developmental scheme, we have indicated that a power of the police and/or prosecution to personally mediate between the victim and the offender, and beyond that a positive duty of the authorities to do so, supersedes the standard set by the guideline. *Austria, Belgium, France, Germany and the Netherlands* have all progressed into these stages. In practice, these measures do not automatically guarantee success and further preconditions must be established. Paramount among these preconditions is that the mediation is carried out by specialists, as demonstrated by the experiences in Belgium, France and the Netherlands.

Overview implementation of guideline B.5 in jurisdictions with the expediency principle:

0 - discretionary decision but no consideration of question of compensation: <i>Denmark, Iceland, Ireland</i>	-
-----R (85) 11	
1a - compensation that has been paid is reason <i>not</i> to prosecute: <i>England and Wales, Norway</i>	R
1b - compensation as condition for dismissal: <i>Belgium, France, Luxembourg, Netherlands, Portugal</i>	R
2 - that <i>no</i> compensation has been paid is reason to <i>go ahead with</i> prosecution: <i>Luxembourg, Sweden, Zürich</i>	R

3 - power of authorities to mediate between victim and offender: <i>Austria, Belgium, France</i>	+
4 - positive duty of authorities to attempt to obtain compensation from offender for victim: <i>the Netherlands</i>	++

2 THE RIGHT TO A REVIEW OR TO PRIVATE PROSECUTION

(B.7) *The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings.*

If the decision is taken not to initiate or to discontinue the public prosecution, the victim loses his chance of being awarded compensation in the course of the criminal proceedings, although he may, of course, still start civil proceedings against the offender. But the Recommendation also advises that the victim should have the right to ask for a review of a decision not to prosecute, or the right to institute private proceedings.

Guideline B.7 places a right to a review on a par with a right to private prosecution. Jurisdictions may choose between the two options, and the guideline does not proclaim a preference between the two. In the following we will first provide an overview of the private

prosecution and the review and then examine the performance of the individual jurisdictions. In the conclusion we will draw up the balance between the two options and offer a critique of the guideline.

2.1 Overview Private Prosecution and Review

Overview private prosecution and review:

0 - no private prosecution	-	0 - no right to a review	-
1 - exclusive right to private prosecution	-	1 - non-institutionalized review	-
----- R (85) 11		----- R (85) 11	
2 - subsidiary right to private prosecution with control mechanism:		2 - institutionalized review:	
a - court may refuse permission	R	a - review by higher rank within same authority	R
b - prosecutor may discontinue, or refuse permission	R	b - review by superior authority	R
c - victim must first constitute himself as civil claimant	R	c - judicial review	+
d - proof of attempt to reach reconciliation	R		

2.1.1 Private Prosecution

The institution of private prosecution – a prosecution brought by a private individual or organization as opposed to a prosecution brought by or on behalf of the state – is a remnant of the days when a criminal offence was essentially a matter to be settled between the individuals directly touched by the act, i.e., the victim and the offender (and their families). With the entrance of public prosecution by the state, the *raison d'être* of the right to private prosecution became that it acts as a personal safeguard for the victim against an arbitrary decision of the authorities to dismiss his case, or to refuse to undertake any action.

The private prosecution comes in all shapes and sizes, and great care must be taken with terminology. A first distinction to be made is between an *exclusive* right to private prosecution, and a *subsidiary* right to private prosecution. Where there is an exclusive right to private prosecution, the offence in question can *only* be prosecuted by the private individual, and not, under any circumstance, by the public prosecutor. This type of private prosecution usually exists only for offences where there is a relatively minor public interest in prosecution such as libel and defamation. The subsidiary right to private prosecution refers to the situation where, in principle, the offence falls within the domain of the public prosecutor, but if the public prosecutor decides to refrain from prosecution, a private prosecution may be initiated. In the following the focus is on the subsidiary form of private prosecution.

To prevent malicious litigation, the subsidiary right to private prosecution is never absolute. The control mechanisms of the authorities depend on the nature of the jurisdiction in question. First of all, in some jurisdictions the court may refuse to allow a private prosecution to continue. In other systems the public prosecutor may – and occasionally must – take over a private prosecution and subsequently has the power to discontinue it, or the victim may require the permission of the highest ranking public prosecutor to proceed. In many jurisdictions the victim must first constitute himself as a civil claimant before he can pursue his private prosecution. A final control mechanism is the condition that the victim may only

proceed with a private prosecution if he can prove that attempts at reconciliation with the accused have failed.

2.1.2 Review

As with the private prosecution, there are significant variations in the type and form of review. The simplest version is the *non-institutionalized* form where the right to a review is not officially recognized, but nonetheless the practice has developed that any complaint addressed to the prosecuting body about the dismissal of a case is acknowledged and the initial decision reconsidered.

In the *institutionalized* version of the review, provisions for a right of the victim to a review are found in legislation or guidelines. This implies that the victim's right to a review is enforceable, in contrast to the non-institutionalized form of review where review is more a service provided by the decision-making body than a procedure that the victim has a right to. Within the institutionalized form of review a distinction can be made between a review by a *higher ranking official within the same authority*, a review by a *superior authority* and, finally, *judicial review*.

2.2 Private Prosecution and Review in Practice, and the Performance of the Individual Jurisdictions

2.2.1 Subsidiary Right to Private Prosecution

Stages 0/1: No subsidiary right to private prosecution

Because the right to private prosecution is intended as a safe-guard against arbitrary decisions to dismiss cases, one would expect to find the subsidiary right to private prosecution (from hereon also referred to simply as private prosecution) in jurisdictions that embrace the expediency principle. A striking exception is *the Netherlands* which does have the expediency principle but no subsidiary right to private prosecution. Conversely, and perhaps equally surprisingly, the subsidiary right to private prosecution also exists in *Spain*, which has a strict principle of legality.

Jurisdictions that do not have the (subsidiary) right to private prosecution and therefore find themselves at stage 0 or 1 of the overview of private prosecution are *Denmark, Greece, Iceland, Italy, Malta, the Netherlands, Portugal, the Swiss canton of Zürich and Turkey*.¹¹

Stages 2a, 2b, 2c, 2d: Right to private prosecution with control mechanism

In *England and Wales*, a member of the public may start a private prosecution by 'laying an information' and asking the court to issue a summons. However, the magistrates may refuse to issue the summons. Also, the Director of Public Prosecutions has the power to take over a private prosecution and end it. In *Cyprus*, permission of the Attorney-General is required to pursue a private prosecution in relation to serious offences. The Attorney-General may take over a private prosecution and end it. In *Ireland*, a private prosecutor is known as a 'common informer'. Common informers may prosecute summary offences. They may also initiate the prosecution of indictable offences, but once an indictable offence is returned for trial by the judge to the District Court, the case is handed to the Director of Public Prosecu-

¹¹ However, many of these jurisdictions do recognize the exclusive right to private prosecution for a limited number of offences such as libel and defamation.

tion, who may decide to drop the prosecution. In *Scotland*, a private prosecution can only be brought under solemn procedure in the High Court. The applicant must apply for concurrence of the Lord Advocate. If the Lord Advocate refuses, the applicant may then apply to the High Court for permission to proceed without the Lord Advocate's permission. In *France*, *Belgium* and *Luxembourg*, the victim of crime may compel the examining magistrate to open a preliminary investigation into a case through a 'plainte avec constitution de partie civile'. Here, the victim files a complaint and constitutes himself as civil claimant before the examining magistrate, who must then open a judicial investigation. From there on, standard criminal proceedings are followed. The case is in the hands of the examining magistrate and the public prosecutor, who may exercise their discretion in relation to the decision whether to prosecute. The victim must also first constitute himself as civil claimant before he can initiate a private prosecution in *Austria*, *Germany*, *Liechtenstein*, *Norway* and *Sweden*. In these jurisdictions, if an injured person has joined, or is willing to join, the proceedings as a civil claimant, and the prosecutor decides to refrain from, or to discontinue, a prosecution, the civil claimant may take over the prosecution. Finally, in *Spain*, the victim who wishes to exercise his subsidiary right to private prosecution must first hand over proof to the court that he has tried to reconcile himself with the perpetrator, with the exception of victims of rape or kidnapping. Furthermore, in Spain the private prosecutor must have legal representation.

In practice, the success of the private prosecution is variable. In *Scotland*, only two private prosecutions have gone ahead this century. By contrast, in *Ireland* the private prosecution is used quite regularly. One reason for this is that in Ireland most private prosecutions in relation to summary offences are conducted by the police.¹² This is confusing because one tends to associate 'private prosecution' with 'private individual' and not with officials such as the police. If one disregards the private prosecutions brought by the police, on average there are two private prosecutions by members of the public (i.e., not the police) a week in the District Courts of the Dublin Metropolitan Area, out of a total case load of approx. 240,000 criminal actions per annum. In *France* it is unknown how often the 'plainte avec constitution de partie civile' is used. In the *Nordic* and *Germanic* jurisdictions, the private prosecution is little used.

Conclusions subsidiary right to private prosecution

From the above, one can only conclude that the practical value that the private prosecution has for victims of crime does not correspond with the substantial support for the private prosecution that is regularly voiced in legal writings, books and articles. Furthermore, even if in some jurisdictions the private prosecution is used with some regularity, it is always in relation to summary or minor offences, never serious offences. Regarding serious offences, the biggest deterrents to the private prosecution are the risk of being ordered to pay all costs, including those of the defendant, if the case is lost in court, and the enormous personal investment of time and energy that is required to work one's way through the legal mazes and to piece together a solid prosecution in a complicated case. The primary value of the private prosecution is a symbolic one.

¹²

Compare with the French 'action directe' that is used both by victims and by prosecutors in relation to minor offences.

2.2.2 Review

Stage 0: No review

No opportunities for review of a decision to dismiss a case exist at present in *Belgium, Cyprus, France, Liechtenstein, Scotland* and *Spain*. The reasons that are put forward why review is not possible in these jurisdictions are diverse. In *Scotland*, it is contended that once an accused person has been informed that there will be no further action taken against him, it would be unlawful to go back on that decision. As the law stands at present, review would therefore be inadmissible. In *France*, the decision of the public prosecutor not to prosecute is a decision of an administrative nature and in this jurisdiction appeals cannot be lodged against such decisions. However, this argument has recently been put aside by the 1998 Bill on the Exercise of Public Action and Modifying the Code of Criminal Procedure which proposes the introduction of a system of review by a higher ranking official in the same authority, and in second instance by a superior authority.

Stage 1: Non-institutionalized review

A non-institutionalized practice of review has grown within the office of the Director of Public Prosecutions in *Ireland*, and the prosecution service in *Sweden*. But it is debatable whether such an unofficial procedure has any real practical value. In *Ireland*, if the Director of Public Prosecutions receives a letter from the victim asking for reconsideration of the decision not to prosecute, the case is reviewed within the office but almost invariably the decision remains the same. There is little point in having a procedure of which the outcome is a foregone conclusion.

Stage 2a: Review by higher placed official

A right to a review by a higher placed official within the decision-making body is found in *Germany* and *Greece*, and as said has now also been proposed in *France*. In *Greece* the public prosecutor has only a very limited right to exercise discretion. If he does decide to dismiss the victim's report by written order the victim may apply to the public prosecutor of the court of appeal for a review. For the most part, decisions to dismiss cases are taken by a judicial council but there is no right to a review for such a decision. In *Germany* the complainant who is also the injured party may appeal against the decision of the prosecutor not to open an investigation, or not to initiate a prosecution. The request for a review is made to the highest-ranking prosecutor of the prosecutor's office in question. A significant difference between *Greece* and *Germany* is that in *Greece* there is a right to a review in one instance only, whereas in *Germany* a further request for a review may be made in second instance to a court of law, see below.

Stage 2b: Review by a superior authority

A review by a superior body is carried out in *Denmark, Iceland, Luxembourg, the Netherlands* and *Norway*. Of course, it is not only the public prosecutor who can be instrumental in preventing a public prosecution but also at an earlier stage the police, by deciding not to investigate a case, to close an investigation or to let the offender off with a warning or a caution. In *the Netherlands*, the victim may lodge a complaint against a decision of the police to close an investigation with the prosecution service in the district where the offence was committed. In *Denmark*, the victim should address a request for a review of a decision of the police not to accept, or to refuse to act upon, a report, and of a decision to close an investigation before a formal charge has been made, to the Chief of Police. If the investigation is closed after

a formal charge has been made, the request for a review must be made to the state prosecutor. A more unusual example of a review by a superior body is found in Iceland, where a request for a review of a decision of the public prosecutor to dismiss a case should be addressed to the Minister of Justice. Finally, in some jurisdictions such as *Denmark* and *the Netherlands*, complaints are sometimes directed to the Ombudsman. The Ombudsman cannot reverse the decision against which the request for a review is directed, but his opinion will be of influence on decisions in future cases.

Stage 2c: Judicial review

Finally, in jurisdictions with judicial review, the review is carried out by an examining magistrate or a court of law. This is the most powerful form of review and it is found in *Germany, Italy, Malta, Portugal, the Netherlands, the Swiss cantons* and *Turkey*. In *the Netherlands*, the request for a review against a decision of the public prosecutor not to prosecute must be directed to the court of appeal. In the Swiss canton of *Zürich*, a decision of the district attorney is reviewed by the judge sitting alone of the district court, and a decision of the public prosecutor by the High Court. In *Portugal* one has to constitute oneself in an official participatory role before action can be undertaken, that is to say that if the prosecutor decides not to prosecute, the victim may constitute himself as an assistant-prosecutor and ask for the intervention of the examining magistrate. In *Malta*, the victim only has a right to judicial review of a decision of the police prosecutor to drop a prosecution. There is no such right to a review of a decision in relation to serious offences. The reasoning behind this is that Malta already has a system of automatic judicial review of decisions of the public prosecutor: in serious cases the decision to drop a prosecution is not taken by the prosecutor but by a court of magistrates, a situation comparable to the Greek system. Automatic judicial review is also found in *Italy*, but here the victim has the right to be informed of the intention of the public prosecutor to request the dismissal of the case so that he can challenge this request before the pre-trial judge. Finally, mention should also be made of recent developments in *England and Wales*, where tentative steps towards extending judicial review to an individual decision not to prosecute would appear to have been made.

2.3 Conclusions

Scotland scores the poorest in relation to the standard set by guideline B.7. Although there is a subsidiary right to private prosecution, it is almost redundant in practice. Technically speaking, all other jurisdictions meet the requirements of the guideline. However, in our opinion the above analysis demonstrates that guideline B.7 is based on an incorrect presumption that in this day and age a subsidiary right to private prosecution can still be placed on a par with a right to a (judicial) review. Modern practice shows that generally speaking the subsidiary right to private prosecution is an unwieldy institution, at least as far as serious offences are concerned. In this respect it is significant that the same conclusion has recently been reached in some of the jurisdictions examined in this research: in *France*, a Bill proposing the introduction of an additional right to a review has been introduced, and the Swiss canton of *Zürich* even went so far as to abolish the subsidiary right to private prosecution in 1995 in favour of a system of judicial review. It is clear that the private prosecution still has a strong symbolic value, in particular in the common law systems where it is at present the only means for the victim to actively involve himself in a system where for the rest he has no 'locus standi' whatsoever. But the private prosecution *by itself* is no longer a sufficient safeguard against arbitrary decisions to dismiss cases. Jurisdictions that have only a subsid-

iary right to private prosecution should seriously consider introducing a right to judicial review alongside, or instead of, the private prosecution.

Overview implementation B.7: private prosecution:

0/1 - no private prosecution/exclusive right to private prosecution: <i>Denmark, Greece, Iceland, Italy, Malta, the Netherlands, Portugal, Zürich, Turkey</i>	-
----- R (85) 11	
2 - subsidiary right to private prosecution:	
a - court may refuse permission: <i>England and Wales, Scotland</i>	R
b - prosecutor may discontinue, or refuse permission: <i>Cyprus, England and Wales, Ireland, Scotland</i>	R
c - victim must first constitute himself as civil claimant: <i>Austria, Belgium, France, Germany, Liechtenstein, Luxembourg, Norway, Sweden</i>	R
d - proof of attempt to reach reconciliation: <i>Spain</i>	R

Overview implementation B.7: review:

0 - no right to a review: <i>Cyprus, Belgium, England and Wales, France, Liechtenstein, Scotland, Spain</i>	-
1 - non-institutionalized review: <i>Ireland</i>	-
----- R (85) 11	
2 - institutionalized review:	
a - review by higher rank within same authority: <i>Germany, Greece</i>	R
b - review by superior authority: <i>Denmark, Iceland, Luxembourg, Netherlands, Norway</i>	R
c - judicial review: <i>Germany, Italy, Malta, Portugal, Netherlands, Swiss cantons, Turkey</i>	+

3 THE COURT AND COMPENSATION

(D.10) It should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished.

In the jurisdictions included in this study, compensation by the offender to the victim is awarded by the criminal courts either through the adhesion procedure or in the form of a compensation order. In addition, two jurisdictions have chosen for a hybrid model that combines the two forms. For each model we will first sketch the main characteristics and summarize the respective limitations, restrictions and technical impediments that in practice frequently prevent that particular model from functioning optimally. Then we will discuss the performance of the individual jurisdictions on the basis of the limitations that have been signalled, and evaluate the solutions that have been found to overcome the various drawbacks.

3.1 Adhesion Model

3.1.1 Characteristics

This is by far the most widespread model allowing the criminal court to order compensation by the offender to the victim. Found in the Germanic, Romanistic and Nordic jurisdictions, it offers the injured person the opportunity of presenting his civil claim for damages against the offender in conjunction with the criminal proceedings, and the criminal court then decides on both the criminal and the civil liability of the offender. The victim is spared the complications and costs of initiating separate proceedings in a civil court, and can lean on the evidence already provided by the prosecutor to help substantiate his claim. In the adhesion procedure, the victim is party to the proceedings in as far as his civil claim is concerned. On the basis of this status he generally has the right to be informed of significant decisions taken in the case, to inspect the case file, to bring witnesses and experts to support his claim, and to be represented by legal counsel.

3.1.2 Limitations, Restrictions and Technical Impediments

A first technical impediment that commonly frustrates the general realisation of compensation for the victim through the adhesion model is the *strict adherence to the principle of civil liability*. Compensation can only be awarded if the civil liability of the offender to the victim has been fully established in accordance with civil law rules of evidence. Where these standards are not fully met, the claim is immediately referred to the civil court for further consideration. A second limitation is the *strong subordinate nature* of the civil claim to the criminal proceedings. There are two sides to this. First of all, the civil claim should not draw attention away from the main issue of the criminal proceedings which is to decide on the criminal liability of the offender. Where additional time and effort may be required to decide the civil claim, it is referred to the civil court. Secondly, even though the civil claim is of a distinctly different nature than the criminal aspects of the case and it is technically possible to establish civil liability in cases where one cannot establish criminal liability, in many jurisdictions a collapse of the criminal case entails automatic collapse of the civil claim for damages. Finally, and most difficult to tackle of all, is the pervasive *negative attitude of the courts* towards considering the question of compensation for the victim in the course of criminal proceedings.

3.1.3 Performance of the Individual Jurisdictions and Solutions to Limitations, Restrictions and Technical Impediments

The adhesion model is found in *Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Italy, Liechtenstein, Luxembourg, Norway, Portugal, Sweden, Switzerland* and *Turkey*. In addition, it forms part of the hybrid model of *the Netherlands*, see below.

Limitation 1: Strict adherence to civil liability

In the adhesion model, an award for compensation can only be made if the victim has entered a claim for compensation. The court cannot order compensation of its own accord. The level of damages to be awarded is established as accurately as possible pursuant to civil law rules of evidence, on the basis of the evidence provided by the victim and/or the authorities. In *France*, the damages awarded should in principle cover the full sum of

material and/or moral damages. Where conclusive evidence is lacking, the court refers the claim to the civil court. Reasonable as these requirements may seem, they actually cause the adhesion procedure to miss its aim. The intention behind creating an opportunity for the criminal court to award (part of the) compensation is to offer the victim an *easy alternative* to claiming (full) compensation in a civil court, but in its present construction the adhesion procedure is an *exact copy* of the civil court procedure, with the added complication that the criminal court would rather not enter into complex issues of civil law. To avoid having to deal exhaustively with the issue of compensation for the victim, the criminal courts in the different jurisdictions have developed evasive tactics. In *Greece*, it is standard court practice to automatically award a minimal amount of moral damages and to refer the material damages to the civil court. This practice is in part maintained by the victims themselves, who at the advice of their lawyers claim only a symbolic amount of damages in the criminal court, whilst at the same time initiating claims procedures in the civil court. In *Italy*, the courts may award a provisional sum for that part of the damages that is sufficiently substantiated, and refer the remaining parts to the civil courts. But instead of using the provisional sum as an instrument to broaden the group of victims to whom (at least some degree of) compensation is awarded, with many victims still having their entire claim honoured, the provisional sum is now as far as the Italian criminal courts are prepared to go with *any* claim. This means that almost every single civil claimant must go to the civil court to recover (the remaining part of) his damages. In *Luxembourg*, the use of the provisional sum is more successful. Here, the courts have adopted a flexible approach to the issue of compensation and provisional damages are frequently awarded, in the way they are intended to be awarded.

The effective use of the adhesion procedure can be improved by approaching the matter from two sides. First of all, the level of information provided to the courts regarding the damages suffered by the victim should be improved. This aspect has already been extensively discussed in the previous chapter. Here we will suffice with bringing back to mind first of all the option available in *Denmark*, *Iceland*, *Norway* and *Sweden* of having the compensation claim prepared and presented by the prosecutor, or by a victim's lawyer. It is disappointing that in practice prosecutors are often too busy to ensure the victim's compensation claim is properly prepared. Secondly, in *Norway* and the *Swiss canton of Zürich* the criminal court may deal with the compensation claim in a separate hearing or put back the consideration of the civil claim until a later date so that the victim has ample opportunity so ensure his evidence is complete. In *Belgium*, the civil claimant may himself ask the court for an adjournment, in which case the court may decide to set a date for a new hearing to deal exclusively with the civil claim of the victim.

But these measures aimed at improving the input of the victims alone are not enough. In addition, the criminal courts themselves should adopt a much more flexible approach to the matter of compensation for the victim. The strict adherence to the principle of civil liability should be slackened to allow the criminal court to (a) estimate, rather than establish accurately, the level of damages, and (b) take the means of the offender into consideration so that a realistically enforceable amount is awarded rather than a castle in the air. Already in 1891, the *Dutch* Supreme Court decided that the criminal court may estimate the level of damages to be awarded, but as yet judges are loath to actually do so. In addition the court should be able to (c) award compensation in a suitable case of its own accord instead of being dependent on a claim made by the victim. One particular case that springs to mind in this respect is a *Danish* case where despite repeated prodding by the presiding judge, the victim's lawyer insisted that there was no compensation claim because the attempted rape

had not been successful. Had the judge been able to award compensation of his own accord, he would most certainly have done so.

Limitation 2: Strong subordinate nature

The subordinate nature of the civil claim for damages to the criminal proceedings is typical for the adhesion procedure. The civil claim may not jeopardize the criminal proceedings in any way, and the criminal courts are quick to refer the claims to the civil court. In fact they are more or less encouraged to do so by the very loose provisions on when a claim may be referred. To give a few examples, in *Germany* the court may reject a claim without any motivation other than that the claim is 'not suitable'. In *Greece*, a claim may be referred if it is deemed to be 'too time-consuming', in *the Netherlands* if it is 'too complicated' and in *Iceland* the court need not consider a compensation claim that can 'cause delay or inconvenience'. More substantial reasoning behind the rejection of a claim should be demanded of the criminal courts. At the very least, the court should indicate *why* a particular claim is too complicated or too time consuming.

The second aspect of the subordinate nature of the civil claim is that more often than not, it is determined that the civil claim may no longer be considered if criminal liability has not first been established. Yet this is one aspect where the adhesion procedure could go one better than the compensation order. Because the compensation order is a sanction it cannot, *per definition*, be imposed where there has not been a conviction. But where compensation is awarded under the auspices of civil law, criminal liability is technically speaking totally irrelevant to the question of civil liability. Yet in many jurisdictions included in this research the legislator has felt it necessary to link the fate of the civil claim heard in adhesion to that of the criminal case. The exceptions here are *France*, *Norway* and *Sweden*. These jurisdictions all allow for compensation to be awarded even if the offender is acquitted of the criminal offence. Furthermore, in the *Swiss canton of Zürich* the civil claim should also be decided on if the accused is acquitted because he is considered to be of unsound mind under imposition of a special measure.

Limitation 3: Negative attitude courts

A significant finding of this study is the pervasive negative attitude of the criminal courts towards the question of compensation for the victim. In the majority of jurisdictions, the civil claim presented in adhesion to the criminal proceedings is considered to be a headache the criminal courts could well do without. The main objection that is voiced is of a dogmatic nature, that the civil claim for compensation simply does not 'belong' within the context of criminal proceedings. This vein of thought runs particularly strongly in *Germany*, which is renowned for its penchant for dogmatic correctness. Slightly more benevolence towards the adhesion model is found in the *Nordic* countries. The general approach here is pragmatic rather than dogmatic, and the dividing line between criminal and civil law does not appear to be as sacred and absolute as in many other jurisdictions – *Sweden* and *Denmark* still even have a combined Code of Procedure for both criminal and civil law. Furthermore, it is common for judges to have a mixed practice of criminal and civil cases so that they are better versed in making the transition between criminal and civil aspects – not that this alone is a guarantee for a more positive attitude towards the adhesion model. In *Greece* and *Turkey* judges also have mixed practices but here the attitude towards compensation in adhesion to the criminal proceedings remains disdainful. It must be granted that the criminal courts in most jurisdictions have to cope with huge backlogs of cases and are therefore understandably keen to refer the civil claim to the civil court to save time.

Unfortunately, this only makes for short-term time saving – in the long run, more time and energy is wasted by the justice system as a whole when a claim is referred to the civil court and a complete new set of proceedings must be pursued than if the criminal court reserves a little extra time to deal with the claim there and then.

But it is not only the negative attitude of the judges that is the deathblow to the adhesion model, lawyers representing victims of crime can also be held accountable. In *Austria* lawyers routinely advise their clients not to present a claim for compensation in adhesion to the criminal proceedings, but to go directly to the civil court. The same can be said for lawyers in *Germany*, *Greece* and *Turkey*. The only exceptions to this general trend are noted in *the Netherlands* and in *Switzerland*, where lawyers do advise their clients to put their civil claims before the criminal courts. Part of the problem in the former jurisdictions is that it is much more lucrative for a lawyer to prepare and present a case in a civil court instead of, or in addition to, bringing a civil claim on behalf of his client in a criminal court. Furthermore lawyers suffer from the same preconceptions as judges, that a criminal trial is no place for dealing with the civil claim of the victim against the offender. It is unclear why Swiss lawyers uphold a different view.

The negative attitude of judges and lawyers is a particularly difficult nut to crack. The seeds of evil are already sown in the very first weeks at university, when students are taught to think in incompatible categories of law. This compartmentalized way of thinking is firmly consolidated in the course of the university studies and subsequent training, and further fed and maintained by legal practice which leans more and more towards specialization. Once a student is established in practice as a lawyer or a judge, it is difficult teaching an old dog new tricks. Although in several jurisdictions (optional) courses on victims of crime are now offered, it is unlikely that any jurisdiction is willing to go as far as changing the well-rooted compartmentalized approach to teaching – and practising – law. A somewhat less ambitious solution which recognizes the perceived need to segregate the criminal from the civil aspects of the case to at least some degree is to settle the civil claim in a separate hearing before the criminal court following the main proceedings. As we saw earlier, this solution has the added advantage of giving the victim the opportunity to properly prepare his claim. Another approach to stimulating a more positive attitude towards awarding compensation in adhesion to the criminal proceedings that has been signalled in *Italy*, *Spain* and in *Switzerland* is to more or less coerce the criminal courts to take the civil claims of the victim into consideration. In these jurisdictions the criminal court is under a legal obligation to decide on the civil claim for damages (if the offender is convicted). In addition, in *Spain*, if a public action has been initiated it is automatically presumed that a civil claim for compensation has also been entered, even if no such claim has been made. Unfortunately, the net effect of these measures seems to be very limited, and the Italian and Spanish levels of awarding compensation through the adhesion procedure are no higher than in any other jurisdiction. The *Swiss* obligation was introduced with the federal Victim Support Act in 1995, and what the effect on Swiss practice will be remains to be seen.

3.2 Compensation Order Model

3.2.1 Characteristics

The compensation order model is found in the common law jurisdictions. In this model the ties between the civil liability of the offender to the victim and the eventual awarding of compensation have been loosened and the question of compensation is more or less

integrated into the criminal proceedings. Prior to the trial the victim may indicate on a form that he desires compensation, but he cannot 'file' a civil claim like in the adhesion model. There are no separate civil proceedings in conjunction with the criminal proceedings to which the victim can become a party, and that the offender is civilly liable is not a prerequisite for the imposition of a compensation order although in practice this will generally be the case. The decision of the court on the question of compensation to the victim is a financial penalty which it may impose of its own accord, even if no compensation form has been completed by the victim. One important advantage of the compensation order lies in the mode of enforcement but we will come to that later in this chapter.

3.2.2 Limitations, Restrictions and Technical Impediments

The compensation order model is in itself a solution to some of the limitations and restrictions encountered by the adhesion model, in particular the problems raised by the question of the strict civil liability and the strong subordinate nature of the civil claim for damages. But the compensation order model has its own hurdles to overcome. First of all, a restriction to the compensation order that is commonly made when it is first introduced into a jurisdiction is that it may *only be made in relation to certain types of crime*, for example property offences. Victims of any other offence, for example violence against the person, are not eligible for compensation. A second restriction that is also commonly encountered in the early days of the compensation order is that only *material damages* may be awarded. Thirdly, there is one jurisdiction where at present the compensation order may *only be imposed as a condition for a suspended sentence, a probation order or a discharge*, and not as an independent sentence in its own right. A fourth impediment, that was also signalled earlier in relation to the adhesion model, is a lack of awareness of, and a generally negative attitude of the courts towards, the opportunity to order compensation for the benefit of the victim.

3.2.3 Performance of the Individual Jurisdictions and Solutions to Limitations, Restrictions and Technical Impediments

The jurisdictions of *Cyprus, England and Wales, Ireland, Malta* and *Scotland* have all adopted the compensation order model.

Limitation 1: Limited to certain types of offences

At present, in *Cyprus* a compensation order can only be made regarding property crime. All other offences are excluded. The compensation orders in other jurisdictions were initially also limited to property offences, this particular restriction not being removed in *Ireland* until as late as 1993. It is understandable that the first steps of the compensation order are focussed towards property offences because it is often easiest to establish losses in these cases. Much more difficult is the establishment of suitable levels of compensation for personal injuries and moral damages. In this respect the *English* solution of drawing up national guidelines on the levels of compensation to be ordered in relation to personal injury deserves consideration by the other jurisdictions.

Limitation 2: only material damages

In *Malta*, no damages other than material damages can be ordered, whether by a criminal or a civil court. In this jurisdiction there is no opportunity to award compensation in recognition of moral damages, pain or suffering. In the other jurisdictions, material and

moral damages may be awarded. However, part of the strength of the compensation order resides with the fact that the level of compensation that is ordered is related by the court to the means of the offender. There is no practical point whatsoever to awarding an amount of compensation for moral or other damages that the offender is incapable of paying anyway. Victims do not derive the same dogmatic or symbolic satisfaction that judges do from ordering levels of compensation that the beneficiaries will never receive in cash. In fact, such a practice is much more likely to sow confusion and disappointment than a lower but more realistic order. On the other hand, victims are also often disappointed that the court appears to attach so little value to what they have suffered. It is a very difficult balance to strike.

Limitation 3: only as a condition

Again it is *Malta* where this limitation is in force: here compensation may not be ordered as an independent sanction as is the case in the other common law jurisdictions, but only as a condition for a suspended sentence or a probation order or a discharge. This implies that in all cases where the offence is considered sufficiently serious not to be dealt with through a suspended sentence, a probation order or a discharge, no compensation can be ordered to the benefit of the victim, even though it may be precisely these cases where the victim's need for compensation is the greatest. It should be noted that there is no state compensation scheme in *Malta*.¹³ Unfortunately, in practice compensation is rarely imposed as a condition in *Malta* (see § 5.3 stage 1a).

Limitation 4: negative attitude courts

The generally negative attitude of the judiciary towards ordering compensation for the benefit of the victim is in principle equally pervasive in the jurisdictions with the compensation order model as it is in those with the adhesion model. The only exception here is *England and Wales*, where the more receptive attitude appears to be directly attributable to the considerable effort that has been made over the years to stimulate the courts to order compensation as a matter of course. In this jurisdiction the criminal courts have been obliged since 1988 to always consider making a compensation order of their own accord, and to motivate why they have *not* done so, in a suitable case. Other measures also taken in 1988 were firstly to draw up the aforementioned sentencing guidelines in relation to personal injury, and secondly to give the police the duty to ensure that all relevant information about the injuries and losses suffered by the victim is included in the file to be forwarded to the prosecution service, so that the prosecution service may in turn inform the court (see Chapter 25). With this last measure we touch on a fundamental weakness of the compensation order model, which is that although the victim may not present his own compensation claim to the criminal court, neither is this a role that the English prosecutor is traditionally comfortable with. In the adversarial common law system, prosecutors are not accustomed to inviting the court to impose a particular sentence, which is exactly what he is required to do in relation to the compensation order. However, in *England and Wales* much has been invested in improving the pre-trial process of collecting information on the victim's injuries and losses, because the success of the compensation order depends for a large part on this link in the chain. No where near the same effort has been made in *Cyprus*, *Ireland*, *Malta* or *Scotland* and the rate of success of their compensation order models is proportionally lower.

¹³ Other jurisdictions lacking any form of state compensation scheme are: *Cyprus*, *Greece*, *Italy*, *Liechtenstein*, *Malta* and *Turkey*.

Having thus sounded the praises of the compensation order in England and Wales in relation to other jurisdictions, it should be noted that even here the absolute success of the compensation order is limited – in 1994 the magistrates' courts made a compensation order in 22% of convictions for indictable offences, and the Crown Court in 9% of all convictions.¹⁴ There appears to be a ceiling to what can be achieved in respect of securing compensation for victims of crime in the course of criminal proceedings. Much of this is due to the limited financial capacity of many offenders, but also to the hesitance of the Crown Court to combine a compensation order with a custodial sentence.

3.3 Hybrid model

3.3.1 Characteristics

In the hybrid model, the adhesion procedure and the compensation order exist side by side. The victim may choose to either join the proceedings as a civil party or to leave the question of compensation to the prosecutor and the court. In the former situation, the court may deal with the question of compensation along the lines of the adhesion procedure and award compensation under the auspices of civil law. But the court also has the power to grant compensation in the form of a compensation order which it may do of its own accord, or at the request of the prosecutor.

3.3.2 Limitations, Restrictions and Technical Impediments

Viewed separately, the adhesion procedure and the compensation order that together make up the hybrid model are each susceptible to the same limitations, restrictions and technical impediments that the respective 'independent' forms of the adhesion procedure and compensation order suffer from. But linked to each other in a hybrid model, they are potentially capable of cancelling out some of each other's limitations and weaknesses. For example, where a civil claim made by the victim on the basis of the adhesion procedure is threatened with failure because it cannot meet the standards set by the strict adherence to the civil liability, the court can opt to make a compensation order instead. Likewise, if, for whatever reason, a civil claim has not been made but the court finds sufficient grounds to award compensation to the victim, it may of its own accord impose a compensation order. Vice versa, a victim who is keen to be involved in the proceedings but wants to benefit from the advantages offered by the compensation order – for instance regarding enforcement, see below – may make a civil claim for compensation in adhesion to the criminal proceedings, but ask the court to impose a compensation order.

Inevitably, the hybrid model has its own particular limitations, restrictions and technical impediments. First of all, the primary hybrid model that is presently in operation suffers from an essential *error of construction*. Secondly, the *androgynous nature* of the hybrid model tends to confuse the police, the prosecution service, the judiciary and the victims. Thirdly, we are again confronted with the seemingly inevitable *negative attitude of the judiciary* towards compensating victims of crime in the course of criminal proceedings.

¹⁴ Home Office Criminal Statistics England and Wales for 1994, Digest 3 1995.

3.3.3 Performance of the Individual Jurisdictions and Solutions to Limitations, Restrictions and Technical Impediments

The hybrid model was introduced in *the Netherlands* in 1995.

Limitation 1: Error of construction

In hindsight, the *Dutch* legislature made an error of construction when it introduced the hybrid model. This error concerns the compensation order part of the model. Instead of adopting a thoroughbred compensation order, it opted to tone this down to a compensation *measure*. It is to this decision that most of the blame for the lack of success of the model can be attributed. In the Dutch sanctions system, a compensation measure is not a 'pure' sanction but a reaction that has both penal and civil law elements. The ideology behind the measure is not that it should inflict harm on the offender in retribution for the offence he has committed, which is the general aim of any penal sanction, but that it should effect to restore the situation that existed before the crime was committed. This in itself is not objectionable, because the compensation order as it exists in the common law jurisdictions is, of course, also aimed at restoring (some of) the damage inflicted on the victim.

But the civil law leanings of the Dutch compensation measure have been carried further, and the offender's liability under civil law has been set as a condition for imposition of the compensation measure. With this requirement, the flexibility of the compensation order as described earlier is lost, and the compensation measure has become little more than a veiled version of compensation awarded via the adhesion procedure. In addition, this adherence to the principle of civil liability has even been allowed to have its impact on the provisions regarding the enforcement stage, which is something we will come to in § 4.

Limitation 2: Androgynous nature

With the above, we have already touched on the androgynous nature of the hybrid model. In theory the model should derive its strength from the combination of the adhesion procedure with the compensation measure, whereby the court is offered a clear-cut choice between two distinctly different options which gives it maximum elbowroom to deal with the question of compensation for the victim. In its present design the combination of the two options has proven to be the model's major weakness. Primarily this is due to the mutual blending of essential characteristics of the adhesion procedure and the compensation measure, so that they have both become slightly different versions of the same thing. It would be much better if the two options were offered in their most polarized forms. As the model now stands in the Netherlands, it offers the police, prosecutors and courts neither fish nor fowl. This has resulted in general confusion regarding how to deal with the question of compensation, which is of course ultimately at the expense of the victim. This confusion is illustrated by the fact that although the law does not require a victim seeking a compensation measure to make a formal claim, the practice has grown that here, too, the victim is required to fill out an adhesion form. The rationale behind this is that the courts do not want to make a compensation measure if compensation is not desired by the victim, and that the adhesion form is a necessary expression of the victim's explicit wish to receive compensation. Ironically, judges confronted with an adhesion form automatically presume that the victim is seeking compensation under the adhesion procedure, and not a compensation measure. You just can't win!

The confusion has also resulted in the wide-spread practice that the criminal court does not opt for *either* compensation on the basis of the adhesion procedure, *or* a compensation

measure, but for safety's sake simultaneously imposes both. In practical terms this means that the court awards the claim for compensation made in adhesion to the criminal procedure, and on top of that imposes a compensation measure for the exact same amount. This is a ridiculous state of affairs. Quite apart from all the legal questions that this practice raises, for example which form of compensation has priority, it also effectively kills the purpose of the hybrid model which was to improve the low success-rate of the adhesion procedure by offering an attractive, easy-to-operate alternative. By thus linking the compensation measure to the adhesion procedure, the compensation measure is again burdened with all the shortcomings of the adhesion procedure that it was supposed to have done away with.

Limitation 3: Negative attitude judiciary

The negative attitude of the judiciary is directed against both the separate elements of the adhesion procedure and the compensation measure, as well as against the hybrid model as a whole. Regarding the objections against the *adhesion procedure*, we have heard them all before: that criminal court judges claim they have insufficient expertise in the field of civil law to deal with compensation claims, that it is too time-consuming, that as a matter of principle victims should not participate in criminal proceedings in whatever capacity, and finally that the adhesion procedure draws attention away from the main issues of the criminal proceedings which is to establish the guilt or innocence of the offender. An additional objection voiced in the Netherlands is that the adhesion procedure may well compromise the interests of the offender because he may feel obliged to automatically admit to causing all the damage that is claimed for fear of further antagonizing the judge as to the question of his guilt. The objections against the *compensation measure* are mostly to do with the specific enforcement provisions, see § 4. Finally, in relation to the *hybrid model* as a whole, the established practice of awarding both compensation through the adhesion procedure and as a compensation measure indicates that the judiciary has wilfully ignored the explicit wish of the legislature to give preference to the compensation measure.

3.4 Conclusions

Malta, Cyprus and Greece score poorest in relation to guideline D.10. In Malta, compensation may only be imposed as a condition for a suspended sentence or a probation order or a discharge, something which is rarely done in practice. Furthermore, only material damages may be awarded, whether by a criminal or a civil court. In Greece, the criminal courts only award a symbolic amount of compensation. Finally, in Cyprus, compensation may only be ordered for property offences. Relatively speaking, the most successful form of compensation appears to be the compensation order as found in *England and Wales*, although in absolute terms its success rate is still limited.

The three different compensation models of the adhesion procedure, the compensation order and the hybrid model all suffer from various limitations, restrictions and technical impediments. However, common to them all is a pervasive and very persistent negative attitude of the judiciary towards awarding compensation against the offender for the benefit of the victim in the course of criminal proceedings. So far, most of the efforts to encourage the criminal courts to award compensation as a matter of course appear to have had little positive effect on their readiness to do so. The most positive developments in this respect are found in *England and Wales*, where a considerable effort has been made to stimulate the use of the compensation order. Judges in the *Nordic* jurisdictions also tend to have a more

benevolent, albeit indifferent, approach to the question of compensation. In all other jurisdictions the attitude of the judiciary remains poor.

4 THE STATUS OF COMPENSATION

(D.11) Legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction.

This guideline touches on the question of the status of compensation awarded by the criminal court, and its relation to (other) sanctions imposed on the offender. The compensation order as found in the common law jurisdictions is a penal sanction whereas compensation awarded through the adhesion procedure is a decision under the auspices of civil law.¹⁵ Somewhere in between lies the Dutch compensation measure. The measure differs from the compensation order in that it is not a full-blown sanction: it does not have to be related to the seriousness of the offence nor to the level of guilt of the offender, and neither does it have to be related to the financial capacity of the offender. This last element in particular is one of the hallmarks of the compensation order.

Practice learns that where compensation is ordered or awarded in conjunction with (other) financial sanctions or measures, or with costs, compensation always loses out. Recommendation (85) 11 chooses not to address this problem until the enforcement stage, see guideline E.14, but one of the conclusions of this study is that to achieve maximum effectivity the question of the rivalry between compensation on the one hand, and (other) sanctions and measures imposed by the court on the other already needs to be settled at the sentencing stage. This thought is expressed in the developmental schemes reproduced below which advise jurisdictions to strive for a higher standard than the one set by guideline D.11.

For each of the three compensation models we will indicate the stages of development in relation to guideline D.11 and discuss the performance of the individual jurisdictions.

4.1 Compensation Order

4.1.1 Developmental Scheme

Developmental scheme of the position of the compensation order in relation to other sanctions and measures:

0 - compensation not as an independent sanction	-
----- R (85) 11	
1 - order instead of, or in addition to, any other way of dealing with the offender	R

2 - preference over fine at sentencing stage	+
3 - preference over costs at sentencing stage	+

¹⁵ In Sweden, compensation awarded through the adhesion procedure is officially referred to as a 'special legal effect'. The amount of compensation to be awarded is decided on the basis of the Tort Liability Act and in effect compensation awarded in adhesion to the criminal proceedings is therefore a decision in civil law.

At stage 0 of the developmental scheme of the compensation order, compensation may not be ordered as an independent sanction, but only as a condition for a suspended sentence, probation order or discharge. In the first stage of development it may be ordered instead of, or in addition to, dealing with the offender in any other way, but the question of hierarchy between compensation and other financial sanctions or orders that may be imposed on the offender is left open. This issue is addressed at the second stage, where legislation provides that if the offender does not have the means to pay both a fine and a compensation order, then preference should be given by the court to making a compensation order. At stage 3 the compensation order is also given preference over the ordering of costs.

4.1.2 Performance of the Individual Jurisdictions

Stage 0: Not as an independent sanction

Malta is the only jurisdiction with the compensation order where such an order cannot generally be made as an independent sanction. Only in relation to three minor (traffic) violations found in the Code of Police Laws can the court award a very small amount of compensation in addition to a penal sanction. However, the amount that the court may order in these cases is so minimal that the provisions are never used in practice.

Stage 1: Instead of or in addition to any other sanction

In *Cyprus, England and Wales, Ireland and Scotland* legislation provides that compensation is a penal sanction that may be ordered instead of or in addition to dealing with the offender in any other way. The clause 'instead of' implies that compensation may even be ordered as the *sole* sanction in which case it stands a much better chance of being enforced than if it has to compete with another (financial) penal sanction imposed on the offender. But here we touch on an interesting phenomenon, that in practice courts are very reluctant to impose a compensation order on its own. In *Cyprus, Ireland and Scotland* a compensation order is never imposed as the sole sanction. *England and Wales* fares slightly better in this respect but even here a compensation order was the sole or main penalty in less than 10% of cases where compensation was ordered in the magistrates' courts in 1993, and in only 3% of cases in which compensation was ordered by the Crown Court.¹⁶ Because the compensation order is for the benefit of the victim and not the state, and furthermore is aimed at least in part at settling the question of damages inflicted by one individual on another, many judges do not consider the compensation order to be a 'real' sanction, despite its official status as such. Therefore in practice judges are still hesitant to impose a compensation order on its own, without the reassuring presence of an additional 'proper' sanction.

Stage 2: Preference over fine at sentencing stage

Because judges are unlikely to ever really accept the compensation order as a full-blown sanction of their own accord, the practice of ordering it as the sole punishment looks set to remain modest if left to its own devices. To prevent the almost instinctive tendency of judges to combine a compensation order with another financial penalty, legislation should therefore determine that where the offender does not have enough means to pay both a fine and compensation, preference should be given to the compensation order. This legislation is in

¹⁶ Home Office Criminal Statistics 1994, table 7.24. See D. Greer (ed.), *Compensating Crime Victims, A European Survey*, Edition iuscrim, Freiburg im Breisgau, 1996, p. 589.

force in *England and Wales, Ireland and Scotland*. But in practice the courts seem to have little regard for these provisions. In England and Wales, for example, in 1988-89 compensation was combined with a fine in 58% of assault cases,¹⁷ and a more recent study covering several different types of offences found that a compensation order was accompanied by a fine in 39.5% of the cases.¹⁸ In theory, if both a compensation order and a fine have been imposed, the problem of rivalry can still be solved by giving the compensation order priority at the enforcement stage. But as we will see below under guideline E.14, once a fine has been imposed it acquires its own particular strength and tends to override the compensation order, regardless what rules are in force for the enforcement. The crux of the matter is that judges are reluctant to take the bull by the horns and prefer to leave the matter of establishing priority between a compensation order and a fine to the enforcement authorities, whereas the enforcement authorities interpret the very imposition of a fine as a sign that the judge sets store by its enforcement, regardless of what other sanctions have been imposed. This vicious circle needs to be broken.

Stage 3: Preference over costs at sentencing stage

A final sign of development is that regard is had for the potential conflict between the compensation order and any costs that the offender may be ordered to pay. Again, this study concludes that this is a matter that should already be confronted at the sentencing stage, and not left to the enforcement stage. *Cyprus* and *Malta* are the most backward in this respect because in these jurisdictions legislation explicitly provides that a compensation order is made without prejudice to the criminal court's power of awarding costs against the offender. *England and Wales* has made the most progress, although only modest measures have been taken so far: an agreement has been reached with the Lord Chancellor's Department and the Crown Prosecution Service that where the offender is of limited means it would be right to give compensation precedence over any order for costs. Unfortunately practice is once again disappointing: a recent study found that in 50% of cases where a compensation order was imposed, costs were also ordered.¹⁹

¹⁷ D. Greer (1996), p. 588 note 40, with reference to D. Moxon, J.M. Corkery, C. Hedderman, *Developments in the Use of Compensation Orders in Magistrates' Courts since October 1988*, Home Office Research Study No. 126, London: HMSO, 1992, pp. 8-9.

¹⁸ A.W. Bush, *Compensation Orders in Favour of Victims of Crimes of Violence – Do they Work?* Dissertation (unpublished), April 1996, pp. 56-57.

¹⁹ A.W. Bush (1996), pp. 56-57.

4.2 Adhesion procedure

4.2.1 Developmental Scheme

Developmental scheme of the position of compensation awarded through the adhesion procedure in relation to penal sanctions:

----- R (85) 11	
1 - compensation awarded in addition to a penal sanction	R
2 - compensation awarded as a substitute for a penal sanction	R

3 - preference over fine at sentencing stage	+
4 - preference over costs at sentencing stage	+

Technically speaking compensation awarded through the adhesion procedure stands completely apart from any sanctions or measures the criminal court may impose on the offender. In stage 1, compensation and penal sanctions are therefore kept rigidly separate and compensation may be awarded 'in addition' to a penal sanction. A definite sign of progress is when, despite the different denominators, a connection is made between the sanctions imposed for the criminal offence and compensation awarded as a result of the adhesion procedure. Stage 2 is consequently that compensation may be awarded as a substitute for a penal sanction. Fines may no longer be ordered in conjunction with compensation at stage 3, and finally at stage 4 compensation also has priority over costs.

4.2.2 Performance of the individual jurisdictions

Stage 1: Compensation awarded in addition to a penal sanction

In all the jurisdictions that have the adhesion procedure, compensation may in principle be awarded by the criminal court in addition to a penal sanction, that is to say in *Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Italy, Liechtenstein, Luxembourg, Norway, Spain, Sweden, Switzerland and Turkey*. Considerations in relation to the penal side of affairs generally have no bearing on the decision whether or not to award compensation through the adhesion procedure, except that in many jurisdictions compensation can not be awarded if the offender is acquitted, see earlier. However, in *Greece* legislation provides that the 'rehabilitation and re-socialisation of the offender and his reintegration into society' may overrule the obligation to pay civil damages to the victim.

Stage 2: Compensation awarded as a substitute for a penal sanction

Only in *Belgium* does legislation provide that compensation may be awarded by a criminal court as a substitute for a penal sanction. In practice, courts rarely do so for the same reason that the jurisdictions that work with the compensation order are reluctant to impose compensation as the sole penalty, i.e., that compensation is not a 'real' sanction. However, it should be noted that several jurisdictions – most notably *France, Luxembourg and the Netherlands* – operate a system of discretionary prosecution whereby the net result is in effect that compensation is awarded as a substitute for a penal sanction, albeit not by the criminal court but at an earlier stage in the proceedings. This situation arises where the offender is offered the option of paying compensation to the victim as a condition for dismissal of the case (see § 1.4 stage 1b). Likewise, if after conviction the court sets compensation as a

condition for a suspended sentence or probation, the net result is also that in effect, if not in name, compensation functions as a substitute for a penal sanction.

Stage 3: Preference over fine at sentencing stage

Where compensation is awarded through the adhesion procedure it is absolutely essential that preference is already given at the sentencing stage to awarding compensation for the victim over a fine. Compensation awarded under the auspices of civil law is enforced by, or on behalf of, the individual victim, whereas enforcement of any penal sanctions is in the hands of the state (see below under guideline E.14). Because the enforcement is in different hands, no-one has insight into, or power over, potential conflicts of interest that may arise at the enforcement stage. To avoid any such conflicts the question of priority must therefore be settled prior to enforcement, at the sentencing stage. None of the jurisdictions involved in this research pay any structural attention to this point, and fines are commonly ordered in conjunction with compensation.

Stage 4: Preference over an order to pay costs at sentencing stage

As with the fine, very little regard is had in practice for the damaging effect that an order to pay costs may have on the victim's chances of effectively enforcing the compensation awarded to his benefit. Particularly remarkable is an obligation that exists in *Italy* for the offender to reimburse the state for up to two-thirds of his keep in penal institutions with all his movable and immovable property. The detrimental effect of such a measure on the chances of the victim to be compensated is obvious.

4.3 Hybrid Model

4.3.1 Developmental Scheme

In principle, the developmental schemes for the 'independent' forms of the compensation order and the adhesion procedure are also valid for the two elements making up the hybrid model.

Developmental scheme for the position of compensation awarded through the hybrid model in relation to penal sanctions:

Compensation order		Adhesion procedure	
----- R (85) 11		----- R (85) 11	
1 - instead of or in addition to any other sanction or measure	R R	1 - in addition to penal sanction 2 - substitute for penal sanction	R R
2 - priority over fine	+	3 - priority over fine	+
3 - priority over costs	+	4 - priority over costs	+

4.3.2 The Performance of the Dutch Hybrid Model in Practice

As we have already seen, the Dutch legislature has opted for a compensation measure rather than a compensation order as part of the hybrid model. Earlier we saw that in several jurisdictions the compensation order has progressed to stage 2, and on occasion even to

stage 3 of the developmental scheme. Conversely, the Dutch measure is firmly entrapped in stage 1 with no immediate prospects of improvement. At the time the measure was debated in parliament, the legislature did carefully consider following the English example that the court should give priority to compensation orders over fines. But this was felt to undermine the fundamental right of the court to freely determine an appropriate punishment in a particular case, within the limits set by the law. Instead, the legislature recommended that the prosecution service should give priority to inviting the court to impose a compensation measure when formulating its demands. However, this obligation for the prosecution service has not been codified or included in any guidelines. The performance of the compensation measure is disappointing in this respect.

If compensation is awarded through the adhesion procedure element of the Dutch hybrid model, it may be awarded in addition to any other penal sanction (stage 1). Furthermore, the situation in the Netherlands is comparable to the one in Belgium, France and Luxembourg, in that the net result of a system of discretionary prosecution is that compensation is awarded as a substitute for a penal sanction, even though this is not provided for in legislation (stage 2). No preference is given to compensation over a fine at the sentencing stage.

4.4 Conclusion

Compensation awarded in the form of a compensation order is a penal sanction, whereas compensation awarded through the adhesion procedure is a decision taken under the auspices of civil law. With the exception of *Malta*, compensation can either be awarded in the form of a penal sanction, as a substitute for a penal sanction or in addition to a penal sanction in all the jurisdictions included in this study. Therefore, all jurisdictions, barring Malta, meet the standard set by guideline D.11.

However, for maximum effect, compensation should furthermore be given priority over the imposition of any (other) sanctions and measures at the sentencing stage, whatever its status. In the common law jurisdictions with the compensation order, *England and Wales* has made the most progress in this respect: compensation should be given preference over both a fine and costs at the sentencing stage, although practice is still far from perfect. Disappointingly, the *Dutch* compensation measure has explicitly been refused priority by the legislature. In relation to the adhesion procedure, the only jurisdiction where the criminal court may award compensation as a substitute for a penal sanction is *Belgium* although in practice this is rarely done. Furthermore, *France*, *Luxembourg* and *the Netherlands* are among those jurisdictions that operate a system of discretionary prosecution whereby in effect, although not in name, compensation is awarded as a substitute for a penal sanction. Compensation awarded through the adhesion procedure does not have priority at the sentencing stage over fines or costs in any of the jurisdictions.

*Overview position of compensation awarded through
the adhesion procedure in relation to penal sanctions:*

----- R (85) 11	
1 - compensation awarded in addition to a penal sanction: <i>all with adhesion procedure</i>	R
2 - compensation awarded as a substitute for a penal sanction: <i>Belgium, France, Luxembourg</i>	R

3 - priority over fine at sentencing stage: /	+
4 - priority over costs at sentencing stage: /	+

*Overview position of the compensation order in relation
to other sanctions and measures:*

0 - compensation not as an independent sanction: <i>Malta</i>	-
----- R (85) 11	
1 - order instead of, or in addition to, any other way of dealing with the offender: <i>Cyprus, England and Wales, Ireland, Scotland</i>	R

2 - priority over fine at sentencing stage: <i>England and Wales, Ireland, Scotland</i>	+
3 - priority over costs at sentencing stage: <i>England and Wales (more or less)</i>	+

*Overview position of compensation awarded through
the hybrid model in relation to penal sanctions:*

Compensation order		Adhesion procedure	
----- R (85) 11		----- R (85) 11	
1 - instead of or in addition to any other sanction or measure: <i>Netherlands</i>	R	1 - in addition to penal sanction: <i>Netherlands</i>	R
-----		2 - substitute for penal sanction	R
2 - priority over fine	+	3 - priority over fine	+
3 - priority over costs	+	4 - priority over costs	+

5 COMPENSATION AS A FINANCIAL CONDITION

(D.13) *In cases where the possibilities open to a court include attaching financial conditions to the award of a deferred or suspended sentence, of a probation order or of any other measure, great importance should be given – among these conditions – to compensation by the offender to the victim.*

5.1 Terminology

In the case of *deferment* of sentence, the accused is convicted of a particular offence, but sentencing is postponed for a given period of time, usually on condition that the offender

is of good behaviour during this period. If the offender meets the conditions the court may reward him by imposing a lighter sentence than it would otherwise have done, or even by imposing no sentence at all. Where a sentence is *suspended*, the accused is both convicted and sentenced, but the sentence is left unenforced subject to good behaviour, or any other special condition imposed by the court. A *probation order* places the offender under supervision of a probation officer or other appointed official, and is made following conviction. 'Any other measure' referred to by guideline D.13 includes the *conditional discharge*. Here the accused who has been convicted of the offence receives no punishment on condition that he does not commit another offence in a specified period. This should be distinguished from the *absolute discharge* where the offender receives no punishment, period. Furthermore mention should be made of the *conditional release* or *parole* whereby an offender sentenced to imprisonment is released from prison before he has completed his sentence, on the understanding that he meets certain conditions such as being of good behaviour. In addition, some jurisdictions recognize the institution of *rehabilitation*. This may be granted after the expiration of a previously determined date from the day of conviction, on certain conditions, and amounts to the extinguishing of all effects of the sentence. Finally, mention should be made in this context of the *mitigation* of sentence, i.e., a sentence discount, that judges may offer in exchange for the performance of a certain act or commitment.

The above is a rough indication of what the terms referred to by guideline D.13 mean. In practice there can be subtle or even significant differences between the jurisdictions in the precise connotations and effects of a particular measure. For example, in the case of an absolute discharge in Ireland the conviction is not recorded, contrary to procedures in England and Wales where the conviction prior to the absolute discharge is recorded.

5.2 Developmental Scheme

*Developmental scheme for compensation as a financial condition
(formal and actual implementation):*

0 - no such measures/no possibility to attach financial condition	-
1 - compensation as a financial condition in place	
a - poor actual implementation	-
b - reasonable actual implementation	-
----- R (85) 11	
2 - legislative obligation to always consider compensation as a financial condition	R

In many jurisdictions, it is permitted for the court to attach financial conditions to one or more of the above measures. Where that is the case, guideline D.13 recommends that such a financial condition should preferably consist of paying compensation to the victim of crime. This guideline is particularly poignant for the countries that have a compensation order. The compensation order is a penal sanction and therefore it cannot per definition be imposed as an independent sentence where sentencing has been deferred, until the period of deferment is over and the court proceeds to sentencing. Neither can a compensation order, which is part of the criminal sentence, be enforced where a sentence is suspended. Conversely, the suspension of the criminal sentence in countries with the adhesion procedure does *not* in principle affect the right of the victim to enforce any award for damages made to his benefit by the criminal court against the offender. This is because such an award is made under the auspices of civil law and therefore leads a life of its own, independent of

the fate of any penal sanctions imposed on the offender. In *France, Italy and Luxembourg*, legislation even explicitly provides that if a criminal sentence is suspended, the offender is still obliged to pay the civil damages awarded against him.

In some jurisdictions, one or more of the measures listed above under 5.1 are not recognized, or alternatively cannot be accompanied by a financial condition. These circumstances form stage 0 of the developmental scheme. At stage 1, (one or more of) the measures are in place and it is technically possible to attach a financial condition such as compensation, but it is left entirely to the discretion of the court whether to impose such a condition. This element of discretion leads to significant differences in actual implementation: in some jurisdictions compensation is hardly ever imposed as a financial condition (stage 1a), whereas in others it is imposed with some regularity (stage 1b). Finally, at stage 2, the attachment of compensation as a financial condition is positively encouraged or even prioritized by legislation. This last stage meets the standard set by the Recommendation of giving 'great importance' to compensation by the offender to the victim.

5.3 Performance of the Individual Jurisdictions

Stage 0: No such measures/cannot attach compensation (deferment)

Deferment of sentence is a typical common law institution found in *England and Wales, Ireland and Scotland*. As said, it is per definition impossible to impose a compensation order as an independent sanction where, and for as long as, sentence is deferred. Case law in *Scotland* has furthermore implied that neither is it desirable that sentence is deferred with a condition that the offender saves money towards a compensation order. There is no legal basis for attaching the payment of compensation as a condition for a deferred sentence in *Ireland*, either. Conversely, in *England and Wales*, the Powers of Criminal Courts Act 1973 allows the court to defer sentence so that it may take into account the fact that the offender has paid, or has agreed to pay, compensation to the victim following conviction.

Stage 0: No such measures/cannot attach compensation (suspended sentence or probation)

Regarding the suspended sentence, no provisions for the attachment of compensation to such a measure exist in *Cyprus, Ireland or Scotland*, although in *Ireland* relevant provisions are currently being introduced for young offenders. In *Cyprus* such a condition cannot even be made in relation to a probation order, something which is possible in all other jurisdictions except for *Turkey*, and that is for the simple reason that the institution of probation does not exist in this latter jurisdiction.

Stage 1a: Compensation as financial condition but poor actual implementation in relation to suspended sentence or probation

This is the stage at which most of the jurisdictions find themselves. Of particular interest here are the reasons *why* compensation is rarely imposed as a financial condition, even though the legislative provisions to do so are in place. In *Iceland, Norway and Malta*, compensation is rarely attached as a condition to a suspended sentence or probation because these jurisdictions lack an adequate system of supervision. For example, in 1998 there were only 4 probation officers in the whole of *Malta*, and none in *Iceland*. The courts are understandably reluctant to impose a condition that can not be effectively controlled. It is especially regrettable that compensation is at present rarely imposed as a condition to a suspended sentence, a probation order or a discharge in *Malta* because, as we saw earlier, this is the *only* way in which compensation for the benefit of the victim can be ordered in this jurisdic-

tion (see § 3.2.3 limitation 3).

A second reason for the lack of popularity of compensation as a condition to a suspended sentence or probation is that in jurisdictions with the adhesion procedure courts may perceive it to be superfluous. As said earlier, enforcement of compensation awarded through the adhesion procedure is not dependent on the criminal sanction, although in many jurisdictions it may only be awarded following conviction of the offender (see § 3.1.3 limitation 2). Where the court opts to suspend the sentence, to put the offender on probation or to give a discharge, this decision is preceded by a conviction and thus compensation may be awarded through the adhesion procedure. If the court has awarded compensation in this way, and then proceeds to suspend the sentence or put the offender on probation, there is little incentive to attach compensation as a condition on top of the compensation that has already been awarded. Ironically, from the perspective of the victim, compensation as a condition may be much more attractive than compensation through the adhesion procedure because enforcement is in the hands of the state (see § 6), and the offender is under pressure to meet the condition on penalty of enforcement of the suspended sentence. This last problem is avoided in *the Netherlands*. Here, criminal courts also consider compensation as a condition to be superfluous because of the possibility of imposing a compensation measure, but contrary to compensation awarded through the adhesion procedure, the compensation measure is enforced by the state (see § 6).

A third reason for the lack of popularity of compensation as a condition for a suspended sentence or probation is that, in many jurisdictions, the same rules of evidence are valid for compensation in this form as for compensation through the adhesion procedure. In *Liechtenstein*, if the extent of the damages cannot be conclusively proven to the criminal court, compensation as a condition may not be imposed. Furthermore, if the victim has gone to the effort of putting together the necessary material in support of his claim to damages, he is much more likely to pursue his claim through the adhesion procedure than to bide his time on the off-chance that the court will suspend the sentence or put the offender on probation on condition that he pays compensation to the victim. In that case we are back to the situation described in the previous section.

Finally, in *Austria, Belgium, Denmark, Germany, Greece, Ireland, Italy Portugal, Scotland, Sweden and Switzerland*, it is difficult to pinpoint a particular reason for the fact that compensation is rarely imposed as a condition to a suspended sentence or probation. However, generally speaking, the negative attitude of the courts towards compensation as an independent award, sanction or measure (see § 3.1.3 limitation 3, § 3.2.3 limitation 4, and § 3.3.3 limitation 3, respectively) also prevails regarding compensation as a condition.

Stage 1a: Compensation as financial condition but poor actual implementation in relation to conditional release from prison

In *Austria, Belgium, France, the Netherlands and Portugal*, compensation may be attached as a financial condition to a conditional release from prison. Until recently, *Greece* had a similar provision but this has been revoked. In practice compensation is only rarely imposed as a condition for parole. The foremost reason for the general lack of success of this combination is the difficulty for the courts of assessing the financial capacity of the offender after a given period of time.

Stage 1b: Compensation as financial condition and good actual implementation in relation to suspended sentence or probation

In *Luxembourg*, compensation may be attached as a financial condition to a suspended

sentence or to a probation order. In practice, both these options are regularly used to order the payment of compensation to the victim. It is difficult to say what the precise reason behind this is, except that the Luxembourg courts do have a generally flexible approach towards compensation for the victim of crime. Compared to most other jurisdictions, *England and Wales* also does fairly well in this respect, although significantly compensation is attached much more often to a conditional discharge or a probation order than to suspended custody. A recent study found that in the cases included in the analysis, compensation was attached to a conditional discharge in 16.4% of the cases, to a probation order in 13%, a community service order in 11.5% and suspended custody in 1.4%.²⁰ These figures show that even in jurisdictions that compare favourably to others, the amount of compensation awarded as a condition to a suspended sentence, a probation order or any other measure is modest in an absolute sense.

Compensation in mitigation of sentence

One widely established practice found in most of the jurisdictions included in this research is to accept compensation in mitigation of sentence. This is a particularly tasty carrot for the courts to dangle in front of the offender because what he stands to gain by paying compensation can be spelled out to him. For example in *Italy* compensation paid prior to the trial leads to a reduction of the sentence by one third. Earlier, in §§ 1.1 to 1.5, we saw that in jurisdictions which recognize the expediency principle, compensation paid prior to the criminal proceedings may result in the discontinuing of the prosecution. In countries with a strict principle of legality, compensation paid at an early stage cannot have this effect, but it may result in an increased sentence reduction. In *Turkey*, compensation paid prior to the instigation of criminal proceedings leads to a reduction of the sentence by one third to two thirds, and compensation paid in the course of criminal proceedings to a reduction by one sixth to one third. To receive mitigation of sentence the courts in most jurisdictions demand that the compensation is paid prior to sentencing, although in *Germany* they also award mitigation on condition that the offender pays compensation to the victim after the trial. One moral objection that can be raised against granting mitigation of sentence in exchange for compensation is that it enables offenders to in effect buy themselves out of (a part of) their sentence, and that offenders without financial means are potentially at a disadvantage. In *Spain*, the criminal courts have therefore developed a principle that compensation should be paid to one's capacity. This implies two things. First of all that where the offender has limited means partial payment of compensation is accepted as a mitigating factor. But secondly, if the offender is capable of fully compensating the victim, partial payment is not sufficient to receive a reduction in sentence.

Stage 2: Encouraged by legislation

In *France* and *Spain*, the legislature has used legislation to actively encourage the use of compensation as a financial condition for a suspended sentence or a probation order. The *French* Penal Code provides that the sentencing judge should try to obtain compensation for the damages and injuries suffered by the victim, even in the absence of a decision of the court on the civil claim. In practice, most sentencing judges do consider securing compensation for the victim to be an important aspect of their work. In *Spain*, the Penal Code contains a set of conditions that must be met to be eligible for a suspended sentence. One of these conditions is that compensation has been paid to the victim. Only if the court has established

²⁰

A.W. Bush (1996), p. 56-57.

the partial or total incapacity of the offender to pay compensation, can this condition be modified.

5.4 Conclusion

Only *France* and *Spain* manage to meet the standard set by guideline D.13. Although it is generally possible to attach compensation as a financial condition to a deferred or suspended sentence, a probation order or any other measure, these provisions are mostly poorly implemented in practice. The reasons for this vary. In some jurisdictions adequate mechanisms for supervision are lacking. Secondly, in jurisdictions with the adhesion procedure, attaching compensation as a condition to the sentence is considered a superfluous option. This is regrettable because there are more incentives for the offender to pay compensation imposed as a condition to a penal sanction than if it is awarded through the adhesion procedure. A third reason is that the same high levels of evidence are required for compensation to be awarded as a condition as for compensation to be awarded through the adhesion procedure.

In *England and Wales* and *Luxembourg*, compensation is awarded as a condition to a suspended sentence or probation with some degree of regularity, but even then absolute figures are very low. In *France* and *Spain*, judges are actively encouraged to impose compensation as a condition by legislation.

It should be noted that in most jurisdictions a practice has grown of accepting compensation paid before or during the trial in mitigation of the sentence.

Overview implementation of compensation as a financial condition:

0 - no such measures/no possibility to attach financial condition: <i>Cyprus, Turkey</i>	-
1a - compensation as a financial condition in place but poor actual implementation: <i>Austria, Belgium, Denmark, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Malta, the Netherlands, Norway, Portugal, Scotland, Sweden, Switzerland</i>	-
1b - compensation as a financial condition quite regularly used: <i>England and Wales, Luxembourg</i>	-
----- R (85) 11	
2 - legislative obligation to always consider compensation as a financial condition: <i>France, Spain</i>	R

6 ENFORCEMENT OF COMPENSATION

(E.14) *If compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible.*

6.1 Overview

The proof of the pudding lies in the eating. However good – or bad – the courts may be at awarding compensation for the benefit of the victim, the real test comes with the enforcement: a court order that cannot be enforced is of no practical value to the victim of crime.

Guideline E.14 distinguishes between compensation that is a penal sanction (or penal

measure) and other forms of compensation. The compensation order of the common law jurisdictions and the Dutch compensation measure are included in the first category. The second category refers to compensation awarded through the adhesion procedure – i.e., compensation as a decision in civil law – but also compensation awarded as a condition to a deferred or suspended sentence, a probation order or any other such measure. We will discuss each category of compensation in turn, along with the performance of the respective jurisdictions, as §§ 6.2 and 6.3, respectively.

The matter of enforcement also brings us to the question of what other options are open to the victim to receive compensation if the money cannot be collected from the offender. In many jurisdictions state compensation schemes function as a safety net, but only for victims of serious violent or sexual offences. There are considerable differences between the schemes in the range of damages that they cover and the amount of compensation paid out. There are also differences in the interaction between state compensation and the pursuit of compensation from the offender, and the corresponding attitudes towards the two options. For example, in some jurisdictions the effectiveness of state compensation has led to slackness as regards the pursuit of compensation from the offender through the criminal courts. The question of state compensation and its influence on compensation from the offender is discussed in § 6.5.

6.2 Penal Sanction

6.2.1 Developmental scheme

Developmental scheme of enforcement of compensation as a penal sanction:

0 - not collected as fine, no priority over other financial sanctions	-
1 - either collected as fine <i>or</i> priority over other financial sanctions	-
----- R (85) 11	
2 - both collected as fine <i>and</i> priority over other financial sanctions	R

3 - payment up front	+

Guideline E.14 advises that where compensation is a penal sanction, it should be collected in the same way as fines and moreover should take priority over any other financial sanction imposed on the offender. Regarding the first element, fines are collected in name of the state by an enforcement authority, the court or the prosecutor. That compensation should be collected in the same way implies that the enforcement of the order or measure is entirely in the hands of one of these authorities, and that the victim does not have to undertake any action himself. It also implies that coercive measures may be applied by the body responsible for enforcement to encourage the payment of compensation, for example the confiscation of property or imprisonment by default.

Regarding the second element of the guideline, that compensation should take priority over any other financial sanction imposed on the offender, we already touched on this subject in § 4 of this chapter on the status of compensation. There we were concerned with priority at the *sentencing* stage. Here, the guideline refers to the priority that should be given to compensation at the *enforcement* stage. In other words, when money is collected from the offender, it should first be put towards the compensation for the victim, and only when the full order has been paid can the rest be used to cover any other financial sanctions.

The developmental scheme for the enforcement of compensation as a penal sanction is as follows. At stage 0, compensation is not collected in the same way as fines, and neither does it take priority over any other sanction. At stage 1, one of these two requirements is met, and at stage 2 both are in place. Beyond the scope of the guideline lies stage 3, which embraces payment 'up front' of the compensation to the victim. This means that the authority responsible for the enforcement of penal sanctions pays the victim the amount of compensation due to him as he leaves the courtroom, and then reclaims this later from the offender.

6.2.2 Performance of the Individual Jurisdictions

Stages 0 and 1: Requirements of guideline not fully met

Ireland hovers precariously between stage 0 and stage 1. In this jurisdiction, the district court clerk is responsible for the enforcement of the compensation order, but not automatically, only at the written request of the victim. Measures available to the district court clerk to enforce payment include an application for an 'attachment of earnings' award. This means that the employer of the offender reserves a certain proportion of the monthly salary of the offender and pays this directly into the account of the victim. Furthermore, the offender may be imprisoned in default. With this, the obligation to pay compensation expires. Very little is known about enforcement of compensation in Ireland in practice, but it appears that no priority is given to compensation at the enforcement stage.

In *Cyprus*, the Probation of Offenders Act provides that compensation may be enforced in the same way as a financial sanction. As in all other jurisdictions with the compensation order, the court may allow the compensation to be paid in instalments. The district court is responsible for the enforcement of compensation orders, even those made in the Assize court, but in practice it is the police who make sure that the offender pays what he is due to the state or the victim. The main shortcoming of the Cypriot compensation order is that even though it has priority over fines, it does not have priority over costs made by the state in relation to the enforcement of sanctions or for the criminal proceedings. Cyprus therefore finds itself at stage 1 of the developmental scheme.

Stage 2: Both collected as fine and priority

In theory, *Scotland* can be placed at stage 2. Not only are compensation orders enforced in the same way as fines, but legislation provides that priority should be given to compensation at the enforcement stage. However, where a compensation order has been combined with another financial penalty such as a fine, the practice has developed that any money received from the offender is divided proportionally between the two. For example, where a fine of 100 pounds sterling has been imposed together with a compensation order of 50 pounds, payable at 3 pounds a week, the clerk puts 2 pounds a week towards the fine, and 1 pound towards the compensation order. This means that the victim does not receive the last payment until almost a year after the order was made. A study published in 1996 found that 87% of compensation orders imposed in Scotland were eventually paid in full, but that payment is often protracted over a considerable period of time.²¹ This time-span could be considerably reduced if true priority were to be given to the compensation order at the enforcement stage. To go back to our example, if the authorities were to put all the money

²¹ J. Hamilton and M. Wisniewski, *The use of the compensation order in Scotland*, Crime and Criminal Justice Research Findings No. 14, Edinburgh: Scottish Office Central Research Unit, 1996.

received each week from the offender towards the compensation order first, and only when that has been completely paid towards the fine, the money owed to the victim would be paid in full after just over 4 months. The difference in time, and therefore aggravation to the victim, is considerable. Ironically, if priority is given to the compensation order in this way, the period needed to pay the fine in full remains the same at 50 weeks. Time wise, giving priority to the compensation order at the enforcement stage in this way greatly reduces the vexation of the victim without jeopardizing the interests of the state.

In *England and Wales*, the success rate of the compensation order is comparable to the Scottish one. Here it is estimated that approximately three quarters of all compensation orders are paid in full within 18 months. The remarks on priority made in relation to Scotland are equally valid for England and Wales. The range of measures available to the English criminal courts to combat non-payment of compensation orders is the most extensive of all the jurisdictions included in this group of compensation. Not only may the courts impose imprisonment in default, but they may alternatively order community service, a curfew, disqualification from driving, a confiscation order or (in the near future) for young offenders a reparation order. Characteristic for all these alternative sanctions is that the obligation to pay compensation expires at the completion of the alternative sanction.

Here, we touch on a significant difference to the compensation measure found in *the Netherlands*. Detention in default may be imposed here too, but it does *not* cause the obligation to pay compensation to expire. The Dutch legislature has insisted that even if compensation is imposed in the form of a penal measure, it is still an obligation arising from civil law, and such an obligation therefore remains whatever penal measures the criminal court may impose. In practice, the Dutch criminal courts are now reluctant to impose the compensation measure because they do not feel comfortable with the rule that a custodial sentence in default does not relieve the offender of the duty to pay the compensation order. Dogmatically speaking, an offender who has sat out detention in default and later pays the compensation order is punished twice for the same offence.

The Dutch compensation measure has had to cope with another problem in relation to the enforcement. Initially, the public prosecutor was responsible for collecting the money for the order from the offender but the collection rate was so poor that in 1996 this responsibility was transferred to the debt collection agency. As a consequence the collection rate has risen dramatically, but unfortunately to this day the stigma of being of little practical use clings to the compensation measure and judges are still not keen to impose it. The lesson that can be learnt from the Dutch experience is that initial mistakes made when introducing a novelty into the criminal justice system tend to be remembered for a long time and may frustrate future application.

Stage 3: Payment of compensation 'up front'

At present, none of the jurisdictions with the compensation order have a system whereby compensation is paid to the victim 'up front', although many voices in favour of such provisions have been raised, most notably in England and Wales. The objections of the authorities against payment 'up front' mostly revolve around the fact that it could have substantial resource implications for the state. At present, if the offender fails to meet his obligation to pay the compensation order it is the victim who loses out financially. In a system with payment 'up front', the financial risk is in principle transferred to the state.

In jurisdictions with a substantial state compensation scheme, such as England and Wales and Scotland (see § 6.5), substantial amounts of money are disbursed by the state to victims of violent offences, but often not until months or even years after the offence was

committed. If these victims were to be paid any compensation ordered by the criminal court against the offender 'up front', the money would ultimately be coming from the same source, namely the state, albeit through a different channel. Therefore the argument that the state will lose out financially is invalid as regards victims of violent offences who are likely to qualify for state compensation. Furthermore, the amounts of compensation awarded in the form of a compensation order stand in no proportion to the amounts paid out in state compensation because a compensation order is related to the means of the offender whereas state compensation is primarily related to the total amount of damages and losses suffered. What the courts would be paying out 'up front' is therefore only a tiny advance payment on the amount the victim of violence stands to receive in the form of state compensation.

As regards the financial risk run by the state in relation to the payment up front of compensation orders made to the benefit of victims of non-violent offences who do *not* per definition qualify for state compensation, we have seen above that at present in England and Wales and Scotland about 80% of the orders are eventually paid in full by the offender. The amount the state stands to lose is therefore hardly exorbitant, and could be reduced even further if the procedures for the enforcement of compensation orders are further improved. That payment is pursued to replenish public funds rather than for the direct benefit of a private citizen will only serve as an additional incentive for the enforcement authorities.

6.3 Other, Non-Penal Forms of Compensation

6.3.1 Developmental Scheme

*Developmental scheme of enforcement of compensation
awarded through the adhesion procedure:*

0 - victim left entirely to own devices	-
----- R (85) 11	
1 - (partial) assistance	R

2 - state assumes responsibility for enforcement	+
3 - payment 'up front'	++

Where compensation is not awarded in the form of a penal sanction but in some other form, guideline E.14 provides that the victim should be assisted in the collection of the money as much as possible. Primarily this part of the guideline refers to compensation awarded through the adhesion procedure under the auspices of civil law. Because of the civil law nature of compensation awarded in this way, the enforcement is in principle the responsibility of the individual victim. If the victim is left entirely to his own devices to enforce compensation awarded to his benefit, the corresponding jurisdiction finds itself at stage 0 of the developmental scheme. Many jurisdictions recognize that it can be extremely difficult and upsetting for the victim to have to approach the offender personally to claim the money owed him, and assistance is offered in varying degrees. This is stage 1 of the developmental scheme. Even better is if the state assumes responsibility for the enforcement, despite the fact that strictly speaking compensation is a matter of civil law. Here we arrive at stage 2. Finally, stage 3 is achieved where compensation is paid to the victim 'up front'.

As regards compensation awarded as a condition for a deferred or suspended sentence,

a probation order or any other measure such as conditional release or in mitigation of the sentence, this way of imposing compensation in principle automatically links the compensation up with the criminal sanction to which it is a condition. Therefore the state is responsible for controlling its enforcement. How this works out in practice is commented on in § 6.3.3.

6.3.2 Performance of the Individual Jurisdictions in Relation to Compensation Awarded Through the Adhesion Procedure

Stage 0: Victim left to own devices

In *Belgium, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands* (as far as the adhesion part of the hybrid model is concerned), *Portugal* and *Turkey*, the victim of crime is not assisted in any way in the enforcement of the compensation awarded to his benefit. This is particularly disappointing as regards *Luxembourg* because up to here this jurisdiction has compared favourably with other jurisdictions as far as the awarding of compensation is concerned. But ineffective enforcement as good as nullifies any lead *Luxembourg* may have held.

Stage 1: (Partial) assistance

Assistance offered to victims of crime in collecting compensation can be either of a practical nature or of a more 'latent' judicial nature. To start with the first, an example is that the public prosecutor assists the victim in finding out where the offender lives. Provisions for such assistance are found in *France* but in practice public prosecutors are reluctant to make the effort and the measure is of little practical value.

With a view to the enforcement of compensation awarded by the court, the (examining) magistrate in *France, Germany* and *Spain* may secure funds from the offender by ordering a deposit, a surety, or by setting a judicial bond or an attachment order respectively. Likewise, in *Denmark, France, Spain* and *Switzerland*, the courts may order that goods are confiscated from the offender and the proceeds reserved for payment of the compensation owed to the victim. Finally, in *Greece* and *Switzerland*, an amount that covers the compensation claim may be deducted from bail money before it is returned to the offender. All these measures aimed at helping the victim to enforce his compensation claim are 'latent' in that the victim must make an application to the examining magistrate or the court for such a provision to be effectuated. In practice, few victims are aware of these opportunities and the collection rate of compensation awarded through the adhesion procedure is very poor. For example, in *France* one study published in 1989 found that only 23% of the victims granted compensation actually received some sort of payment within one year, and only 11% of these victims received the full amount of damages awarded to them.²² There is no reason to assume that the scores are any different today. However, in 1990 legislation introduced a new provision that 20% of prisoners' wages may be put towards compensating their victims. But in keeping with all the other measures discussed so far, this provision has had only minimal significance in practice. One of the reasons is that salaried prison work is only available to a limited amount of prisoners.

One provision found in *Greece, Norway* and *Spain* is that compensation has priority over other financial sanctions when it comes to enforcement, this despite the fact that guideline

²²

G. Piffaut, 'Concrete achievements towards the implementation of the fundamental principle of justice for victims', in: HEUNI, *Changing the United Nations Victim Declaration and recent developments in Europe*, Publication series no. 16, Helsinki, 1989, p. 126.

E.14 implies that such a measure is only called for in relation to compensation as a penal sanction. In effect this provision means that the victim has right of way as regards the financial means of the offender. It is unclear what practical value this rule has. It is unlikely that the state is prepared to stall the enforcement of any financial claims they have against the offender indefinitely in anticipation of any action the victim may undertake. Neither are the enforcement authorities prone to warning the victim that ready cash is available. However, such a rule does give a resourceful and determined victim an instrument with which he can claim money from the state if the authorities beat him to the limited financial means of the offender.

Stage 2: State assumes responsibility

The state does not assume automatic and full responsibility for the enforcement of compensation awarded through the adhesion procedure in any of the jurisdictions. But two jurisdictions that do come close to this desirable state of affairs are *Norway* and *Sweden*.

Since 1994, the criminal court in *Sweden* forwards the decision on the civil claim of the victim directly to the local debt collection agency. The agency then sends the victim a letter providing him with all the necessary information and inviting him to give the agency written or oral permission to enforce the damages on his behalf. It is estimated that somewhere between 40-60 percent of the victims answer the letter sent by a debt collection agency, and that between 16-40 percent of the victims who apply for enforcement of damages eventually receive full payment, either through enforcement or voluntary payment.²³ One problem that has been signalled is that the letter and the application form sent by the debt collection agency to the victim are too complicated (see also Chapter 25 on information), and furthermore that they neglect to say that the services of the agency are free of charge. The system could also be made more effective by basing enforcement on implicit instead of explicit consent. In that case the debt collection agency would automatically enforce the court decision on damages, unless the victim indicates that he does not want enforcement by the agency to take place. Because compensation through the adhesion procedure is only awarded on application by the victim, it is safe to presume that provisional permission has been given until the victim indicates otherwise.

In *Norway*, the State Recovery Agency provides a similar service to the Swedish debt collection agency, but it is unknown how many victims actually make use of this service.

Stage 3: Payment 'up front'

Because compensation awarded through the adhesion procedure is at least in theory strictly a matter between the victim and the offender, the idea of payment 'up front' by the state is even more foreign than in relation to the compensation order where the state is already responsible for the enforcement. None of the jurisdictions with the adhesion procedure have such a system, although in *Austria* the Code of Criminal Procedure does have a provision on the advance payment of compensation to the victim. This differs from payment 'up front' in that the victim must make an application for such an advance payment, whereas payment 'up front' implies that the victim is so to speak handed an envelope as he leaves the courtroom. The Austrian provision is only rarely used in practice.

²³

Justitiedepartementet, *Brottsoffer: Vad her gjorts? Vad bör göras?* Betänkande av Brotts-
offerutredningen, Statens offentliga utredningar 1998:40, Stockholm, 1998, pp. 257-261.

6.3.3 Enforcement of Compensation as a Condition

Where compensation is attached as a condition to a deferred or suspended sentence, or to probation, the enforcement is generally in the hands of the body responsible for the supervision of the offender. In many jurisdictions this is the probation service, but in *the Netherlands* the public prosecutor enforces compensation imposed as a condition. We remarked earlier (§ 5.3 stage 1a) that compensation imposed as a condition is potentially advantageous to victims in jurisdictions that have the adhesion procedure, because then the enforcement is the responsibility of the state rather than the victim, and the offender is under pressure to meet the condition on penalty of enforcement of the sentence to which it is a condition. We also saw that in jurisdictions with the adhesion procedure the courts unfortunately tend to regard the imposition of compensation as a condition a superfluous measure.

Very little is known about the enforcement rate of compensation imposed as a condition, but one thing is clear and that is that collection rates are often disappointing for lack of an effective system of enforcement. For example in *Malta*, where compensation can *only* be awarded as a condition, adequate supervision of the payment of compensation is greatly complicated by the fact that there are only 4 probation officers on the whole island. Furthermore, where compensation is accepted in mitigation of sentence, the compensation should ideally be paid prior to or during the trial. In *Germany*, for example, no proper enforcement system is in place to ensure that a promise to pay compensation after the trial is over, which has been accepted in mitigation of the sentence, is actually paid.

6.4 Conclusions on the Enforcement of Compensation

The most significant conclusion to be drawn in relation to guideline E.14 is that, as far as enforcement is concerned, the compensation order is, without a doubt, much more successful than compensation awarded through the adhesion procedure. Although the utmost care should be taken when comparing results of studies conducted in different jurisdictions, the general trends that may be discerned from the various studies are unmistakable. Compare, for example, the enforcement rate of around 80% for compensation orders in *England and Wales* and *Scotland*, against the 23% in *France*. The only positive exception as far as the adhesion procedure is concerned is found in *Norway* and *Sweden*, where the State Recovery Agency/debt collection agency enforces compensation on behalf of the victim. Although the system still needs to be sophisticated, and enforcement rates are still far from spectacular, all jurisdictions with the adhesion procedure should adopt this strategy.

Finally, in jurisdictions with a reasonably high rate of enforcement of compensation, the step to payment up front is not as big as the authorities would have us believe. As yet, none of the jurisdictions included in this study make actual payments up front.

Overview of enforcement of compensation as a penal sanction:

0 - not collected as fine, no priority over other financial sanctions: <i>Cyprus, Malta</i>	-
1 - either collected as fine or priority over other financial sanctions: <i>Ireland</i>	-
----- R (85) 11	
2 - both collected as fine and priority over other financial sanctions: <i>England and Wales, Scotland</i>	R

3 - payment up front: /	+

Overview of formal implementation of guideline E.14 on enforcement of compensation awarded through the adhesion procedure:

0 - victim left entirely to own devices: <i>Belgium, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands, Portugal, Turkey</i>	-
----- R (85) 11	
1 - (partial) assistance: <i>Denmark, France, Germany, Greece, Spain, Zurich</i>	R

2 - state assumes responsibility for enforcement: <i>Norway, Sweden</i>	+
3 - payment 'up front': <i>Austria</i>	++

In practice, *England and Wales, the Netherlands* (compensation measure), *Norway, Scotland* and *Sweden* are relatively successful regarding the enforcement of compensation on behalf of the victim, whereas enforcement in all the other jurisdictions is poor. Because the difference is so pronounced, the five aforementioned jurisdictions are rated with 'good' for actual implementation of guideline E.14 in the table on compensation represented at the end of this chapter, whereas all other jurisdictions score a 'poor' (-).

6.5 State Compensation

In the above, we have reviewed all the modes of enforcement of compensation, whether ordered as a compensation order or through the adhesion procedure or as a condition to another sentence. In this section we will consider the provisions that provide a safety-net where enforcement fails, or where the amount of compensation ordered does not do justice to the damages and losses actually suffered.

Nine countries (eleven jurisdictions) included in this study have signed and ratified the European Convention on the Compensation of Victims of Violent Crime. Five more countries have signed but not (yet) ratified, and the remaining seven have neither signed nor ratified. But some of the countries which belong to the last category do have some form of state compensation, albeit of a limited nature. On the other hand, some countries who have signed (but not ratified) the Convention have no state compensation whatsoever. To sum up, all jurisdictions included in this research have some form of state compensation scheme with the exception of *Cyprus, Greece, Italy, Liechtenstein, Malta* and *Turkey*. Ironically, these are precisely the jurisdictions where state compensation for victims of violent crime is most needed, for want of any other standard forms of financial support or security such as personal insurance.

*Overview of ratification of the European Convention on the Compensation of Victims of Violent Crime
and the relation to state compensation schemes*

Signed and ratified	<i>Denmark, France, Germany, Luxembourg, Netherlands, Norway, Sweden, Switzerland, United Kingdom (England and Wales, Scotland, Northern Ireland)</i>
Signed only	<i>Belgium, Cyprus, Greece, Portugal, Turkey</i>
Neither signed nor ratified	<i>Austria, Iceland, Ireland, Italy, Liechtenstein, Malta, Spain</i>
State compensation Scheme	<i>Austria, Belgium, Denmark, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom (England and Wales, Scotland, Northern Ireland)</i>
No state compensation scheme	<i>Cyprus, Greece, Italy, Liechtenstein, Malta, Turkey</i>

Most of the state compensation schemes operate on an *ex gratia* basis: compensation under the scheme is a donation from the state. But in *Denmark, England and Wales* and *Scotland* the victim of a violent offence in principle has a *right* to state compensation. The schemes differ in respect of who can claim compensation, the period of limitation, the amount awarded for comparable offences and the administration of the scheme. In some countries, victims of domestic violence are excluded from the compensation scheme. The amounts awarded vary considerably from jurisdiction to jurisdiction, as does the period of limitation, compare for example *Ireland* (3 months) to *Switzerland* (2 years). Most schemes are administered centrally but some locally. In *England and Wales*, a claim for less than £1,000 is not taken into consideration whereas in other countries there is a much lower, or no, minimum stake.

Regarding the impact that a state compensation scheme can have on claiming compensation from the offender, in *Norway* and *Denmark* the fact that many offenders cannot pay compensation anyway has led to a more or less general transferral of the responsibility of compensating the victim from the offender to the state. In serious cases substantial claims are not contested by the offenders because even if ordered by the court to pay, they do not have the means to do so, and once awarded the claim is sent straight on to the state compensation board. Unfortunately, this way of dealing with the major claims is also the way in which the minor claims are dealt with, only here the victim cannot send his claim on to the state compensation board, and he ends up with nothing.

7 CONCLUSION TO CHAPTER 26 ON COMPENSATION

On the whole, the guidelines included in recommendation (85) 11 that are discussed in this chapter are poorly implemented. Compensation awarded to the victim in the course of criminal proceedings is an ailing institution, and so is private prosecution. The following general conclusions may be drawn.

First of all, to ensure that compensation is taken into consideration whenever a discretionary decision is taken whether to prosecute (guideline B.5), the police and/or prosecution in each jurisdiction should have the power and the duty to personally arrange mediation between the victim and the offender. The actual mediation should be attempted by specialists.

Secondly, all jurisdictions should adopt judicial review to allow the victim to contest a decision of the authorities to drop the case. Even though guideline B.7 allows for private prosecution instead of a system of review, this study clearly shows that judicial review is to be strongly preferred. Where a jurisdiction chooses to retain a subsidiary right to private prosecution, judicial review should be introduced alongside.

Of the three different models for awarding compensation, the compensation order is significantly more successful than the adhesion model and the hybrid model. Not only is it imposed more often, but the rate of enforcement is also much higher. But in an absolute sense, the frequency and amount of compensation awarded in the form of a compensation order is still very modest. Characteristic for all three models is a pervasive negative attitude of the prosecution and judiciary towards awarding compensation for the benefit of the victim in the course of criminal proceedings. This negative attitude is strongest in the Germanic jurisdictions, and least pronounced in the common law jurisdictions. In the Nordic jurisdictions, the attitude is one of indifference.

Whatever form compensation may be awarded in, it should already be given priority over fines and costs at the sentencing stage. Furthermore, much more importance should be given to imposing compensation as a condition to a deferred or suspended sentence, a probation order or any other measure, particularly in view of the fact that the incentive for the offender to pay compensation imposed in this way is much bigger. Finally, a substantial part of the strength of the compensation order is due to the fact that it is enforced by the state. Compensation awarded through the adhesion procedure should also be recovered by a state agency on behalf of the victim. In that case, the agency should function on the principle of implicit permission.

Regarding the performance of the individual jurisdictions, compensation fares best in *England and Wales*, and worst in *Malta*. Of the jurisdictions with the adhesion procedure, *Sweden* comes out in front.

The above comparative analysis can be summarized in the following table:

	B.5	B.7	D.10	D.11	D.13	E.14 formal	E.14 actual
Austria	+	R	R	R	-	++	-
Belgium	+	R	R	R	-	-	-
Cyprus	(R)	R	-	R	-	-	-
Denmark	-	R	R	R	-	R	-
England and Wales	R	R	R	+	-	R	+
France	+	R	R	R	R	R	-
Germany	(R) ¹	+	R	R	-	R	-
Greece	(R)	R	-	R	-	R	-
Iceland	-	R	R	R	-	-	-
Ireland	-	R	R	+	-	-	-
Italy	(R)	+	R	R	-	-	-
Liechtenstein	(R)	R	R	R	-	-	-
Luxembourg	R	R/R	R	R	-	-	-
Malta	(R)	+	-	-	-	-	-
Netherlands	++	+	R	R	-	R ²	14 ³
Norway	R	R	R	R	-	+	+
Portugal	R	+	R	R	-	-	-
Scotland	(R)	R	R	+	-	R	+
Spain	(R)	R	R	R	R	R	-
Sweden	R	R	R	R	-	+	+
Turkey	(R)	+	R	R	-	-	-
Zurich	R	+	R	R	-	R	-

¹ (R) indicates that the decision to prosecute is not a discretionary one, therefore these jurisdictions per definition meet the standard set by guideline B.5.

² Netherlands: Adhesion procedure: poor, compensation measure: adequate.

³ Regarding enforcement, the adhesion procedure and compensation measure are combined.

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Chapter 27

Treatment and Protection: Comparative Analysis and Conclusions

1 INTRODUCTION TO TREATMENT AND PROTECTION

The Recommendation includes two guidelines on the treatment of victims and two guidelines dealing with the protection of victims. The guidelines on treatment address the training of police officers on how to deal with victims and the manner of questioning victims. The guidelines on the protection of victims deal with the protection of victims against intimidation and retaliation as well as from unwanted publicity.

The aim of the guidelines on the treatment of victims by the criminal justice authorities is to minimize inconvenience. With good reason, the first guideline of the Recommendation contains the obligation for the police to be trained on how to treat victims in a constructive and reassuring manner. The police are the first, and in many cases the only, representative of the legal system to come into contact with the victim. The attitude of the police towards victims is therefore crucial to the victim's confidence in the justice system, and of his willingness to cooperate with the investigation and subsequent proceedings (guideline A.1).¹ Another important aspect of the treatment of victims concerns the manner of questioning. During all stages of the procedure, the victim may be subjected to questioning. In the pre-trial stages, he may be examined by the police, the public prosecutor and the examining magistrate. This may be followed by the questioning by the judge, the public prosecutor and the defence counsel during the trial stage. Repetitive questioning is often unavoidable in order to gather evidence against the accused and to substantiate the charge. But also because the criminal justice system requires that all evidence gathered in the pre-trial stage is presented 'live' to the court. The criminal justice authorities, however, can lighten the burden by having due consideration for the victim's personal situation, feelings and emotions, as well as by creating special procedures for vulnerable victims, such as children and persons with mental disabilities (guideline C.8).

The guidelines regarding the protection of victims during criminal proceedings see at the protection of the privacy of victims (guideline F.15) and the protection of victims against intimidation and retaliation by the offender (guideline G.16). Protection against intimidation and retaliation can never be absolute. However, the state is bound by an obligation of means

¹ For a detailed discussion of the guidelines concerned with treatment and protection, see Chapter 1, § 4.

(*obligation de moyen*)² to try to protect the victim to the best of its abilities. The legislature should make sure that it takes measures or develops legal reforms that allow the criminal justice authorities to protect the victim as much as possible against any damaging actions by the defendant. Today, most jurisdictions have created protective measures but their application in practice is infrequent. Furthermore, several jurisdictions have created special provisions to protect victims who must testify against terrorist or organized crime organizations.

2 TREATMENT OF VICTIMS AND TRAINING OF THE POLICE

2.1 Victim-Awareness Training

(A.1) *Police officers should be trained to deal with victims in a sympathetic, constructive and reassuring manner.*

According to this guideline, the authorities should make sure that their police officers are trained to deal with victims in a constructive and respectful manner. The 22 member states included in the study can be divided into two main groups: states providing training for the police according to the guideline, and those that fail to do so. Within the former category a further distinction can be made regarding the way the police are trained. First of all, police recruits should be trained. However, the training of recruits is insufficient to make sure that the police deal with victims in a sympathetic, constructive and reassuring manner. As in all other organizations, teaching modern ways of performing basic duties only to newcomers will not change old habits and long-standing working methods. Therefore, it is necessary to train incumbent personnel as well as recruits if one genuinely strives for a new way of dealing with victims of crime.

² The translation in English of the continental term *obligation de moyen*, as opposed to *obligation de resultat* is rather difficult because this concept is unknown in common law. Therefore, in English a literary translation from French is used: *obligation of means* as opposed to *obligation of result*. An obligation of means expresses the duty of states to undertake certain activities to achieve a set goal. An obligation of result refers to the situation that a state is obliged to fully attain a set goal. Concerning the protection of victims, states are bound by an obligation of means rather than of result, because states cannot prevent all possible intimidating or threatening acts of accused or convicted persons, and/or effectively protect every victim of crime against the possible occurrence of such acts. They should, however, incorporate in their legislation the instruments that allow the judicial authorities to respond as effectively as possible to such acts.

2.1.1 Developmental scheme

Developmental scheme formal and actual implementation guideline A.1:

0 - no training	
1 - limited training for recruits	
2 - limited training of incumbent personnel	
-----	R(85)11
3 - extensive training for recruits	
4 - extensive training of incumbent personnel	
-----	R(85)11
4 - follow-up courses	
5 - refresher courses	
6 - measuring effects in periodical evaluations	

Stage 0: no training

No official victim-awareness training for police officers exists in *France, Germany, Greece, Italy, Liechtenstein, Malta, Portugal, Spain and Turkey*. In *Portugal*, however, this situation is going to change in the near future because of the INOVAR project. This project sees at improving the relationship between the police and the general public, *inter alia* by improving the quality of training and introducing training programmes for the police on how to deal with victims. If this project is realized, it is expected that *Portugal* will move upwards to at least stage 3.

Today, in all of these states, with the exception of *Greece and Turkey*, persons or services working outside the police training centres may provide some training on an ad-hoc basis. In most jurisdictions, victim support workers or social workers give a limited amount of lectures at certain police schools or for certain police units. This strategy has several disadvantages. First, the presentations by outsiders are not included in the official police training programme. This means that not all recruits, police officers and units working with victims are reached. Second, the lectures can often not be considered as adequate victim-awareness training because they are very limited in place, time and frequency. The lectures are primarily intended to create awareness and a modest degree of knowledge among recruits and policemen of the difficulties faced by victims of crime. In *Spain*, lectures are only be provided infrequently and on a limited scale in regions which have active victim support services or women's groups. In *Germany*, local women's groups or rape crises centres exclusively train incumbent personnel of the police rape units. Recruits are not trained at all. In conclusion, the training provided in these jurisdictions cannot be said to be sufficient in any way to fulfill the requirements of guideline A.1.

Stage 1: limited training for recruits

At the police schools and academies in *Cyprus, Denmark, Ireland, Luxembourg, Scotland and Switzerland*, the victim-awareness training of recruits is rather limited in time and/or in scope. Modules on victims are included in the basic training programme but they consist only of a few hours training. For instance, in *Zürich (Switzerland)* only a two-hour course is given to recruits on how to deal with victims of crime. Moreover, the modules are frequently scheduled at awkward times such as Friday afternoons. This is not the best time to get an inspired audience. Furthermore, it may suggest that the subject is not particularly relevant.

In *Cyprus and Scotland*, the limitation is, furthermore, caused by the subject of the training. In *Cyprus*, police recruits are given an eight hours training course on how to treat victims of domestic violence. The treatment, position and needs of other victims are not

addressed. In *Scotland*, the training is limited to the treatment of certain specific groups of victim-witnesses, such as the child witness.

Stage 2: limited training to incumbent personnel

Two member states (*England and Wales, Scotland and Sweden*) provide victim-awareness training to incumbent personnel of a limited scope. The training sees either only at the treatment of particular groups of victims, or training is only available to certain categories of police officers. *Scotland* offers an example of the former type of limited training. Here, an in-force training programme has been set up to improve the treatment of victims of domestic violence. In *England and Wales*, on the other hand, only police officers of the domestic violence or sexual assault units receive further training.

Stage 3: extensive training for recruits

In the other jurisdictions (*Austria, Belgium, England and Wales, Iceland, the Netherlands and Norway*), the official curriculum of police schools and academies comprises several courses and seminars regarding the treatment of victims.

It is interesting to see that in *Austria, Denmark, the Netherlands and Norway* the police schools and academies do not train recruits in how to treat victims of crime in separate modules or courses but have opted to integrate victim-awareness training into other courses included in the curriculum. The idea behind this strategy is that it teaches police recruits to perceive victims-oriented duties as something that is an integral part of basic police duties.

Concerning the training of recruits, it is important to underline that among the jurisdictions which adhere to the stages 1 and 2, we can distinguish five jurisdictions (*Austria, Cyprus, Ireland, Sweden and Switzerland*) which exclusively provide (limited) training for recruits. The other jurisdictions (*Belgium, Denmark, England and Wales, Iceland, Ireland, Luxembourg, the Netherlands, Norway and Scotland*) provide training for incumbent police personnel as well as for recruits. The decision to give in-service training to policemen who left the police training institutes at a time when no training was given on this subject, or who left the police schools and academies a long time ago is another step towards a police force that is trained to deal with victims in a constructive manner.

Stage 4: extensive training to incumbent personnel

Five jurisdictions (*Belgium, Denmark, Iceland, Luxembourg, the Netherlands, Norway*) train their incumbent police personnel in a more extensive manner. But the way the in-service training is designed greatly differs. In *Iceland*, all members of the police have to follow a course on how to deal with victims of (sexual) crime. In *Luxembourg*, every member of the police force will be trained in the video-recorded questioning of children. Furthermore, lower-rank police officers (who take down reports of crime) receive training on how to deal with victims of violence in a reassuring and constructive way. Other members of the police force are trained to deal with victims of sexual crimes, or follow a course on how to question victims of serious crimes. Finally, all *Dutch* policemen receive in-service victim-awareness training. The training courses are made to measure the daily duties of the police officer. The training distinguishes mainly between officers performing routine activities regarding victims and those working in a more profound manner with victims of crime, e.g. officers working with victims of serious crime or those responsible for the questioning of victims.

Stage 5: follow-up training

Follow-up training courses for incumbent police officers are set up in *Denmark, Ireland, Luxembourg, the Netherlands* and *Norway*.

Three of these jurisdictions give follow-up courses for specific units or groups of police officers. In *Ireland* officers nominated to specialize for the domestic violence unit receive further training in a follow-up course. In *Norway* and *Luxembourg*, advanced courses on the investigation of sexual offences are offered.

Two jurisdictions provide follow-up courses for all members of the police. In *Denmark*, every police officer should be trained on how to deal with victims of crime during follow-up courses. These courses are not focussed on victims in particular but attention is given during the courses to the treatment of victims (see under stage 2). In *the Netherlands*, the follow-up courses are made to measure the specific duties of police officers. For instance, policemen working at the reception desk receive a 3.5 days training course on how to treat victims of crime.

Stage 6: refresher courses

At stage six, we only find *Denmark*. Here, police officers are given regular refresher courses in which the treatment of victims is addressed.

Stage 7: impact measurement

Measurement of the effects of victim-awareness training in regular performance assessments should be the next step towards a police force that takes the treatment of victims seriously. Evaluation of the performance of individual police officers in their daily contacts with victims is necessary to underline the importance of dealing with victims in a proper way. It also underscores that victim-related activities are police duties in their own right, which receive just as much attention as crime fighting. Unfortunately, this level of sophistication is not yet reached in any of the 22 member states.

2.2 Conclusions

The developmental scheme demonstrates that victim-awareness training is still not an integrated part of police training. The member states which find themselves at stage 1 of the developmental scale formally meet the requirements of guideline A.1. In practice, however, the training of recruits is too limited to meet its actual standards. Similarly, jurisdictions which only provide limited training to incumbent personnel do not meet the standard set in guideline A.1. This level of sophistication is only reached by the member states adhering to the stages 3 and 4. This means that out of the 22 jurisdictions included in the research only nine member states train their police force in accordance with guideline A.1. Five of these nine jurisdictions even provide follow-up courses. However, only one of them provides refresher courses. None of the jurisdictions have taken steps that would allow them to measure the effects of victim-awareness training.

Developmental scheme of guideline A.1:

0 - no training: <i>France, Germany, Greece, Italy, Liechtenstein, Malta, (Portugal) Spain, Turkey.</i>	-
1 - limited training of recruits: <i>Cyprus, Denmark, Ireland, Luxembourg, Scotland, Switzerland</i>	-
2 - limited training of incumbent personnel: <i>England and Wales, Scotland, Sweden</i>	-
<i>-----R(85)11</i>	
3 - extensive training of recruits: <i>Austria, Belgium, England and Wales, Iceland, the Netherlands, Norway.</i>	R
4 - extensive training of incumbent personnel: <i>Belgium, Denmark, Iceland, Luxembourg, the Netherlands, Norway</i>	R
<i>-----R(85)11</i>	
5 - follow-up courses: <i>Denmark, Ireland, Luxembourg, the Netherlands, Norway</i>	+
6 - refresher courses: <i>Denmark</i>	++
7 - <i>measuring effects in periodical evaluations</i>	++

The member states of the Council of Europe must ensure that their training is at least in accordance with the standard set in guideline A.1. However, it is advisable that follow-up and refresher courses are provided as well. Such courses would not only improve the treatment of victims by the police, they also emphasize the relevance attached to victim-oriented duties. To convey the message that a respectful and empathetic treatment of victims is a basic police duty, periodic performance assessments are essential and need to be implemented in all member states.

3 TREATMENT OF VICTIMS DURING QUESTIONING

(C.8) *At all stages of the procedure, the victim should be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians or other persons qualified to assist them.*

3.1 Interpretation of the guideline

Guideline C.8 addresses only one particular aspect of the phenomenon of questioning victims, and that is the manner of questioning. The guideline remains silent on the frequency of questioning. Nevertheless, the frequency of questioning will be dealt with in this section. First of all, because the number of times a victim is questioned is extremely relevant to victims of crime. Repetitive questioning of victims is a widely and well-recognized source of secondary victimization. Secondly, the number of times the victim is questioned is not only critical to the victim's perception of the criminal proceedings but also to his willingness to cooperate with the judicial authorities in the future.

As far as the manner of questioning is concerned, the guideline singles out two groups of victims who are considered to be particularly vulnerable: children and the mentally ill or handicapped.⁵ They should be given the opportunity to be questioned in the presence

⁵ Guideline C.8 uses the term 'mentally ill or handicapped', however, the term used today in the English speaking jurisdictions to refer to this group is 'persons with learning disabilities' or 'persons with mental disabilities'.

of a person they trust. The guideline is, however, silent about the special needs these victims have when subjected to questioning. Research has well established the conditions under which these victims should be questioned, as well as the special facilities that are needed for the best possible examination of these vulnerable victims. This aspect of questioning is included as well in the overview. Another omission of the guideline is of a too general nature: it states that victims should be questioned in manner that gives due consideration to their personal situation but fails to specifically designate the two groups that are widely recognized as suffering most from inconsiderate questioning, i.e., victims of sexual crimes and domestic violence. We will specifically discuss the manner in which these two groups of victims are questioned. First of all because they are commonly recognized as the outstanding example of victims who are in need of special consideration to their personal situation and dignity. Secondly, because the attention and consideration of the criminal justice authorities for these vulnerable victims is a sign of sophistication that surpasses the awareness for the needs of children and persons with learning disabilities. In most jurisdictions, the care for victims who are subjected to questioning in the course of the criminal process begins with having consideration for children and victims of sexual offences. Caring for children and trying to protect them from harm is most probably innate human behaviour. Even in jurisdictions where nothing has been regulated, have the criminal justice authorities always some degree of due consideration for children. They may even bend the rules for them. They may, for example, allow children to be accompanied by a trusted person, even when this is strictly speaking not allowed. Contrarily, having consideration for victims of sexual crimes does not seem to come naturally. It is often incited by pressure from the outside, i.e. the feminist movement.

3.2 The Manner of Questioning

In this section on the questioning of victims, firstly the manner of questioning will be addressed. Among the various aspects of the manner of questioning, we start with the manner in which child-witnesses are being questioned. This is, as a rule, the first indicator of awareness and care for vulnerable victims (§ 3.2.1). The developmental scheme regarding the questioning of children is followed by some remarks on the examination of the questioning of persons with mental disabilities (§ 3.2.2). Hereafter, the questioning of other vulnerable victims, and in particular victims of sexual crimes and domestic violence is described (§ 3.2.3). Concerning the 'average' victim of crime, we only give some tentative remarks on the manner of questioning. The reason for this approach is that very few jurisdictions have given formal attention to the supposedly non-vulnerable victim. Also, no research has been undertaken into the subject of the manner of questioning of these victims. It follows that our findings regarding 'average, non-vulnerable' victims are limited and sometimes consist of personal observations only (§ 3.2.4).

3.2.1 Children

Regarding the questioning of children, the awareness of the need to adapt the normal questioning methods to their needs and interests is greatest. Children are as a rule treated and questioned with more consideration and empathy than other victims. The criminal justice authorities usually try to be as considerate as possible, even if they have not been given victim-awareness training. Nevertheless, the manner in which children are questioned varies considerably. In certain jurisdictions, the consideration for the special needs of child-

witnesses depends entirely on the empathy that the individual member of the criminal justice authorities has with the child. The risk in these jurisdictions is that with the best intentions, terrible mistakes are being made. In *Malta*, for example, where children frequently need to testify in (jury) court, judges have tried to alleviate the burden of testifying by not putting the child in the witness stand. Instead they allowed him to sit in a chair, placed in the middle of the courtroom in front of the presiding judge. This position in court is probably even more intimidating than the witness stand. Numerous child-witnesses broke down and were unable to give evidence, in spite of the good intentions. In other jurisdictions, this risk has been noticed and reform measures were introduced. The reforms allowed child-witnesses not only to testify in better conditions, but also to be questioned by persons who are specially trained to adapt the manner of questioning to the needs and capacities of the child.

Developmental scheme manner of questioning child-witnesses:

- | | |
|--|------------------|
| 1 - dependant on the individual examiner | |
| 2 - special attention at the level of the police | |
| 3 - some attention by the other authorities | |
| ----- | <i>R (85) 11</i> |
| 4 - questioning in the presence of a trustee | |
| ----- | <i>R (85) 11</i> |
| 5 - questioning in a child-friendly hearing-studio | |
| 6 - questioning through a live television-link | |
| 7 - video-recording is used as evidence in court | |

Stage 1: the manner of questioning is discretionary

In *Cyprus, France, Greece, Malta and Turkey* hardly any special attention is given to the questioning of children during the pre-trial and trial stages. Though, children are questioned with more consideration than other victims. In these jurisdictions, there are no specialized police officers to conduct the pre-trial questioning. In *France*, children are questioned by members of the juvenile brigade, but they receive no special training. The manner of questioning, therefore, depends entirely on the innate awareness of the capacity of young children to reproduce evidence. In *Greece*, there is little special care for children during the pre-trial stages. Of these five jurisdiction, only in *Turkey* children are not questioned by the police but by public prosecutors, but they are not trained either.

The questioning of the child-witness in court is not much better in these five jurisdictions (with the possible exception of *Greece*, see stage 3). No special measures have been taken to improve the manner of questioning in court. Therefore, children are treated in the same way as adults. They have to testify in court as soon as they have reached an age to be able to understand the questions.

In *Iceland and Luxembourg*, the situation differs from the above described jurisdictions. In spite of the fact that in *Luxembourg*, the law allows the court to use the pre-trial statements, the courts prefer to examine the child during the trial. Even in those cases, where the child has been examined earlier in a child-studio and the questioning was recorded on tape. Similarly, in *Iceland*, the video tape of the hearing in the studio is not considered as sufficient evidence. But the Icelandic court may then decide to question the child in chambers in the presence of the defence counsel and the public prosecutor. The video-recording of this hearing is shown to the accused, who may offer comments. In these two jurisdictions, audio-

visual recording serves mainly as a means to avoid repetitive questioning in the pre-trial stages but does not prevent further questioning in court.

Finally, some jurisdictions have given the court the power to direct the debate and conduct the questioning. As a result, in *Belgian, French, German, Italian, Luxembourg and Turkish* courts, the child can only be questioned by the presiding judge and not directly by any other party to the proceedings. The presiding judge may rephrase the question before putting it to the child. However beneficial this may be to the child-witness, this legal provision is not necessarily an expression of special consideration for the child. The protection of victims against hostile questioning is not per definition the most important rationale, for it may also serve to prevent unnecessarily lengthy examination of witnesses and thus reduce the duration of the trial.

Stage 2: special consideration at the level of the police

A great number of jurisdictions have introduced special training programmes for the police to be able to question children in accordance to their needs. Such training is not only beneficial for the child, but also for the functioning of the criminal justice process. In order to obtain valid evidence from small children, the person questioning the child should be aware of the child's psychology. They should, inter alia, be taught not to ask the same question twice for the child will believe it first gave the wrong answer. The criminal justice authorities must be taught that young children provide the most reliable evidence if they are allowed to tell what happened in their own way and time. This free production of evidence is the most reliable way of giving evidence because it cannot be manipulated by the interrogating officer. The examiner should run through the story as it is told by the child. He should, furthermore, be aware that young children are generally incapable of giving accurate answers to detailed questions.⁴

As a result, questioning children is always performed by specially trained police officers in *Belgium, Denmark, Iceland, Italy, Luxembourg, the Netherlands, Norway, Scotland, Spain and Sweden*. In *Portugal* the INOVAR project will shortly introduce special training for police officers to deal with children. In four of these jurisdictions, *Belgium, Italy, the Netherlands and Spain*, the police forces have, furthermore, created juvenile brigades which are responsible for the investigation of cases involving children and their questioning. In the remaining jurisdictions, police officers do not necessarily belong to a special unit but they are specially trained officers who regularly question children. Finally, in the Swiss cantons of *Bern* and *Schaffhausen*, the questioning of children may also be left to qualified members of the children's welfare department.

Stage 3: some consideration by the judicial authorities

In some jurisdictions, the judicial authorities may take certain measures to improve the manner of questioning of a child-witness, either in the preliminary or trial stage.

In *Austria*, the examining magistrate may decide that the questioning of a child must be conducted by a child-psychologist. In *England and Wales, Ireland and Scotland*, special measures have been implemented to prepare child-witness and their parents or guardians for any examination in court. In these jurisdictions special brochures have been developed for children to explain the trial proceedings and what their role will be. In *Scotland*, a special

⁴ See H.R. Dent, *The effects of interviewing strategies on the results of interviews with children*, in: A.T. Trankell (eds.), *Reconstructing the past*, Deventer, 1982. M.A. King and J.C. Yuille, *Suggestibility and the child witness*, in: S.J. Ceci (eds.), *Children's eyewitness memory*, New York, 1987.

child-witness support scheme has been set up to prepare children for their experience in court. Children are familiarized with the courtroom and explained what will happen. In *Portugal*, the 1999 Act on the Protection of Witnesses allows the pre-trial examiner to be assisted by a social worker for psychological assistance. About the impact of the law on daily legal practice nothing can be said at this point in time.

Other jurisdictions have taken measures to alleviate the burden of given evidence in court. In *Italy*, the public prosecutor may be assisted by experts during the questioning of child-witnesses. However, the defence counsel can still cross-examine the child directly. In *Greece*, very young child-witnesses are not required to give evidence in person. Their parents or guardians may give evidence instead. In *Spain*, children under the age of 18 can be heard in court without the presence of the defendant. In *Switzerland*, the manner of questioning children may vary from canton to canton. In *Zurich*, children are not heard as witnesses but as informants of the court. The main advantage of this practice is that they are not obliged to answer all the questions of the defence counsel. *Norwegian* law allows the court to observe, rather than question the child. The videotape registration of the observation can be shown as evidence in court. In *England and Wales*, certain legal districts have set up innovative practices for child-witnesses. The court timetable is scheduled in a way that allows cases involving children to take place in the afternoon. Furthermore, the waiting time at the court is reduced. The child can wait at home until he receives a phone call to tell him (or his parents) that the trial is about to start. In *Scotland*, the court removes all wigs and gowns during the questioning of a child. If the child is not questioned via a closed circuit television link (see stage 6), the presiding judge will either come down and sit with the child at the clerk's table, or the child will sit with him on the bench. In Glasgow and Edinburgh even specially adapted courtrooms are built for cases involving children.

Finally, for the near future, the *English* 1998 Youth Justice and Criminal Evidence Bill proposes several legal reforms to improve the manner of questioning of child-witnesses. The child will be allowed to give evidence either behind a screen, through a live television link, or the prerecorded statement of the child may be reproduced as evidence. The questioning of the child-witness may at all times be conducted via an intermediary, who may adapt the question to the age of the child by rephrasing it or by toning it down into a less intimidating or harmful question. In addition, the Bill proposes to make the child's presence in court a less intimidating experience by having the court remove its wigs and gowns during the time the child has to give evidence.

Stage 4: questioning in presence of a trustee

As is stated in guideline C8, a token of special consideration for the personal situation of child-witnesses is to allow them to be questioned in the presence of a parent, a guardian or another support person. In *Cyprus*, *Luxembourg*, *Malta* and *Spain*, the child-victim is always questioned by the police in the presence of his parents or another trusted person. In *Denmark*, the child-victim is questioned in presence of a representative of the social service. He cannot be accompanied by a parent. In *Austria*, *Belgium*, *Iceland*, *Liechtenstein*, *Spain*, *Switzerland*, children can be accompanied by anyone who can be of support to them. In *Portugal*, this has recently been allowed by the 1999 Witness Protection Act. Finally, in *England and Wales*, the Youth Justice and Criminal Evidence Bill proposes to allow vulnerable victims, such as children and persons with learning disabilities to be accompanied by trustee or support person.

Stage 5: the child examination studio

The creation of studios to question children in a child-friendly environment is a very important measure to improve the manner of questioning. The child-examination studio permits the authorities to question children under the best possible circumstances. This is beneficial to child-witnesses and the criminal justice system. Even very young children can give evidence that will stand in court, provided that they are questioned by trained officers in a child-friendly environment. In *Belgium, Denmark, Iceland, Luxembourg, the Netherlands, Norway, Scotland and Sweden*, the police have special interrogation rooms for children where the child can sit and play during the questioning. The studio is divided by a one or two-way screen. In one part of the room the child is questioned. In the other part, behind the screen, the examination is observed and assessed by, for instance, the prosecutor, another trained police officer, and the lawyers of the defendant and the child. Interestingly, both in *the Netherlands and Norway* the questioning was initially performed by specialists who were not trained as police officers. This practice was quite unsuccessful because the specialists did not know what questions should be asked to gather sufficient evidence to substantiate the charge. Nowadays, police officers are specially trained in how to conduct a questioning involving children, including toddlers.

Stage 6: the live television-link

In *Austria, England and Wales, Ireland, Italy, Liechtenstein, Luxembourg, Portugal and Scotland*, the legislature has created the opportunity to hear children via a closed-circuit television link, which is connected to the courtroom.

In *Austria, Germany, Liechtenstein and Portugal*, both during the pre-trial and the trial stages, children can be heard in an adjacent room through a television-link to protect him from direct questioning by the defence counsel. All *Austrian* courts have now the capacity to hear children in this manner. Also, the rooms are pleasantly furnished to make the child feel more at ease during the questioning. Both in *Austria and Liechtenstein*, the actual questioning is conducted through intermediary persons. They are seated as well in the adjacent room and hear the question via an earplug. Also in *Ireland, Italy and Portugal*, the television-linked questioning of the child may go through an intermediary. In *Italy*, a child-psychologist functions as the intermediary. In *England and Wales, Ireland and Scotland*, juvenile victims have the formal right to be questioned through a live television link in court. But in *Ireland*, only the four courts in Dublin have installed the needed electronic equipment.

Stage 7: video-registration of the examination in the studio

Video-registration of the pre-trial questioning by the police can be used as evidence in court in *Belgium, Denmark, Germany, the Netherlands, Norway and Sweden*. This are the same jurisdictions which use a child-studio to question children, with the exception of *Iceland and Scotland*.

In *Belgium*, the Guideline on Audio-Visual Recording determines that victims under the age of 14 can be questioned only once by a specially trained police officer. In court, the video-tape is admissible as evidence. The court watches the tape *in camera*. In *Germany*, the Witness Protection Act allows for the audio-visual registration of the questioning of child-victims under the age of 16. The presiding judge, however, may also decide to hear the child in the absence of the defendant. Furthermore, *German* courts may question the child in another, private room without the presence of the parties and the public. This practice is, however, widely criticized. In *the Netherlands*, the questioning of children under the age of 16 is done in a child-studio. The video-tape recording is allowed as evidence in court. Likewise, the video registration of the studio examination of children is shown as evidence

in court in *Denmark, Norway and Sweden*. In *Denmark*, however, the court determines when and by whom a child under the age of 15 is questioned. As a rule, children do not testify in court but it may occur, even in cases of sexual abuse, that the child is heard in the presence of the accused.

In the near future the *Irish Criminal Evidence Act* will declare video-recorded pre-trial statements by alleged victims under the age of 14 admissible in court. This is a very important as well as a remarkable reform. Under common law, cross-examination of witnesses is generally considered to be vital to criminal proceedings as well as an inalienable right of the defence.

3.2.2 Persons with Mental Disabilities

Developmental scheme regarding questioning of persons with mental disabilities:

0 – no special attention	
-----	R(85)11
1 – questioned in presence of trustee	
-----	R(85)11
2 – special measures	
3 – questioning through a live television link	
4 – video-registration used as evidence in court	

Stage 1: no special attention

Contrary to children, very few jurisdictions have special facilities for persons with mental disabilities or learning difficulties. This means that as long as they understand the questions they will have to testify like any other witness. This situation prevails in *Cyprus, Denmark, France, Germany, Greece, Iceland, Italy, Liechtenstein, Malta, the Netherlands, Spain, Sweden and Turkey*. Only if persons with learning disabilities are unable to answer the questions of the public prosecutor or the defence counsel, they are exempt from giving evidence in court. Unfortunately, this may mean that the offender cannot be convicted. For that reason, it is advisable to introduce measures that allow for the questioning of persons with mental disabilities in a manner that gives due consideration to their mental capacities.

Stage 1: questioning in the presence of a trustee

A first step to improve the manner of questioning is to allow a person with mental disabilities to be accompanied by a person he trusts. This measure has been implemented in *Austria, Belgium, England and Wales, Ireland, Luxembourg, Scotland and Switzerland*. The *Portuguese Witness Protection Act* allows all vulnerable victim-witnesses to be accompanied by a support person.

Stage 2: special measures for persons with mental disabilities

This burden for the criminal justice system of losing out potential valid testimony is greatest in jurisdictions governed by the orality and immediacy principles. Among these jurisdictions, the strain on persons with mental disabilities is the most apparent in legal systems which allow cross-examination of witnesses. For that reason, it is unsurprising that most attention to victim-witnesses with mental disabilities is given in *England and Wales, Ireland and Scotland*. The explanation for the fact that in *Cyprus and Malta* despite similar legal systems hardly any attention is given to victims with learning disabilities lies in the more general lack of

awareness for the position of vulnerable victims during criminal proceedings in these two jurisdictions. In jurisdictions where evidence, gathered during the preliminary stages, is admissible in court, less frequently problems arise with victim-witnesses who have mental disabilities.

In *England and Wales, Ireland and Scotland*, the authorities have printed brochures for persons with learning disability and their parents or guardians. These brochures are quite similar to the brochures for children: they explain the court proceedings and what their role will be. Also, special projects have been set up that familiarize witnesses to the court surroundings and allow them to see the courtroom before the trial. During the visit, the court proceedings are explained. In *Scotland*, persons with a learning disability are questioned with the help of an appropriate adult. During the trial, they can be questioned through a closed-circuit television-link to the courtroom.

Stage 3: the right to be questioned through a live television-link

In *Austria, Germany, Liechtenstein and Scotland*, persons with mental disabilities can be questioned through a closed-circuit television-link. The *Portuguese Witness Protection Act* allows for television or video-linked questioning. In *England and Wales*, the Youth Justice and Criminal Evidence Bill proposes to introduce this legal reform to improve the manner of questioning of persons with a learning disability.

Stage 4: video-tape of questioning in studio is admissible in court

The jurisdictions which allow children to be heard in special studios may hear persons with mental disabilities in these studios as well (*Belgium, Denmark, Iceland, Luxembourg, the Netherlands, Norway, Scotland, Sweden*). If these jurisdictions would use these facility for persons with mental disabilities, the video-tape of the examination is admissible as evidence during the trial in *Belgium, Denmark, Germany, the Netherlands, Norway, Sweden*. It is unknown, however, whether these jurisdictions frequently use these facilities for persons with learning disabilities. In *the Netherlands*, persons with the mental capacity of someone under the age of 16 may be heard in a child-examination studio. Usually, these cases involve sexual abuse of persons with mental disabilities. Today, *Norway* is the only jurisdiction where witnesses with mental disabilities have a formal right to be questioned by specialists in a studio.

3.2.3 Other Vulnerable Victims

Regarding this group of victims, we focussed on the attention of the criminal justice authorities for victims of sexual crimes and for victims of domestic violence. In general victims of sexual crimes receive much more attention than victims of domestic violence. The treatment and questioning of victims of sexual crimes has long been the focal point of protest by feminist groups. Only recently, the public has become more aware of the position of victims of domestic violence within criminal proceedings. For a long time, domestic violence was considered a private matter which fell outside of the criminal justice domain. In addition, most women do not report incidents of domestic violence to the authorities. Women often try to conceal their physical and mental suffering from the outside world. As a result, it was felt, for a long time, that domestic violence was not a very big issue that only occurred in certain groups of the population or in certain cultures. Today, this myth is shattered.

Developmental scheme manner of questioning other vulnerable victims:

- 1 - little attention for the questioning of vulnerable victims
-
- 2 - practical measures and legal reforms at the level of the police:
 - a) questioning by police officer of the same sex
 - b) questioning in the presence of a trustee
 - c) rape units
 - d) domestic violence units
 - e) formal rules on questioning
 - 3 - practical measures and legal reforms at the level of the other authorities:
 - a) questioning in absence of accused
 - b) no cross-examination on the victim's sexual history
 - c) formal rules
 - 4 - special facilities for the questioning of vulnerable victims:
 - a) rape suites
 - b) video-link
 - c) video-recorded evidence admissible in court.

Stage 1: little attention

If the police are not given any victim-awareness training (*France, Germany, Greece, Italy, Liechtenstein, Malta, Portugal, Spain and Turkey*, see § 2.1), a general lack of awareness can be observed regarding the manner in which the police should question victims of sexual crimes or domestic violence. In *Germany, Liechtenstein and Spain*, however, this is remedied to some extent by legal reforms. In *Portugal*, the 1991 Act on the Protection of Women sees at the creation of special units for victims of domestic violence and sexual offences. To date, however, no such units have been set up. In the remaining jurisdictions, such as *France*, the police generally show little consideration to the victim and the manner of questioning is classified by numerous victims as unpleasant. Due to a lack of training, the manner of questioning depends entirely on the sensitivity and intuition of the individual officer. Moreover, in these nine jurisdictions, the consideration for vulnerable victims may vary considerably. For instance in *Italy, Portugal and Spain*, victims living in the south are, as a rule, worse off than in the northern parts of the country. This is particularly true for victims of domestic violence for whom the police usually have the least consideration. Their difficulties are viewed upon as a private family matter which does not concern them until a 'real' crime has been committed.

The judicial authorities – public prosecutors, magistrates and judges – are usually even less aware of the importance of considerate questioning than the police. A first expression of unawareness is the practice of confronting vulnerable victims with the accused during the pre-trial stages. Especially in *Luxembourg and France*, examining magistrates regularly confront the victim with the defendant. Examining magistrates believe it impossible to conduct a satisfactory investigation without confronting the victim and the suspect during the questioning. The confrontation is especially valued when there is little evidence, or when the evidence consists mainly of the testimony of the victim, e.g. in rape cases. Magistrates seem little aware of the fact that this may be a very painful experience. Some magistrates even feel that an unexpected confrontation of the victim with the accused is the best way to discover the truth. The use of unannounced confrontations must be abolished forthwith. The presumed benefits regarding fact-finding or the discovering of the truth do not outweigh

the evidential risk of serious secondary victimization.

A second expression of the judicial authorities' lack of knowledge is the fact that they generally ignore the concept of secondary victimization. Generally speaking, the *French, Greek, Icelandic, Italian, Maltese, Portuguese, Spanish and Turkish* prosecutors, magistrates and judges ignore the risk of secondary victimization when they question victims of sexual crimes and domestic violence. In *Iceland*, victims particularly object to the rude questioning and the standard confrontation with the defendant in court. As a rule, the authorities in these eight jurisdictions have little knowledge of the possible aggravating effects of the presence of the defendant on vulnerable victims.

Stage 2: reforms at the level of the police

A first sign of awareness of the needs of vulnerable victims is giving them the opportunity to be questioned by a police officer of the same sex. In *Belgium, Cyprus, Denmark, England and Wales, Iceland, Ireland, Malta, Liechtenstein, the Netherlands, Norway, Portugal, Spain and Switzerland* victims of sexual crimes are offered the possibility to be questioned by female police officers. However, this does not always mean that these victims can always be heard by a female officer because they are not always available. But at least an official policy exists that if a (qualified) female police officer is on duty, she should conduct the questioning if the victim so wishes.

In addition, four jurisdictions – *England and Wales, the Netherlands, Portugal and Switzerland* – allow vulnerable victims to be accompanied by a person of confidence during their questioning. This is a measure that can quite easily be implemented and is, therefore, worthwhile considering in other jurisdictions.

A third victim-oriented reform is the creation of special units to conduct both the questioning and the investigation in cases involving sexual offences. Rape units have been established in *England and Wales, certain German States, Ireland and Spain*. In *the Netherlands* these units were abolished a few years ago but will be reinstated. The policy that every police officer should be able to conduct the questioning and investigation of sexual offences has failed. Also, the valuable expertise of the specialists decreased rapidly. Furthermore, in *England and Wales* a female police officer is appointed as a rape chaperone. The chaperone serves as a liaison officer for the rape victim. All communications, both from the victim to the criminal justice authorities and vice versa, go through this police officer.

Similarly, *Cyprus, England and Wales, Ireland and Luxembourg* have established domestic violence units. The members of these units are offered specific training programmes. As a result, the manner in which victims of domestic violence are treated and questioned has significantly improved. In *Portugal*, the police have developed a special security plan for victims of domestic violence, in the form of a guide.

Finally, in *Belgium and the Netherlands* special guidelines have been issued regarding the police questioning of victims of sexual offences. The *Belgian* Guideline on Sexual Aggression is very specific on to conduct the questioning of victims of sexual crimes. The guideline obliges the police to explain to victims why certain potentially harmful questions must be asked. They must also prepare victims for a confrontation with the suspect, if this is considered vital to the investigation. Likewise, in *the Netherlands*, the 1986 Guideline concerning victims of sexual offences (the Beaufort Guideline) has had a considerable impact on the way these victims are treated and, in particular, on the manner of questioning. Today, virtually no Dutch police officer is unaware of how they should treat and question victims of sexual offences. This does not mean, however, that they are all capable to do the questioning themselves. Therefore, they are instructed to leave the questioning to experi-

enced and specially trained officers. The Beaufort Guideline underlines that no questions should be asked or remarks be made that blame victims and/or express any disbelief in their story.

Stage 3: reforms concerning the judicial authorities

As a rule, the awareness of judicial authorities of how to treat and question vulnerable victims is inferior to that of the police. Public prosecutors and judges never receive any training on this subject. The only exceptions to this rule are the *Dutch* public prosecutors and trainee judges, and the *English* magistrates. It is, therefore, a definite sign of sophistication if public prosecutors and judges are aware of the effects of inconsiderate questioning.

In general, *Belgian, Luxembourg, Dutch, Norwegian, Swedish* and *Swiss* judges will rarely condone inconsiderate examination of victim-witnesses, vulnerable or not. In these jurisdictions it is common knowledge among defence counsels that this defence strategy is likely to annoy the court and may backfire on their clients case.

Certain jurisdictions have taken concrete steps to improve the manner of questioning in court. In *Austria, Germany, Iceland, the Netherlands, Norway, Portugal* and *Switzerland*, the court may question the victim in the absence of the accused but in the presence of his counsel.

It is important to note that in common law jurisdictions and jurisdictions heavily influenced by common law (*Cyprus, England and Wales, Ireland, Malta* and *Scotland*), the law does not offer the courts the opportunity to hear an adult witness in the absence of the defendant. Furthermore, judges are not allowed to play an active role. As a result, judges do not (easily) intervene in the questioning of witnesses. Though they may be very conscious of the risk of secondary victimization, judges may feel that they cannot give the impression to protect the victim-witness, and thus favour his side in a contested case. However, the *English, Irish* and *Scottish* law do no longer allow the defence counsel to ask questions in cross-examination about the victim's sexual history and sexual inclinations without special leave of the court. In *England and Wales*, a jurisdiction renowned for its harsh cross-examination, the 1976 Sexual Offences Act already disallowed cross-examination on the victim's sexual history without special leave of the presiding judge. In English court practice, however, this rule has been proven to be of little value because judges invariably grant permission to broach the subject of the victim's past sexual history. For the future the 1998 Youth Justice and Criminal Evidence Bill may considerably improve the manner of questioning of vulnerable victims. It proposes *inter alia* to allow the victim to testify behind a screen or via a live television link – which is today already possible in *Scotland* – either through an intermediary person or not. It also proposes to allow audio-visual registration of the victim's pre-trial statement and to show it as evidence in court.

Likewise, in the *Scandinavian jurisdictions*, where cross-examination also exists but in a completely different, less harsh manner, the victim cannot be questioned by the defence counsel about his sexual history. In *Iceland*, the only Scandinavian jurisdictions where it is allowed, it is most uncommon.

Finally, four jurisdictions (*Cyprus, Portugal, Spain* and *Switzerland*) have introduced important legal reforms. In *Portugal*, the Witness Protection Act is expected to greatly improve the manner of questioning. In *Spain*, the legislature has recently obliged the criminal justice authorities to question victims of sexual offences in a manner that gives due consideration to their personal situation and dignity (s. 15 State Compensation Act). Spanish courts are traditionally rarely inclined to protect victims against harsh questions by the defence counsel. Whether a formal obligation is able to change this mentality cannot yet be assessed. The effects of a formal obligation should not be underestimated though. The

Cypriot legislature, for instance, has issued a Domestic Violence Act that has had a great impact on the manner of questioning by the police. But it has had less of an effect on the manner of questioning in the courtroom and the willingness of the courts to intervene and stop a disrespectful line of questioning. It is probable that changing the manner of questioning in court is probably a more long-winded undertaking than improving police questioning. The fact that the courts generally disapprove of training, for this would jeopardize their independence and/or impartiality, may contribute to this phenomenon. Notwithstanding the above, the introduction of formal rules is important for it expresses the legislature's opinion that the manner of questioning must change.

Of all jurisdictions included in the research, the legal reforms undertaken in *Switzerland* to improve the manner of questioning of vulnerable victims are particularly worthy of esteem. The victim of serious crime has the right to bring a support person to all hearings. He can no longer be confronted with the defendant at any stage of the proceedings without his consent. If he refuses a confrontation, the accused has to leave the room where the questioning takes place. The accused has the right to follow the questioning through a live television-link and suggest further questions. If it is impossible to establish a live television-link, the statement of the victim should be read to him. Hereafter, he may propose that additional questions be asked. Furthermore, the victim may request to be questioned by an authority of the same sex during all stages of the criminal proceedings. This means, for example, that the victim may decide that his case be tried by a female judge in a single-judge court. If the case is tried by a panel court, the court must comprise judges of both sexes. In addition, the victim has the right to refuse to answer questions about private matters. Interestingly, very few victims use this right. Perhaps due to the great awareness of the criminal justice authorities of the manner of questioning, victim-witnesses feel comfortable enough to answer questions which relate to their private life.

Stage 4: special facilities

The setting up of rape suites in *England and Wales*, *Scotland and Ireland*, *Norway (Oslo)* and a rape trauma centre in *Iceland (Reykjavik)* is very important to many vulnerable victims. A rape suite is a special reception facility at the police station where a victim of rape can be questioned in comfortable surroundings. If a rape victim reports the offence, he is immediately brought to the rape suite where everything is prepared for the victim to be questioned by trained officers and for safeguarding the evidence. The forensic evidence is taken by a medical doctor in a separate part of the rape-suite. Also, the rape suite allows the victim to take a shower after the physical examination. The *Icelandic* rape trauma centre is very similar to the rape suite. The main difference is that it is situated in a hospital. The *Icelandic* police immediately accompany a victim of rape, who wishes to report the crime, to the rape trauma centre, where specialists are waiting to question and physically examine him under the best possible conditions.

Six other jurisdictions allow for the use of a live television-link to improve the manner of questioning (*Ireland*, *Germany*, *Liechtenstein*, *Portugal*, *Scotland* and *Switzerland*). In *Germany*, *Liechtenstein* and *Portugal*, the court has the opportunity to question any witness to whom the questioning in the presence of the defendant poses a threat to his well-being in another room, while transmitting the testimony by audio-visual means. *Portuguese* law even allows the victim to remain unrecognizable. In *Switzerland*, every victim of serious crime has the right to be questioned through a television-link. In *Ireland* and *Scotland*, the legislature has recently issued formal rules which allow for the questioning vulnerable witnesses via alternative means, such as a closed circuit television-link or from behind a screen. In *Ireland*,

the questions may, in addition, be put through an intermediary. In *England and Wales*, this is currently under consideration.

A final reform that should be introduced is to provide for questioning in rape-suites and to record the examination on audio-visual tape in order to use it as evidence in court. This would greatly improve the manner of questioning of vulnerable victims for they would only be questioned by specially trained officers. In the common law jurisdictions, however, where much value is attached to examining the victim 'live' during the trial, the video-tape may not be considered to do justice to the rights of the defence. The possible loss of the right to cross-examine the witness could be solved by allowing a (state-paid) lawyer, added to the case by the Bar Association, to witness the questioning in the rape suite. He should make sure that the rights of the suspect are safeguarded. Furthermore, it would reduce the number of times the victim has to relive the offence.

3.2.4 The 'average victim'

Whether the victim of 'ordinary' crime is questioned in a manner which gives due consideration to his personal situation and his dignity depends, foremost, on the individual examiner's knowledge of the distress inconsiderate questioning may cause. Secondly, it is determined by the working of the criminal justice system. The system may incorporate rules or practices that may have a positive or a negative influence on the manner of questioning of 'average', supposedly not particularly vulnerable victims.

In this section, a brief description of such local realities is given. Hereafter, some remarks are made on the manner of questioning of the average victim in the individual jurisdictions. The few legal reforms that have been implemented are included.

Knowledge of secondary victimization

As we have discussed in the section on victim-awareness training, the training of recruits is as a rule insufficient to change the manner in which victims are questioned. It is rare for newcomers in any organization, particularly if they are young and inexperienced, to be able to improve age-old working-methods, unless incumbent personnel is trained as well. Only in six jurisdictions incumbent police personnel is extensively trained on victim-related topics and in two jurisdictions victim-awareness training for the judicial authorities is provided. In these eight jurisdictions, the manner of questioning of the average victim is, in all likelihood, positively influenced by training. In the remaining jurisdictions, the general level of awareness of the risk of secondary victimization is probably much lower. Concerning certain groups of particularly vulnerable victims, however, the situation may be quite different, as is indicated in § 3.2.3, stage 3.

As a rule of thumb, we can say that in the *Anglo-Saxon* and *Nordic* jurisdictions, as well as in the *Benelux*, the knowledge of the concept of secondary victimization is greatest. The phenomenon secondary victimization is generally poorly known in most Mediterranean jurisdictions, and particularly in *Cyprus*, *Greece*, *Italy*, *Malta* and *Turkey*.

Characteristics of the criminal justice system

In addition to the general level of victim awareness, the criminal justice system itself may have a considerable impact on the manner of questioning of the average victim. Certain legal provisions that may have a positive or negative impact on the manner of questioning (A and B) are discussed, followed by legal practices (C and D). It is important to emphasize that local realities with a negative impact may outweigh those with a positive impact, or

even an advanced level of awareness of the risk of secondary victimization.

A Legal provisions with a potential positive influence

Certain legal provisions, common to all jurisdictions, may have a positive influence on the manner of questioning. These legal provision concern mostly the trial stage. Every criminal justice system includes the possibility of holding a trial (partly) *in camera* (see guideline F.15). All jurisdictions have also given the court the authority to intervene and disallow disrespectful, irrelevant or impertinent questions. What is therefore critical to best practice is the actual implementation of such provisions. In certain jurisdictions, such as *Belgium, the Netherlands* and the *Nordic* jurisdictions except for *Iceland*, the courts are quite willing to protect the victim-witness. In the *common law* jurisdictions, however, the courts do not easily intervene if the line of questioning is inconsiderate or disrespectful.

The active role of the court during the examination of witnesses is also important to the manner of questioning. In *Belgium, Luxembourg* and *Turkey*, the presiding judge directs the questioning and decides whether or not a question may be put to the victim. The defence counsel is not allowed to question witnesses directly. The examination is conducted through the presiding judge. He may either allow the question and give the victim permission to answer it, or he may rephrase or disallow the question. In the other continental jurisdictions, the courts direct the debates but the legislature allows for direct examination of witnesses. In *Spain* the defence counsel has even the right to seek legal remedy if the court does not allow them to put certain questions to the victim-witness.

B Legal provisions with a potential negative influence

Besides the features that may promote the manner of questioning, criminal justice systems may incorporate lineaments that are potentially detrimental to the way the victim is questioned. A great number of criminal justice systems are of an adversarial nature and allow for the cross-examination of witnesses. Cross-examination may concern the issue or the facts related to the offence, but it may also regard the credit of the witness. Being subjected to cross-examination by the defence counsel can always be a quite aggravating experience for victims, but this is particularly true for cross-examination to credit. This form of cross-examination mainly tries to undermine the credibility of the victim-witness by trying to put (part of) the blame on the victim or to find fault in his past. Although cross-examination is an element found in both the *common law* and the *Nordic* jurisdictions, it is foremost a problem in the common law jurisdictions. In the *Nordic* jurisdictions, with the exception of *Iceland*, harsh and disrespectful cross-examination by the defence counsel is simply not done and is not accepted by the court.

The second characteristic with a potential negative influence on the manner of questioning of victims is the fact that the victim may be questioned by the defendant himself. Though it is quite rare for the accused to conduct his own defence, it still happens occasionally. It is a phenomenon common to many jurisdictions, but it is, foremost, a problem in *Cyprus, England and Wales, Ireland, Malta* and *Scotland*. These five jurisdictions generally allow for harsh cross-examination and the courts do not readily intervene to stop harmful and disrespectful questions. In *England and Wales* this right of the defendant is currently under debate, following some exceptionally dramatic rape cases where the accused personally subjected the victim-witness to a long-lasting and painful questioning.

C Legal practices with a potential positive influence

One aspect of legal practice that can be considered as a sign of sophistication are the witness to court programmes and the separate waiting rooms for victims in court-buildings.

The witness to court programmes are foremost found in *England and Wales, Ireland and Scotland*. The explanation for this phenomenon is the fact that testifying in these adversarial systems can be quite an ordeal for victims and a worse experience than in most other jurisdictions. The witness to court programmes are aimed at familiarizing the victim-witness with the courtroom and explaining the criminal proceedings. At the same time, the programmes offer moral support throughout the trial proceedings. The witness to court programmes were set up because many victims were too intimidated by their surroundings or too shocked by the experience to still be able to function adequately as a witness. In practice, the witness to court programmes are very much valued by victims and legal practitioners alike.

Separate waiting rooms at the courts are important to victims and their relatives who dread the confrontation with the accused and his family or friends. In *Ireland*, in all renovated or new courts separate waiting-rooms for victims are being built. In *the Netherlands*, certain (new) court buildings provide separate waiting-rooms for victims.

D Legal practices with a potential negative impact

In Europe, it is still rather common to perceive the victim as an *alleged* victim until the accused has been convicted. Numerous legal practitioners, especially judges, consider it legally sound to treat the victim as an alleged victim, in analogy to the official status of the offender before the court's verdict. However, contrary to the position of the offender, the position of the victims is not reinforced by this concept. It has without a doubt a negative impact on the way the victim is questioned. If an individual (examining) magistrate or judge sees the victim foremost as an alleged victim, he will be less inclined to avoid potentially harmful questions or to disallow a line of defence that is essentially a character attack on the victim.

In most jurisdictions, the majority of legal practitioners do not perceive the victim as an alleged victim. In *Cyprus, England and Wales, Greece, Ireland, Malta and Scotland*, however, the criminal justice system defines the victim as an alleged victim whose innocence is not established until the guilt of the defendant is decreed. This characteristic of the criminal justice system may make being questioning an ordeal. Nonetheless, the manner of questioning in court is much less harsh in *Greece* than it is in the other five jurisdictions. Greek courts generally exude an atmosphere of cordiality rather than of animosity. Moreover, the courts are very much in charge of the questioning.

Further remarks on the manner of questioning

During the course of our study, we have discovered too few legal reforms aimed at improving the manner of questioning of the average victim to allow us to present our findings in a developmental scheme. Only *Belgium* and *the Netherlands* have introduced legal reforms at the level of the police. Concerning the judicial authorities, this has only be done in *Austria* and *Germany*. Five jurisdiction allow the average victim to be questioned without the presence of the accused, if his presence would threaten the victims's well-being or would prevent him from testifying (*Austria, Germany, the Netherlands, Switzerland, Turkey*). Although this opportunity is not strictly limited to vulnerable victims, it will usually be used to improve

the manner of these victims rather than that of the average victim. The discussion of additional local realities that bear an influence on the manner of questioning is limited to some tentative remarks.

Remarks on police questioning of the average victim

If the police have little consideration for vulnerable victims, such as children and victims of sexual offences, it is most probable that they will show even less consideration for other victims. Contrary to the questioning of vulnerable victims with whom the police often have a certain degree of empathy, the reasons to give due consideration to the emotions and dignity of victims of ordinary crime are, as a rule, less apparent. Without adequate victim-awareness training, it is improbable that the police question victims according to the standards set in the guideline. Concerning crimes that are committed regularly, such as theft or burglary, policemen do not necessarily have much understanding for the sometimes highly emotional reaction of the victim. Training is probably the best way to raise awareness of the distress such crimes may cause. In jurisdictions which have introduced extensive training for recruits (*Austria, Belgium, England and Wales, Iceland, the Netherlands, Norway*) the manner of questioning is generally more considerate than in jurisdictions which offer limited training or no training at all. In jurisdictions which offer training to incumbent personnel as well as to recruits (*Belgium, Denmark, England and Wales, Iceland, Luxembourg, the Netherlands, Norway and Scotland*) or provide follow-up courses of a general scope (*Denmark and the Netherlands*), the manner of questioning by the police is likely to be even more considerate.

Apart from victim-awareness training, formal rules on the manner of questioning may be of critical importance. Though changing the manner of questioning of vulnerable victims will be more easily achieved. Formal rules have been issued in *Belgium* and *the Netherlands*. According to the *Belgian* Guideline OOP 15bis and internal circulars, the police must make sure to create the right ambience to question victims of crime. Police officers must show understanding for the feelings of the victim, even if the case does not appear to be very serious. They should make sure not to minimize events. Moreover, they should avoid blaming the victim or inducing feelings of guilt. In *the Netherlands*, the 1986 Guideline regarding a new treatment of victims of crime already stipulated that it is of the greatest importance that police officers recognize that the victim may be shocked by the offence and show understanding for his emotions. This obligation is repeated in the subsequent guidelines, such as the 1995 Guideline Terwee.

Remarks on the questioning of average victims by the judicial authorities

Similar to the manner of questioning by the police, the awareness of how to question victims can firstly be improved by training. However, 20 out of 22 jurisdictions do not train public prosecutors, magistrates and judges on victim-related subjects, such as the manner of questioning. Consequently, their level of awareness of the needs and interests of victims is generally lower than that of the police. In addition, the risk that they see the victim foremost as a witness who is instrumental to the criminal proceedings is greater due to their legal background.

Here too, the manner of questioning of the average victim can be improved by formal rules. *Austria and Germany* are the only jurisdictions that have created formal rules regarding the questioning of all victims. *Austrian* law contains the formal right of the victim to refuse to testify or to answer questions that would disgrace him or his relatives, even in the pre-trial stages. The examining magistrate must inform the victim of this right. He may also order the accused to leave the room during the questioning of the victim. He may, furthermore,

decide that the questioning must be conducted through audio-visual means to protect the victim's mental or physical health (irrespective of the type of crime). If these victims have to testify in court, they may again testify through a video-link. All Austrian courts have been equipped with the necessary instruments to allow for audio-visual hearings during the pre-trial and trial stages. Likewise, *German* procedural law contains a general obligation for the authorities to treat every victim with due respect and consideration. Furthermore, it comprises specific rules about what kind of questions are permissible. According to the law, questions that may dishonour witnesses or concern his or his relatives' private life cannot be put to the witness, unless such questions are 'unavoidable'. In court practice, however, this rule is not always followed and disrespectful questioning occurs. Court practice is enforced by case law that allows for questioning to credit, which is often disrespectful towards the victim. German legal practice leads to the hypothesis that to improve the manner of questioning by the judicial authorities, the creation of formal rules is relevant but may be less important than enhancing the awareness of the risk of secondary victimization. This hypothesis seems to be corroborated by legal practice in, for example, the *Belgian, Danish, Dutch, Norwegian* and *Swedish* courts where the manner of questioning is generally respectful and considerate in spite of an absence of formal rules. However, this may be primarily determined by legal culture.

A third means to alleviate the burden of being questioned for victims is to examine the 'average' victim in the absence of the accused, if he so wishes. The *Austrian, Dutch, German, Swiss* and *Turkish* courts have the power to question the witness in absence of the accused. In *Austria*, the witness may ask the court to remove the accused from the courtroom during his testimony. In practice, however, the court will not easily be persuaded to allow this. In *Germany*, the court has the opportunity to question any witness, to whom the questioning in the presence of the defendant poses a threat to his well-being, in another room under transmission of the testimony by audio-visual means. Alternatively, the presiding judge may decide to remove the accused from the courtroom during the testimony. The latter option is also available in *the Netherlands*. In practice, the defence counsel remains in the court room to hear the victim's statement. If the victim-witness has testified and has left the courtroom, the defendant is recalled and is informed of the victim's testimony. Hereafter, he may suggest additional questions. If necessary the victim-witness is recalled to answer further questions in the absence of the accused. Finally, in *Turkey*, the law stipulates that the presiding judge can order the accused to be removed from the courtroom during the questioning of the victim if he fears the witness may not (dare) tell the truth in the presence of the accused.

In conclusion, it is rather difficult to weigh all the local realities that advance or demote the manner of questioning of the average victims. As said, one negative characteristic of the criminal justice system can outweigh several positive legal provisions or practices. For instance, the negative impact of cross-examination in the common law jurisdictions can not be neutralized by witness to court programmes, or the creation of separate waiting rooms for victims. In particular, if the cross-examination is carried out by the defendant himself. Also, the positive effects of police training on how to question victims may be undermined by the negative impact of the concept of the alleged victim held by individual (examining) magistrates or judges. What is clear, however, is that the manner of questioning of supposedly not very vulnerable victims receives much less attention than that of vulnerable victims, such as children and victims of sexual offences. Furthermore, it is much more influenced by the local realities of a jurisdiction. These local realities may have such a great impact

because far too few adequate victim-oriented reforms have been introduced to promote the manner in which the average victim of crime is examined by the judicial authorities. The legislature as well as the legal practitioners should reevaluate the manner in which the average victim is being questioned. The next step should then be to extent measures for vulnerable victims to include other victims. It is not enough to question only vulnerable victims in accordance with guideline C.8. Not in the least because jurisdictions need to have the confidence and cooperation of victims of crime to combat and solve crime.

3.3 The Frequency of Questioning

The frequency of questioning depends not only on the case at hand, but also on the (functioning of) the criminal justice system. It is, therefore, useful to sketch certain features of criminal justice systems that have a direct effect on the frequency of questioning. The number of times a victim is questioned is firstly determined by a legal system's adherence to certain basic principles and rules of criminal law or procedure. The most influential basic principles are, on the one hand, the legality and expediency principle, and the orality and immediacy principle on the other. In addition, certain formal provisions such as the opportunity to offer a guilty plea or to deal with confessing offenders in a more speedy manner are relevant to the repetitiveness of questioning.

Basic principles

First, it is important to know whether the criminal proceedings are governed by the legality or the expediency principle. In jurisdictions that are governed by the legality principle all *prima facie* cases will be prosecuted. If it is governed by the expediency principle, the prosecution service has the power to decide not to prosecute the suspect. He may then simply dismiss the case, or he may offer a transaction to the suspect, i.e., the offer to pay a certain sum to the state in exchange for a dismissal of the case, or start claim settlement or mediation procedures between the victim and the offender. If the suspect pays money to the state or the victim, the case will be dismissed. In *Belgium, Denmark, England and Wales, France, Iceland, Luxembourg, the Netherlands, Norway and Scotland* the prosecution service has the powers not to prosecute the case, even if there is enough evidence to prosecute the suspect.

Second, it is important to enumerate the legal systems which are governed by the orality or the immediacy principle. If a legal system is governed by the orality principle, all items of proof have to be orally presented to the court by the parties, witnesses and experts. The court cannot use documents produced during the pre-trial stage if they are not orally presented during the trial. The immediacy principle interpreted in a *material* sense is very similar to the orality principle: the court may only use statements of suspects, witnesses and experts made during the trial. However, the same principle may also be *formally* interpreted. Then the court may use testimonies given during the pre-trial stage as evidence. But the parties have the right to request that certain witnesses and experts are examined during the trial.⁵ It follows that in jurisdictions that are governed by a strictly interpreted orality and/or immediacy principle, the victim must be re-examined in court, even if he has already been thoroughly questioned during the pre-trial stages. Victims are examined in court, unless there are very special circumstances which would permit the use of his pre-trial statement. The jurisdictions which adhere to the orality principle are the common law systems (*England*

⁵ Under influence of the European Court for Human Rights, the immediacy principle is again more and more interpreted in the material sense.

and Wales, Ireland, Cyprus, Malta), the Germanic jurisdictions (*Germany, Austria, Liechtenstein, German-speaking Switzerland*), the Scandinavian legal systems (*Denmark, Norway, Sweden, Iceland*), as well as some Romanistic and legal systems of a mixed nature (*Italy, Portugal, Greece and Turkey*). It follows that victims in such jurisdictions have to give evidence during the court hearing because the evidence has to be presented orally to the court.

Other jurisdictions are governed by a less formally interpreted immediacy principle (*France, Belgium, Luxembourg and Spain*). In these jurisdictions, the courts usually prefer to hear the victim-witness again during the trial, with the exception of *Belgium*. Though, this is not strictly required by law. The formally interpreted immediacy principle governs the criminal proceedings in *the Netherlands* and *the French and the Italian-speaking parts of Switzerland as well as the canton of Zurich*, which means that it is exceptional for the victim to have to testify in court.

In conclusion, victims throughout Europe – with the exception of *Belgium, the Netherlands* and most *Swiss cantons* – are questioned again in court by the judicial authorities and the defence counsel.

Formal legal provisions

It is relevant to know which jurisdictions incorporate the possibility for the accused to submit a guilty plea or have special procedures for confessing offenders. If an accused pleads guilty before the trial, it may lead to trial avoidance and thus reduce the number of times a victim is questioned. Two jurisdictions (*England and Wales* and *Scotland*) allow a guilty plea. In *Scotland*, the judge must accept the guilty plea and give a verdict, whereas in *England and Wales* the judge may refuse to accept it and may continue the trial proceedings. The same applies to special procedures for confessing offenders, whereby the court may immediately give his verdict without having a full hearing. All Scandinavian jurisdictions (*Denmark, Iceland, Norway, Sweden*) have such procedures. In *Spain*, the confessing offender must give the court permission to give the verdict immediately. Without such permission, the trial proceedings will continue and the victim-witnesses will be questioned.

3.3.1 The developmental scheme

The developmental scheme on the number of times the victim is subjected to questioning by the judicial authorities should be read with the above mentioned local realities in mind. Due to the fact that few jurisdictions have introduced legal reforms to avoid repetitive questioning, the developmental scheme consists mainly of findings that result from the semi-structured interviews held in all 22 jurisdictions.

Developmental scheme concerning the frequency of questioning:

- 1 - repetitive questioning
- 2 - repetitive questioning of vulnerable victims is limited
- 3 - repetitive questioning of all victims is limited

Stage 1: repetitive questioning

In *Cyprus, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Portugal, Spain* and *Turkey*, victims are frequently subjected to repetitive questioning in the pre-trial and trial stages. Even vulnerable victims, such as children, are as a rule questioned again during the trial after being questioned in the pre-trial stage. In spite of the fact that in *Iceland* and

Luxembourg the law allows the court to use pre-trial statements as evidence, the courts prefer to examine the victim again during the trial (for *Iceland*, see further stage 2).

Stage 2: repetitiveness limited regarding vulnerable victims

In all jurisdictions, which allow the recorded questioning of a child-witness to be used as evidence in court (*Belgium, Denmark, Germany, Netherlands, Norway, Portugal and Sweden*), the child is only interviewed once during the pre-trial stage. Children are not re-examined in court. In *Portugal*, the Witness Protection Act stipulates that the examiner should avoid repetitive questioning regarding all vulnerable witnesses. An interesting, recent development in *Iceland* is, however, that the questioning of vulnerable victims by the police and the court may be conducted during one session. This initiative meets the local demand of the courts to hear the victim in person and reduces the number of questioning sessions at the same time.

Regarding victims of sexual crimes, the creation of rape units, rape suites and rape trauma centres reduces the number of times the victim has to give evidence in the pre-trial stages (*England and Wales, certain German states, Iceland, Ireland, Norway, Scotland and Spain*). In addition, the *Dutch* and *Luxembourg* police have adopted an official policy to avoid repetitive questioning as much as possible regarding victims of sexual crimes. The *Dutch* 1986 Guideline stresses that the questioning should be carried out by one designated police officer to prevent that the victim has to tell his story time and again to each officer entering the room.

Furthermore, in *the Netherlands* the victim has the greatest chance not to be subjected again to questioning in court due to the functioning of the criminal justice system (see stage 3), and the particular consideration of the courts for victims of sexual crime. Dutch judges generally disallow the questioning of victims of rape or other sexual offences. The defence counsel may question the victim during the pre-trial stages, or, if the (mental) health risks for the victim are considered too great, the counsel may suggest questions in writing to the examining magistrate.

Stage 3: repetitiveness is limited regarding all victims

Only in jurisdictions where witnesses are not required, as a rule, to testify in court (*Belgium, the Netherlands and most Swiss cantons*), the repetitiveness of questioning is effectively reduced. It cannot be maintained, however, that this is necessarily a victim-oriented legal reform. The decision not to hear all witnesses in court is primarily intended to make the functioning of the criminal justice system more efficient. As a positive side-effect, it reduces the number of times witnesses are questioned. Therefore, it would be very difficult to integrate this legal practice into a developmental scheme indicating the implementation of special victim-oriented reforms or practical measures.

3.4 Conclusions

In general, the manner in which *children* are questioned receives the greatest attention from the legislature as well as from the judicial authorities. This is best demonstrated by the relatively few jurisdictions having hardly any special attention for children.

However, the opportunity for children to be accompanied by a trusted person during any hearing needs still to be implemented in a number of jurisdictions. Furthermore, the opportunity should be created to question children in special studios. The questioning in these studios should be conducted by specially trained police officers rather than by psychologists, as is shown by practice in the *Netherlands* and *Norway*. If possible, legal reforms

should be undertaken to allow for the audio-visual recording of the questioning in the studio and the use of the video-tape as evidence in court. If this step is considered incompatible with the criminal justice system, the child should be questioned in a room adjacent to the court through a closed-circuit television-link. Preferably, the questions should be relayed to the child through an intermediary person who can rephrase the question and adapt it to the mental capacity and age of the child.

Developmental scheme on the manner of questioning children:

1 - contingent on the individual examiner: <i>France, Greece, Malta, Turkey.</i>	-
2 - special attention at the level of the police: <i>Belgium, Denmark, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Scotland, Spain, Sweden, some Swiss cantons.</i>	-
3 - some attention at the level of the courts: <i>Austria, certain districts of England and Wales, Greece, Italy, Norway, Portugal, Spain, some Swiss cantons.</i>	-
-----R (85) 11	
4 - questioning in the presence of a trustee: <i>Austria, Belgium, Cyprus, Denmark, Iceland, Liechtenstein, Luxembourg, Malta, the Netherlands, Portugal, Spain, Switzerland.</i>	R
-----R (85) 11	
5 - questioning in a child-friendly hearing-studio: <i>Belgium, Denmark, Iceland, Luxembourg, the Netherlands, Norway, Scotland, Sweden.</i>	+
6 - questioning through a live television-link: <i>Austria, England and Wales, Germany, Ireland, Italy, Liechtenstein, Luxembourg, Portugal, Scotland.</i>	+
7 - video-recording is used as evidence in court: <i>Belgium, Denmark, Germany, the Netherlands, Norway, Sweden.</i>	++

The manner of questioning of *persons with mental disabilities* would benefit greatly from the same measures. Unfortunately, far less jurisdictions have attention for the special needs of these vulnerable victims than for children.

Developmental scheme concerning the questioning of persons with mental disabilities:

0 - no special attention: <i>Cyprus, Denmark, France, Germany, Greece, Iceland, Italy, Liechtenstein, Malta, the Netherlands, Spain, Sweden, Turkey</i>	-
-----R(85)11	
1 - questioning in presence of trustee: <i>Austria, Belgium, England and Wales, Ireland, Luxembourg, Portugal, Scotland, Switzerland</i>	R
-----R(85)11	
2 - special measures for persons with mental disabilities: <i>England and Wales, Ireland, Scotland.</i>	+
3 - questioning via live television link: <i>Austria, Germany, Liechtenstein, Portugal, Scotland</i>	+
4 - video-recorded questioning allowed as evidence in court: <i>Norway (Belgium, Denmark, Germany, the Netherlands, Sweden)</i>	++

Concerning *vulnerable adult victims*, much more attention is given to the questioning of victims of sexual offences compared to victims of domestic violence. Only four jurisdictions (*Cyprus, England and Wales, Ireland and Luxembourg*) have created special domestic violence units. *Cyprus* is the only jurisdiction that has issued a special law concerning domestic violence. Given the fact that domestic violence is considered a major problem that needs to be combatted,

it is advisable for other jurisdictions to take similar steps to improve the treatment of victims of domestic violence throughout the criminal justice system.

Other measures and legal reforms are, foremost, aimed at victims of sexual crimes and occasionally at other vulnerable victims. The first step to improve the manner of questioning of vulnerable victims is to allow them to be questioned by a police officer of the same sex, and in the presence of a trusted person. Also, the police should consider setting up sexual crime and domestic violence units. Members of such units must be trained on how to investigate domestic violence cases, and how to conduct the questioning. It is also advisable to set up rape suites for the reception, treatment and questioning of victims of sexual crimes. During the trial, these victims should have the opportunity to be heard in the absence of the accused. Preferably, the questioning should be conducted via a live television-link. In jurisdictions that give defence counsels the right to cross-examine a victim of sexual crimes, no questions on the victim's sexual history should be allowed.

Finally, the recording of the questioning in the rape suites on video-tape and its subsequent use as evidence during the trial should be considered. Similarly to the questioning of children, the burden of having to testify would be considerably alleviated if victims of sexual crime would only have to be questioned once. Unfortunately, this reform measure has not been implemented in any of the jurisdictions.

Developmental scheme manner of questioning vulnerable victims:

- 1 - little considerate questioning by the judicial authorities: *France, Greece, Italy, Malta, Portugal, Turkey*
- 2 - practical measures and legal reforms at the level of the police:
 - a) questioning by police officer of the same sex: *Belgium, Cyprus, Denmark, England and Wales, Iceland, Ireland, Liechtenstein, Malta, the Netherlands, Norway, Portugal, Spain, Switzerland*
 - b) questioning in the presence of a trustee: *England and Wales, the Netherlands, Portugal, Switzerland*
 - c) rape units: *England and Wales, certain German states, Ireland, Spain*
 - d) domestic violence units: *Cyprus, England and Wales, Ireland and Luxembourg*
 - e) formal rules on questioning: *Belgium, the Netherlands*
- 3 - practical measures and legal reforms at the level of the other authorities:
 - a) questioning in absence of accused: *Austria, Germany, Iceland, the Netherlands, Norway, Portugal, Switzerland*
 - b) no cross-examination on the victim's sexual history: *England and Wales, Denmark, Ireland, Scotland, Norway, Sweden*
 - c) formal rules: *Cyprus, Portugal, Spain, Switzerland*
- 4 - special facilities for the questioning of vulnerable victims:
 - a) rape suites: *England and Wales, Iceland, Ireland, Norway, Scotland*
 - b) video-link: *Germany, Ireland, Liechtenstein, Portugal, Scotland*
 - c) video-recorded questioning in rape suite admissible as evidence in court

The manner of questioning of the *average* victim cannot easily be assessed. It is, however, undeniable that the manner of questioning of the average victim receives even less attention than that of vulnerable victims. Only in four jurisdictions, legal reforms have been introduced to improve the manner of questioning of these victims. In *Belgium* and *the Netherlands*, the reforms see at the manner of questioning by the police, whereas in *Austria* and *Germany* these are aimed at the manner of questioning by the judicial authorities. It is interesting to see that the positive impact of reforms can be neutralized by legal practice. The same

is true for local realities with a potential positive influence. Nevertheless, the legislature and legal practitioners should be more aware of the manner of questioning. Today, the manner in which victims are questioned does not live up to the standards set out in guideline C.8.

The *frequency* of questioning is determined by the workings of the criminal justice system and by the awareness of the criminal justice authorities of the potential aggravating effects of repetitive questioning. It is rather remarkable that in less than half of the 22 jurisdictions, the authorities try to reduce the number of hearings involving vulnerable victims. In none of the jurisdictions, legal reforms are introduced to avoid repetitive questioning in all cases. In general, the frequency of questioning is given much less attention than the manner of questioning. Even so, it is important to realize that the number of times a victim is questioned is equally relevant to his perception of procedural justice and the criminal justice system as a whole. Reducing the frequency of questioning will have a positive impact on victim satisfaction and support for the authorities.

Developmental scheme on the frequency of questioning:

- 1 - repetitive questioning: *Cyprus, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Portugal, Spain, Turkey*
- 2 - repetitive questioning of vulnerable victims is limited: *Belgium, Denmark, Germany, Iceland, Ireland, the Netherlands, Norway, Portugal, Scotland, Spain, Sweden*
- 3 - repetitive questioning of all victims is limited: *none*

In conclusion, the developmental scales indicate that the manner in which victims are questioned by the authorities has significantly improved over the last years. Although not in all jurisdictions in the same degree or in the same way. In *France, Greece, Italy, Malta and Turkey* much more attention should be given to the manner of questioning. But also in other jurisdictions the manner of questioning is in need of improvement. Legal reforms should be undertaken and special facilities created in order to reach the highest stages of the different developmental scales. Likewise, the frequency in which the victim is questioned should be given much more attention. Improving the manner of questioning and reducing the number of times a victims is questioning during the criminal proceedings are not only effective strategies to improve the position of victims within criminal proceedings but also to improve their attitude towards and cooperation with the criminal justice system and its representatives.

4 PROTECTING THE VICTIM FROM PUBLICITY

(F.15) Information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or particular status or personal situation and safety of the victim make such special attention necessary, either the trial before the judgement should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate.

In the following, we will first give an overview of the range of measures available providing

protection for the victim from intrusive publicity. Then we will discuss the practice and policies of the individual jurisdictions in relation to these measures.

4.1 Overview measures providing protection from publicity

Overview measures providing protection from publicity:

1. Hearings 'in camera'
 - 1 - discretionary power
 - 2 - obligation
 - a specified offences
 - b request victim
2. Limited disclosure personal information victim
 - 1 - pre-trial principle of secrecy
 - 2 - policies of the authorities
 - 3 - specific restrictions
3. Restrictions press coverage
 - 1 - self-regulation
 - 1.1 - tacit understanding
 - 1.2 - media code of ethics
 - 2 - extraneously imposed restrictions
 - 2.a - power court individual case
 - 2.b - general restrictions

Where (the principle of) publicity is exercised to its fullest, personal information about the victim of crime may find its way from the authorities through the legal machinery into the public domain, and via the media into thousands of households. The three measures designed to provide the victim with protection from intrusive publicity aim to curtail the random dissemination of personal information about the victim by severing the distribution chain at different points.

Measure 1: hearings 'in camera'

The first measure suggested by the guideline is that in cases requiring special attention it should be possible to hold the trial before the judgment in camera. In all jurisdictions the court has the power to order (parts of) a hearing to be heard behind closed doors, away from the public eye, for a variety of reasons varying from protection of public morals to the safety of participants. Some jurisdictions even go so far as to always hear certain types of cases such as rape cases in camera, or to always honour a request of a victim to hold the trial in camera.

Measure 2: restrictions on disclosure

The guideline suggests that as an alternative it should be possible to restrict the disclosure by the authorities of information about the victim to whatever extent is appropriate. In some jurisdictions, the principle of secrecy in the pre-trial stages prohibits the disclosure of any sensitive information prior to the case going to trial. In others, it is forbidden to reveal the identity of victims of sexual offences in open court. In this latter case, the principle of publicity is compromised in a much more fundamental way than if the protective measures are aimed only at press coverage. In that case, all information is still revealed in open court

for anyone to hear, even though it is not broadcast to the whole nation. Where there is a prohibition to reveal the identity of a victim in court, only the participants in the criminal proceedings are aware of his or her identity.

Measure 3: restrictions on press coverage

As a third option the guideline suggests that it should be possible to pose limits on press coverage. Details of a case may be broadcast on television or radio, or published through articles, photographs or drawings in newspapers, magazines and books. Restrictions on press coverage mostly relate to 'the media' in the cumulative, although in some jurisdictions there are specific regulations for different modes of publication. For example, there may be special rules relating only to television coverage, or to taking photographs.

Restrictions are placed on the media in different ways. In some jurisdictions, (1) self-regulation has led to tacit understanding or explicit agreements being reached by the media among themselves, for example that names of victims of sexual offences, or of child victims, may not be published. Tacit understanding is unwritten, and only suffices in jurisdictions where there is no sensation-seeking tabloid press. Explicit agreements are published in the media's own code of ethics. A breach of the code results in disciplinary measures by the media board. Besides self-regulation, restrictions may also be (2) extraneously imposed. First of all, in some jurisdictions the courts have been given a statutory power to place specific restrictions on press coverage in relation to individual cases as the need may arise. In addition, general restrictions have often been placed on (certain elements of) the media, either through special media acts and guidelines, or by including sections dealing with the media in other pieces of legislation. Some of these general restrictions are concerned with providing standard protection for victims of specified categories of offences, such as rape and sexual assault, whereas others deal with specific forms of media coverage, for example television broadcasting. A newspaper, television- or radio-station may be sued for violation of such provisions. In jurisdictions with a particularly tough tabloid press, matters may be taken even further by making it a criminal offence to publish personal details of (certain groups of) victims of crime. In that case, violation may even lead to imprisonment.

4.2 Measure 1: hearings 'in camera'. Practice and policies of the individual jurisdictions

The first way to protect the victim from intrusive publicity is to ensure that details about him and the case do not go beyond the four walls of the courtroom. In all the jurisdictions included in this study the criminal court has the power to order the trial to be held 'in camera'. That is to say that all, or part of, the criminal proceedings are conducted behind closed doors, away from the public eye and the press. Only those participating in the proceedings, or individuals with special permission to attend (which may include *bona fide* members of the press), may be present in the courtroom.

In most jurisdictions, the grounds on which the court may order a case to be held in camera are formulated in fairly general and non-committal terms, for example to protect 'public morals', 'public order' or 'security', or to safeguard the 'interests of justice'. Only occasionally is the protection of the victim from publicity, or his personal dignity, explicitly recognized in legislation as a valid reason for ordering a trial to be held in camera. This is the case in *Belgium*, *Cyprus* and *the Netherlands* (to protect the privacy of the parties involved in the case), *Portugal* (to safeguard 'personal dignity'), *Spain* (out of 'due respect for the victim or his family'), and *Switzerland* (if 'predominant interests of the victim' so require). But it

should be noted that the absence of such explicit recognition in legislation does not in any way prevent courts in other jurisdictions from ordering a trial to be held in camera solely to protect the victim, albeit that in such a case the official motivation may be to protect public morals, or the interests of justice. Furthermore, an explicit legislative section may be little more than hollow symbolism: in Cyprus a trial may be ordered to be held in camera for a great variety of reasons, including the protection of the private life of the parties, but in practice judges rarely do so.

In principle, whether or not (part of) a hearing in a particular case is heard in camera is left to the discretion of the court. However, in some jurisdictions cases involving certain types of offences are always held in camera, either because legislation so obliges or because it has become standard practice. There are also jurisdictions where there is an obligation to honour any request of a victim of (a serious offence) to hold (part of) the trial in camera. We will examine each of these options in turn.

Hearing in camera at discretion of court

In jurisdictions with no statutory obligations to hear certain trials in camera, it is at all times left to the discretion of the court whether (part of) the hearing should be heard behind closed doors. In practice, this freedom of the court leads to substantial differences in the frequency with which in camera hearings take place. In *Cyprus*, *Greece* and *Turkey* trials are hardly ever held in camera. Conversely, in *England and Wales*, *the Netherlands* and *Scotland*, where it is also left to the discretion of the criminal court whether to hold (parts of) the trial in camera, this is a much more common occurrence.

Obligation to hear certain type of offence in camera

In *Ireland*, the Criminal Justice Act of 1951 gave the criminal court a general discretionary power to order any hearing in relation to criminal proceedings 'of an indecent or obscene nature' to be held in camera. Thirty years later, the 1981 Criminal Law Rape Act introduced an obligation to hold hearings in relation to rape and (attempted) sexual assault in camera. This was followed in 1995 by a similar obligation for hearings in relation to incest. Interestingly, proposals have been made to further extend the statutory duty to hear cases in camera to other sexual offences, in particular where children or the mentally impaired are concerned.

In *Iceland*, there is no such legislative obligation to hold hearings in relation to particular offences in camera, yet a practice has grown whereby all cases involving serious sexual offences are automatically dealt with behind closed doors. Conversely, a similar practice which had developed in *Norway* has been halted and reversed: from 1987 until 1991 all cases involving sexual offences were automatically heard in camera, but a revival of the principle of publicity has now resulted in a much more restricted use of the power to hold trials behind closed doors.

It is interesting to note that, even though in many jurisdictions there is an obligation to hold any trial involving a juvenile defendant in camera, there is only occasionally a comparable obligation where the victim or a witness is a juvenile. One positive exception is *Italy*, where a case involving a child victim of a sexual offence is always held behind closed doors.

Obligation to honour request of victim

In *Denmark*, the court must close the doors during the testimony of the injured person in a case of incest, rape or serious sexual assault, if the injured person so requests. In *Luxembourg*,

a request of the public prosecutor or the victim to hold a trial in camera is in practice always complied with. Even though the victim may also make a request for the trial to be held in camera in other jurisdictions, the court is not compelled to honour this request.

4.3 Measure 2: limited disclosure personal information victim. Practice and policies of the individual jurisdictions

Measure 2 limits the disclosure by the authorities of personal information about the victim of crime. Three matters need to be addressed here. First of all, in some jurisdictions the principle of secrecy places significant restrictions on the revealing of information in the pre-trial stages. Secondly, attention must be paid to the general policies of the authorities regarding the dissipation of information, i.e., by whom information may be given out, and when. Finally, specific restrictions on the disclosure of information about certain groups of victims may be in place.

Principle of secrecy

In jurisdictions where the principle of secrecy governs the pre-trial stage, adherence to this principle should at least in theory provide some degree of protection from publicity for the victim until the case reaches court. Jurisdictions which explicitly proclaim to adhere to the principle of secrecy are *Belgium, France, Portugal and Turkey*.

In *Belgium*, the principle of secrecy alone has not been able to provide the victim with adequate protection from publicity during the pre-trial stages. Primarily this may be attributed to a habit developed by the prosecution service of holding press conferences with a view to getting better and more positive press coverage of the activities of the investigating authorities. Ironically, many victims who were denied information about the case under the guise of the supposed secrecy of the preliminary investigations could subsequently learn all they wanted to know from reports in the press. Such a situation is unacceptable, and the 1998 Act Franchimont recognizes that the principle of secrecy needs to be reinforced. It stresses that the pre-trial stage should remain secret, and that breaches constitute offences that may be sanctioned.

In *Portugal*, the authorities appear to be less blatantly callous about the principle of secrecy. During the preliminary investigation the police may only give information of a general nature to the press, for example that a suspect has been apprehended. No statements may be made which reveal specific information about a case. Furthermore, provisions following from the principle of secrecy have been explicitly extended to cover the behaviour of the press. The Code of Criminal Procedure provides that the media may only publish documents which are not bound by the secrecy of the preliminary investigations. However, once the trial starts in Portugal the proceedings are usually subjected to full scale publicity, unless the case is held in camera. The principle of secrecy only covers the pre-trial stage.

Regarding the publication of documents, the principle of secrecy has a slightly wider reach in *Turkey*. Here, it has been translated into a provision found in the Press Act which prohibits the publication of documents of the preliminary investigations. Once the preliminary investigations are over, the press is free to publish documents which have been officially disclosed during the trial, but with the restriction that reporters may not subject these documents to their own interpretation.

The *French* principle of secrecy provides the most comprehensive protection for victims of crime. All individuals involved in the criminal proceedings, with the exception of the civil claimant and the defendant, are bound by the principle of secrecy. This includes the police,

prosecutors, legal experts and clerks of the court. The Code of Criminal Procedure contains an additional specific provision binding the police to secrecy. Furthermore, their own code of conduct places further limits on their freedom of speech during and after the trial.

Policies of the authorities

Policies concerning the distribution of information by the authorities vary enormously from one jurisdiction to the next. In some there is no established national policy at all, or it is worded in such vague terms that in effect matters are left to the discretion of the local authorities. At the other end of the line, carefully designed provisions regulate who may give out information on behalf of the authorities, and at what point in time.

To start at the non-regulated end, in *England and Wales* the release of personal information about victims of crime to the press during police investigations is left to the discretion of the local forces. There is no national code or guideline on this, and the individual police forces have developed their own codes and practices. As a result, there are significant differences in the degree in which the forces make information about victims available to the public and the press. Other jurisdictions without any form of national policy regarding the release of personal information about victims of crime are *Ireland, Liechtenstein, Luxembourg and Scotland*.

A modest but ineffective attempt at formulating a national policy has been made in *Austria*. In this jurisdiction the Code of Criminal Procedure provides, firstly, that when fulfilling their duties or imparting information to third parties, all officials involved in the criminal justice process must bear in mind the interests the injured person has in the protection of his privacy; secondly, that particular caution should be taken with the distribution of photo images or the announcement of personal details, that could lead to the widespread identification of the injured person, without this being necessary in view of the aims of criminal justice; and thirdly that the personal details of any witness being questioned in court should be kept from the public as much as possible. The main weaknesses of these provisions are that no practical criteria are provided to help the authorities establish whether they are taking sufficient care, and furthermore that there are no sanctions on infringement.

To combat intrusive and inaccurate press coverage, stronger national policies were recently introduced in *Belgium* by the 1998 Act Franchimont. During the pre-trial stages only the public prosecutor, not the police, may give statements to the press. Furthermore the Code of Criminal Procedure provides that insofar as possible, the identity of individuals mentioned in the legal files may not be revealed to the media. Interestingly, the Code of Criminal Procedure has also put explicit obligations on the defence counsel, the accused, the civil claimant and the injured person not to use data found in the legal files to harm the private life, the physical or moral integrity of individuals mentioned in the file. Contrary to the provisions in *Austria*, infringement of these *Belgian* rules is threatened by a sanction of a maximum of one year imprisonment or a fine.

In *Spain* and in the *Netherlands*, policy has focussed on who is responsible for giving out information. A *Spanish* national policy has been devised whereby the public prosecutor has been made responsible for ensuring that victims of violent crime or sexual offences are protected from all forms of unwanted publicity. Along the same lines, but much more well-developed and covering a wider range of victims, is the national policy regarding the dissipation of information about victims of crime by the judicial authorities that has been devised in the *Netherlands*. In this jurisdiction, the prosecution service has been given overall responsibility for public relations policies on the basis of the Media Guidelines. In the pre-trial stage the police and prosecution service may only give out information through their

respective official spokespersons, and in both cases the prosecution service is held accountable for what has been said. As a general code of conduct, no information may be given about any person involved in any way in a criminal case. The identity of victims, witnesses or surviving relatives may not be made public, nor may information about their nationality, ethnic origin or sexual preference be revealed. Furthermore, the authorities should in principle adopt a passive approach to the press, that is to say that information about a criminal case is only provided when explicitly requested. Only in exceptional cases should the authorities approach the public and press of their own accord. In practice, the Dutch media never reveal the identity of victims of crime (or others involved in the proceedings such as the accused). It is tempting to conclude that this is due to a successful national policy, but that begs the question why the similar policies adopted in *Belgium* do not appear to have the same effect. Once again, it is likely that much is simply due to differences in attitude and culture of the press.

Specific restrictions

In the two previous sections we have discussed the principle of secrecy and general policies and provisions regarding the disclosure of information about victims of crime. In this section we will look at special provisions for particular groups of victims. Some of these only restrict the disclosure of information during the pre-trial stages. Others attempt to limit the disclosure of sensitive information to the confines of the courtroom, or even place restrictions on what may be disclosed *within* the courtroom.

Portugal is an example of the first situation, where specific restrictions are in place only for the duration of the pre-trial investigation. In this jurisdiction the identity of victims of sexual offences or offences against the victim's honour or privacy may not be revealed prior to the trial, if these victims have not yet reached the age of 16.

Until 1995, it was common practice in *Switzerland* for the police and investigating authorities to announce the names and addresses of all victims of crime to the press. To combat this, the federal Victim Support Act of 1995, which deals with victims of sexual and/or violent offences, then introduced a provision that the authorities and private persons may only reveal the identity of a victim of a sexual or violent offence outside of a public court hearing if this is necessary in the interest of the criminal proceedings, or if the victim agrees to this. The Victim Support Act does not impose any sanction on transgression of this rule, but if an official reveals the name and personal details of a victim without any justification he is in breach of professional secrecy and may be prosecuted on the basis of the Penal Code. In practice, the prohibition to reveal the identity of a victim of a sexual or violent offence is still insufficiently observed, and consideration should be given to introducing an explicit sanction.

Finally, in *England and Wales* it is even forbidden to reveal the identity of a victim of rape or sexual assault in open court. Regarding other victims, the judge or magistrates may upon request agree not to read out their names and addresses.

4.4 Measure 3: restrictions press coverage. Practice and policies of the individual jurisdictions

Self-regulation through tacit understanding

The most gentle and non-coercive form of restriction on press coverage is self-regulation of the press through tacit understanding. This is found in *Liechtenstein* and *Luxembourg*. In these jurisdictions there are no formal restrictions on what the press may publish, yet names

or pictures of victims of crime are hardly ever published in the newspapers. In Luxembourg it is an implicit rule that such names are only published if they are already public knowledge, i.e. if the victim has sought media attention himself. However, one should also realize that Liechtenstein and Luxembourg are tiny jurisdictions – Liechtenstein has a population of only 31,389 against some 500,000 people living in Luxembourg. This implies that in Liechtenstein in particular, where everyone knows each other, it is almost impossible to stop at least a proportion of the people guessing the identity of the victim in a particular case, even if the press does not publish details of the names of either the accused or the victim.

Self-regulation through media code of ethics

A stronger form of self-regulation through a media code of ethics is found in *Iceland, Norway and Sweden*. The *Norwegian* press code of ethics prohibits the use of the name of a victim in print, unless the victim himself approaches the press. Furthermore, it is not permitted to take photographs during the main hearing in court, nor to take pictures of those involved in the case on the way to or from the courthouse. Similarly, the *Icelandic* press code of ethics determines that no victim shall be unduly embarrassed, and pictures and interviews with victims are only published with their permission. The victim has a right to file a complaint with the press office or the organization of journalists if the code of ethics is broken, and a disciplinary measure may be imposed. An added complication in Iceland is the smallness of its population, which amounts to no more than 275,264. As is the case in Liechtenstein and Luxembourg, if the name of the accused is made known to the public, a significant amount of people will be able to guess the name of the victim. State television and radio in Iceland refer to the offender in neutral terms such as 'accused' or 'defendant' until conviction and sentencing, which also offers some degree of protection of the privacy of the victim in the trial stages.

Power of the court to direct the press

In *Belgium, Cyprus, Denmark, Germany, Malta, the Netherlands and Portugal*, the criminal court has the power to place limits on what the press may report about details of an individual case under its consideration. However, there are considerable differences in the range of this power. At the top end of the scale, the criminal courts in *Cyprus* have a constitutional power to prohibit the publication of names of persons involved in a particular case, and furthermore to exclude the press from the whole, or part of, a trial. But at the bottom end, in *Malta*, the court may only place restrictions on publication if the trial is held in camera. In all other cases, except those heard in the juvenile court (see below) the Maltese court may only recommend, not order, that the media leave the courtroom, or that they do not publish names in their reports of the case.

In practice, the *Cypriot* courts rarely barr the press from the courtroom or hold a hearing in camera, yet pictures of victims hardly ever appear in the press. Conversely, in *Malta*, cases that are held in camera may still receive extensive press coverage, with enough explicit information to allow for the identification of the victim. In jury cases, the Maltese press even include full names of all the parties and persons involved in the proceedings in their reports. These are frequently accompanied by pictures of victims, although these are mostly printed with the consent of the victims concerned. The striking divergence between Cypriot and Maltese practice appears to be due to differences in the attitude of the press rather than the approach of the courts to curbing publicity.

Standard protection for specified categories of victims

In many of the jurisdictions covered in this study special measures guaranteeing standard protection against publicity are in place for victims of (serious) sexual offences. The most powerful protection that can be provided to specific categories of victims is to make it a statutory criminal offence to at any time publish any information that may lead to their identification. Regarding victims of sexual offences, this level of protection is provided in *Belgium, Denmark, England and Wales, Iceland, Ireland, Scotland and Turkey*. In *France* similar protection is provided to a slightly different category. There, it is a criminal offence to publish any information concerning victims acting as civil claimants during the criminal proceedings, until the moment the court has given its verdict.

Of the above provisions, the *Irish* ones are the most far-reaching. In this jurisdiction it is not only a criminal offence to publish matters that may lead to the identification of the complainant of sexual assault, but also to publish information provided by the complainant of her own free will, unless explicit permission is provided by the court. This provision that permission of the court is required at all times was introduced for two main reasons. First of all, to keep it absolutely clear that anonymity is guaranteed at all times for every victim of a sexual offence, and secondly to prevent complainants from being pressurized or induced to go public.⁶ Consideration should be given to introducing a similar rule in *England and Wales* where victims are regularly harassed by the press for details, and even offered huge sums of money to tell their story. Compare also the provision in *Belgium* where the injunction on publicity regarding a victim of a sexual offence may only be lifted for reasons concerning the investigation, and even then the permission of the examining magistrate, or the written consent of the victim, is required. In all other jurisdictions the press are free to publish any information volunteered (orally) by the victim.

Characteristic for a criminal offence is that transgression may be punished by a sanction. Mostly, the sanction for infringement of the above rules is a fine, but in *Turkey* transgression may even lead to imprisonment. In practice, the threat of sanctions is sufficient to ensure compliance with the rules.

A less powerful form of protection is provided by an *unsanctioned* prohibition to publish information that may lead to the identification of a certain category of victim. This is the case in *Switzerland*. Here, federal legislation provides protection from publicity for victims of sexual and/or violent offences, but individuals and the press who transgress these rules can only be called to account by the individual victim on the basis of private law. They cannot be prosecuted for a criminal offence. In practice the prohibition to reveal the identity of victims of sexual and/or violent offences are not structurally observed and Swiss commentators contend that compliance would undoubtedly be greater if the right to anonymity were protected by an explicit sanction.

No standard protection for victims of sexual offences or of violence is provided in *Cyprus, Greece, Italy, Luxembourg, Malta or the Netherlands*. But whether that automatically entails exposure of victims to intrusive press coverage depends entirely on the attitude and ethics of the local press. As we have seen earlier, in *Luxembourg* names of victims are only rarely published in the newspapers. Likewise, the *Dutch* media never reveal the identity of the victim (or the accused). Conversely, the *Greek* press is relentless. Dubbed 'crime maniacs'

⁶ Interestingly, in Ireland it is *not* (yet) a criminal offence to reveal the identity of a child complainant, although in practice this information is never published. S. 209 of the upcoming Children Bill, 1996 will make it an offence to publish any reports or pictures of any child involved in court proceedings, whether as complainant or witness, or any information that could lead to identification of that child. See further the report on Ireland under guideline F.15.

by Greek legal practitioners, the media cover most cases extensively and even publish descriptions and photographs of victims of extreme violence without their permission. Only juveniles (victims and offenders) enjoy standard protection from the press. For all other victims, the only instrument available is to sue the press in a civil court for intrusion of privacy. But the ensuing damages that the paper may be ordered to pay hardly outweigh the revenue of a sensational story in the papers, so this does not deter the press in the least. Equally ineffective is a new law on privacy that was adopted in *Italy* in April 1997. Aimed at providing protection for victims from the press, regulations putting the law into action are unfortunately still lacking.

Prohibitions for specific forms of media coverage

Whenever the criminal proceedings are held in camera (see earlier), or specific restrictions have been placed on the press in relation to a particular case, media coverage in the courtroom is automatically excluded or limited. In this section we are therefore concerned with the regulations for the press in all other situations.

Regarding the presence of television camera's in the courtroom during criminal proceedings, this is forbidden at all times in *Austria*, *Cyprus* and *France*. In most other jurisdictions it is up to the president of the court to determine whether camera's are allowed into the court room or not, but even then there are usually general restrictions in place on what the camera's may record. For example, in *the Netherlands* camera's are occasionally allowed into the courtroom but the accused and the victim may only be filmed in such a way that they cannot be recognized, i.e. they must either be filmed from behind, or their faces must be blotted out. In *Portugal* it is also prohibited to film the victim's face, or to record his voice. In contrast to the reticent attitude towards the presence of television camera's during criminal proceedings that prevails in most jurisdictions, *Spanish* and *Turkish* courts regularly allow camera's into the courtroom. In *Turkey*, camera's are allowed to film both suspects and victims in such a way that identification is possible, and their full names may even be disclosed. The only exceptions are victims of sexual offences and incest, as well as the families of persons who have committed suicide. For these groups general protection from publicity is provided as recounted above.

Photo-equipment and tape-recorders are barred at all times from the courtroom during the hearing of the case in *Austria*, *England and Wales*, *Cyprus*, *Denmark*, *France*, *Portugal* and *Scotland*. In *France* it is also a criminal offence to publish images of a person who finds himself in private surroundings without his consent. Therefore pictures of victims or their family taken against their wish in or around the home may not be published. Unfortunately, in practice the restrictions on taking pictures inside the courtroom, or in the home, are more often than not nullified by the fact that there are no regulations preventing the press from photographing individuals on their way to and from the court, as is the case in *Portugal*. The same gap exists in relation to television coverage. For example, even though photo- and television camera's are not allowed into the courtroom during criminal proceedings in *Austria*, the president of the court may give permission for the press to make audio- or visual recordings in the courtroom prior to the opening, or after the closing of the case. If the victim is already or still in the courtroom at those times, he may also be photographed or filmed.

Quite unusual is a provision found in *Cyprus* and *Denmark*, which forbids even the making of sketches in court. This is something which is not explicitly forbidden in other jurisdictions, albeit that there is the restriction that the sketch may not reveal the identity of a victim enjoying protection from publicity.

4.5 Conclusions

Across the European board, the differences in practice regarding publicity of criminal trials, and the publication of personal details of victims of crime (and defendants), are enormous. In some jurisdictions, where there are no formal restrictions on publicity, the press is extremely discreet. In others, no amount of legislation seems to be able to control the press. This lack of control may be due to the fact that the maximum fine that can be imposed does not outweigh the profits made with publication, or that there is no sanction at all on transgression of a prohibition to publish details. On occasion, even officials show a total lack of disregard for prohibitions on what they are allowed to reveal about victims of crime. The individual attitudes of the press are of paramount importance. Furthermore, although we have primarily focussed on the hurt that can be caused by revealing personal details of victims of crime, regard should also be had for the aggravation and grief that inaccurate or insensitive reporting of cases can inflict. The media should at all times strive for the highest level of quality in relation to its reports on criminal cases.

The above leads us to the following (revised) overview of provisions regarding the protection of the victim from intrusive publicity. The individual jurisdictions are mentioned alongside each measure:

1. Hearings 'in camera'	
1 - discretionary power: <i>all jurisdictions</i>	R
2 - obligation	
a - specified offences: <i>Iceland, Ireland, Italy</i>	+
b - request victim: <i>Denmark, Luxembourg</i>	+
2. Limited disclosure personal information victim	
1 - overriding pre-trial principle of secrecy: <i>Belgium, France, Portugal, Turkey</i>	R
2 - policies of the authorities: <i>Austria, Belgium, the Netherlands, Spain</i>	+
3 - specific restrictions: <i>England and Wales, Switzerland</i>	++
3. Restrictions media	
1.1 -self-regulation	
1 - tacit understanding: <i>Liechtenstein, Luxembourg</i>	R
2 - media code of ethics: <i>Iceland, Norway, Sweden</i>	R
1.2 -extraneously imposed restrictions	
a -power court to direct press in individual case: <i>Belgium, Cyprus, Denmark, Germany, Malta, the Netherlands, Portugal</i>	+
b - general restrictions	
1 - on particular forms of media coverage: <i>Austria, Cyprus, Denmark, France, Netherlands, Portugal, Scotland</i>	+
2 - in relation to victims specified offences: <i>Belgium, Denmark, England and Wales, France, Iceland, Ireland, Scotland, Turkey</i>	+

5 PROTECTING THE VICTIM FROM INTIMIDATION AND THE RISK OF RETALIATION

(G.16) Whenever this appears necessary, and especially when organised crime is involved, the victim and his family should be given effective protection against intimidation and the risk of retaliation by the offender.

In § 4, we examined the protection of the victim of crime from intrusive publicity on the basis of guideline F.15. We now come to the final guideline encompassed by Recommendation (85) 11, which deals with the protection of the victim against intimidation and the risk of retaliation by the offender. In the following we will first provide an overview of the different measures that aim to prevent the victim and his family from being threatened, or retaliated against. Then we will discuss the policies and practice of the individual jurisdictions in relation to these measures.

5.1 Overview protective measures

Measures aimed at protecting the (victim)witness and his family against intimidation and the risk of retaliation by the offender:

Physical protection

- 1a - police protection
- 1b - preventive custody/refuse bail
- 2 - personal protection equipment
- 3 - relocation
- 4a - facilities at court
- 4b - pre-trial depositions
- 5a - measures to discourage offender from tracing personal details victim
- 5b - right victim to remain completely anonymous

Legal instruments aimed at deterrence

- 1 - injunction or protection order
 - 1.1 - civil remedy
 - 1.2 - condition
 - 1.3 - criminal justice agency
 - a - police
 - b - examining magistrate
 - c - public prosecutor
- 2 - criminal offence to threaten/intimidate witness
 - 2.1 - general offence of threatening or intimidating another person, or perverting the course of justice
 - 2.2 - aggravating circumstance
 - 2.3 - specific offence to threaten or intimidate an injured person, a witness or a civil claimant
 - 2.4 - offence to threaten or intimidate even after the trial has ended

Information on release offender

There are three main methods for protecting the victim and his family against intimidation and the risk of retaliation by the offender. First of all, the victim can be provided with physical protection. Secondly, there are a variety of legal measures aimed at deterring the offender from harassing the victim and his family. Finally, the victim can be given timely information about a pending release of the offender so that he can take his own protective measures.

Measure 1: physical protection

The first measure is to give the victim physical protection by bodily preventing the offender (or his cronies) from approaching the victim. One way to achieve this is by putting a protective police shield round the victim, his home and his family, or to keep the offender in preventive custody during the pre-trial and trial stages. But there are also alternative methods. For example, the victim may be provided with a do-it-yourself protection pack containing, among other things, a personal alarm or mobile 'phone, or he may be temporarily or permanently relocated. Intimidation and the risk of retaliation on the way to, and at, court can be minimized by providing special facilities for the victim and his family such as police transport, a private waiting room and separate seating in the courtroom. More far-reaching are the options available in some jurisdictions to use pre-trial depositions of (victim)witnesses so that they do not have to come to court at all. Finally, physical protection can also be provided by keeping the identity of the victim from the offender. In some jurisdictions there are measures in place that discourage the offender from tracing personal details of the victim. In other jurisdictions a threatened (victim)witness may even have an absolute right to anonymity.

Measure 2: Legal instruments aimed at deterrence

Besides through such literal protection of the victim, the offender may also be discouraged from intimidating or harming the victim through a variety of injunctions or prohibitions. Some of these measures are civil law remedies – albeit that a breach of such a remedy may be a criminal offence – and are imposed by the civil court. Alternatively, the criminal court may attach a protection order as a condition to a suspended or deferred sentence. In some jurisdictions, the police, examining magistrate and/or public prosecutor may also be empowered to impose a protection order in the course of the criminal proceedings.

Besides through injunctions and prohibitions, undesirable behaviour directed at the victim or his family may be directly threatened with sanctions. In all the jurisdictions included in this research, it is a criminal offence to threaten another person. This implies that it is always possible to prosecute someone who has threatened or intimidated a witness under the denominator of the general offence. Likewise, threatening a witness can generally be brought within the scope of the offence of perverting the course of justice. A more direct and immediate repercussion for threatening a witness is provided if this act of the offender serves as an aggravating circumstance to be taken into account by the court at the sentencing stage. One step further is the creation of a separate and specific offence of threatening or intimidating a witness. This allows for prosecution of the offender for threatening the witness, regardless of the result of the trial to which the threatened person was a witness. Ideally, it should also be a criminal offence to harass a witness *after* the trial.

Measure 3: timely information about a pending release

Finally, the victim may be offered a helping hand in protecting himself by informing him of the release of the offender on bail or from preventive custody in the pre-trial and trial

stages, or of the conditional or permanent release of the offender following a custodial sentence.

5.2 Measure 1: physical protection. Practice and policies of the individual jurisdictions

Police protection, preventive custody

Before proceeding, it should be noted that police protection is usually provided for *witnesses*, rather than victims. Of course, in many cases the victim is the prime witness for the prosecution, having experienced the offence firsthand, and in this capacity he will qualify for protective measures. To emphasise that the victim generally only receives police protection in as far as he may be considered a witness, we will speak of the victim-witness where relevant.

Although all jurisdictions included in this research provide at least some degree of police protection to threatened victim-witnesses, there are enormous differences in the extent and the duration of the protection. Minimal police protection in the form of surveillance or patrols for the duration of the pre-trial and trial stages can be provided in *all jurisdictions* when needed. In *Belgium*, the victim-witness can ask for police protection but if such protection is provided, it is usually only for a limited period of time. In *Greece*, the public prosecutor and the examining magistrate can order pre-trial police protection. However, the magistrates interviewed in the course of our study reported that this was a rare occurrence, and that it is even rarer for a victim to request such protection himself. In view of the more or less total absence of organised crime in *Iceland*, *Luxembourg* and *Malta*, it is hardly surprising that these jurisdictions do not have extensive programmes or facilities to protect victim-witnesses from intimidation and retaliation. Police protection here is always on a case-by-case basis.

All the jurisdictions included in this study are physically capable of providing a 24-hour police presence, but obviously this method of protecting the victim from intimidation and the threat of retaliation requires substantial human and financial resources as well as organizational talent. It is only resorted to in the most flagrant cases of intimidation, and then only for a limited period of time. We have no information on how often jurisdictions provide this type of intensive protection.

In many of the jurisdictions included in this study, it is possible to keep an accused person in preventive custody if he has tried to influence a witness, or if there are well-founded reasons to believe that he intends to do so. This is the case in *Austria*, *Belgium*, *France*, *Germany*, *Greece*, *Liechtenstein*, *the Netherlands*, *Portugal*, *Spain* and the canton of *Zurich*. However, it should be noted that preventive custody is generally only available in relation to serious offences. Because of its radical and intrusive nature, it is generally regarded as a last resort – only if all other measures have failed may this drastic measure be taken. An interesting variation of preventive custody is found in *England and Wales*, where it is possible to take the victim-witness, rather than the accused, into preventive custody on a voluntary basis.

Related to the preventive custody measure is the possibility available in *England and Wales*, *Ireland* and *Scotland* to refuse bail where there is a serious risk of intimidation of witnesses by the accused were he to be released. Likewise, if the accused is released on bail it is a standard condition that he does not interfere with witnesses. Other conditions that may be imposed include an order that the accused stays away from the victim-witness or the victim-witness' home. It is a criminal offence to breach bail conditions, and transgression

may lead to the revoking of bail.

Personal protection equipment

In *Norway*, a trial project with personal alarms for victims was launched in Autumn 1997. The alarms are distributed by the police in accordance with instructions issued by the Ministry of Justice. At the time of writing (November 1999) the project was under evaluation. A similar pilot with personal alarms for female victims of domestic violence is being conducted in the *Netherlands* and *Spain*. Some *English* police forces also already distribute personal alarms.

In *Sweden* matters have been taken even further. In this jurisdiction, the police may issue teargas sprays, a mobile phone, a tape recorder or even a watchdog to a threatened victim-witness.

Relocation

The most radical way of protecting the victim-witness and his family from intimidation and the risk of retaliation is to permanently relocate them in another part of the country, or abroad, under a new identity. This measure is typically found in jurisdictions with well-established, powerful forms of organised crime such as *Italy* and *Spain*, but is also known in *England and Wales*, *France*, *Germany*, *Ireland*, the *Netherlands*, *Scotland*, *Portugal*, *Turkey* and *Sweden*. The *Portuguese* programme was only recently introduced following the coming into force of the 1999 Witness Protection Act. In *Turkey*, relocation is only available for victims of terrorism, and in *Sweden* a new identity is provided for a maximum duration of 5 years.

It is obvious that permanent relocation asks a lot of the victim and his family. Not only do they have to definitively take leave of their home, workplace, friends and family, but they must also make a huge effort to build up a completely new life under a strange identity. Such a drastic measure is only resorted to in the most extreme cases.

More frequent is temporary relocation for the duration of the criminal proceedings.

Facilities at court, pre-trial depositions

If the victim is required to testify in court as a witness, the criminal proceedings more or less force him into the vicinity of the accused and his family and friends. Not only is he required to sit in the same courtroom as the accused, but more often than not the two 'camps' have to wait in the same area outside the courtroom for the case to be called. In most jurisdictions, if it is blatantly obvious that a victim-witness is being seriously intimidated or threatened, an effort will be made to provide incidental, case-by-case protection at court. For example, at the special request of the public prosecutor, the victim-witness will be allowed to wait in a separate room, even if no special waiting room is available. Likewise, where there is reason to fear an attempt at retaliation in the courtroom itself, armed guards may be positioned between the accused and the victim. Some jurisdictions also have one or more secure courtrooms where the court is shielded from the public gallery by bullet-proof glass. This may provide some degree of security to a victim-witness who fears retaliation by family members of the accused sitting in the public gallery.

Only in a few jurisdictions can one speak of structural efforts to provide separate facilities for victim-witnesses (for the prosecution) at court. This is not as easy as it seems because many of today's courts are housed in old buildings that were simply not designed to cater for modern needs. Often, there is a chronic lack of space and there is no place for court users to wait other than in the corridor or on the stairs. *England and Wales*, *Ireland* and the *Netherlands* are examples of jurisdictions where separate waiting rooms for victims/

witnesses for the prosecution are being built into new courthouses. Similar proposals have been made in *Denmark*.

Of course, the most effective protection one can provide at the trial stage is to avoid the victim having to come to court in the first place. In jurisdictions where the criminal proceedings are governed by coercive principles of orality and immediacy, and the institution of the examining magistrate is unknown, there is little or no scope for excusing the threatened victim-witness from giving his testimony in person in court. This is the case in the common law jurisdictions of *England and Wales*, *Cyprus*, *Ireland*, *Malta* and *Scotland*, although some exceptions are now being made in relation to child witnesses (see section 3 of this chapter on the questioning of victims). In jurisdictions with more procedural leeway, and an examining magistrate, there is generally more room to use pre-trial depositions of victim-witnesses as evidence-in-chief in the main trial proceedings, albeit only under strict conditions to guarantee the defendant's right to a fair trial. In *France*, *Italy* and *Spain* incidental use is made of pre-trial depositions in accordance with stringent rules. The *French* Supreme Court has determined that if the accused has requested that a witness is heard in court, the court may only refuse to summon such a witness if there is a serious risk of reprisals and intimidation. The decision not to hear such a witness must be elaborately motivated. In *Italy*, it is possible to use the deposition of a witness given during a pre-trial court hearing as evidence-in-chief in the main trial proceedings, as long as the defence lawyer was present during that pre-trial hearing.⁷ In *Spain*, upon the official request of one of the parties to have his testimony read out rather than giving an oral testimony, the pre-trial testimony of a witness who qualifies for protection under the 1994 Act on the Protection of Witnesses and Experts in Criminal Proceedings may be used as evidence in court.

Characteristic for these three jurisdictions is that the use of pre-trial depositions is an exception to the established practice of hearing witnesses in person in court. In *the Netherlands* and in *Zurich*, it is the world turned upside down. In these jurisdictions, the bulk of criminal cases is decided on the basis of the dossier of the pre-trial examinations, and witnesses who have testified before the police and/or the examining magistrate are often not required to testify in court at all. Furthermore, in the Netherlands a victim-witness who falls within the scope of the Witness Protection Act has an absolute right not to have to appear in court in person. The examining magistrate determines whether someone qualifies for such protection, and his decision is final – even the court hearing the main trial cannot reverse this decision. The pre-trial deposition given by the threatened witness before the examining magistrate is read out during the main trial proceedings. The defendant's right to a fair trial is guaranteed by giving the defence the opportunity to put questions to the witness through the examining magistrate. However, because the protection provided to such a witness includes an absolute right to anonymity (see below) he is not required to respond to any question that may reveal his identity.

Withholding personal information about the victim from the offender, the right to absolute anonymity

It is generally accepted that a person accused of committing an offence has the right to know who has testified against him, and this principle has been upheld on numerous occasions by the European Court of Human Rights in Strasbourg. But the court has also accepted

⁷ A similar provision has recently been proposed in Denmark.

that under exceptional circumstances a witness may be allowed to remain anonymous.⁸ Occasions do arise wherein the victim may have very legitimate reasons to fear for his personal safety if the accused, or others present in the courtroom, get to know his name and address. Although most of the jurisdictions covered by this study leave this matter well alone, some have tried to strike a balance between the interests of the defendant and those of the victim and his family.

Mostly, the measures are of a practical nature aimed at preventing the offender from casually finding out where the victim lives, rather than actually forbidding him access to information about the victim's name and place of residence. This is the case in *Denmark, England and Wales, France, the Netherlands, Spain and Sweden*. In *Denmark*, during the pre-trial stage, the defence may be ordered not to pass on the name of a witness to the accused. However, once the case goes to trial, the witness may no longer remain anonymous although his address may still be concealed from the defendant. In *England and Wales*, the identity of victims of rape or sexual assault may not be revealed in open court (see above), but this does not mean that this information about the complainant is also withheld from the accused. However, some measure of protection is provided by what has now become standard practice in this jurisdiction, namely the removal of the address of a witness from his statements before these are disclosed to the prosecution. Comparable is the practice in *France* and *the Netherlands* of allowing a threatened victim-witness to elect domicile at the local police station. In *Spain*, the examining magistrate may order the removal of the name, address, workplace and profession of a threatened victim-witness from the legal files. Finally, in *Sweden* the address, occupation, and other personal details of a threatened victim-witness are not included in the summons served on the defendant. Furthermore, this type of information is only recorded in the protocol of the investigation if this information is of importance to the investigation. Otherwise it is recorded on a separate sheet that is removed before the defence views the file.

Most far-reaching of all is the previously mentioned *Dutch* provision that a threatened victim-witness has an absolute right to remain anonymous, and not to appear in court, once he has been recognized as a threatened witness by the examining magistrate. The only other jurisdiction that has included a legislative section on this sensitive issue is the canton of *Zürich* in Switzerland. Section 19-3 of the Code of Criminal Procedure provides that, throughout the proceedings, in special circumstances the personal details of the victim are withheld from the accused, as long as this is not in conflict with the main interests of the criminal proceedings. It is unclear what practical value or effect this Swiss section has.

5.3 Measure 2: legal instruments aimed at deterrence. Practice and policies of the individual jurisdictions

Having discussed the different means of providing the victim with physical protection, we now come to the legal instruments aimed at deterring the offender from intimidating or retaliating against the victim and his family.

Injunction, prohibition or protection order

A first way of using a legal instrument to deter the offender from threatening or intimidating a victim is through the imposition of an injunction, a protection or a prohibition order. Such

⁸ For more details on the relevant case-law of the European Court of Human Rights see the chapter on the Netherlands.

orders come in many shapes and sizes, and carry a variety of names. Besides the differences in the type of legislation they are rooted in, and the authority that imposes them, there are also differences in the scope of the orders, which may vary from a prohibition for the accused to go into a certain area, to barring him from the marital home or even suspending his parental rights. Such prohibitions may also be attached as a condition to a deferred or a suspended sentence.

Civil remedies

In all the jurisdictions included in this study, there are civil remedies available through which the victim may be provided with some degree of protection. Regarding the protection of victims of domestic violence, the most well-established packages of civil remedies are found in *Cyprus*, *England and Wales* and *Ireland*. There are two main types of orders that the victim of domestic violence may invoke through civil proceedings. The first is a prohibition for the offender to commit further acts of violence against the applicant. In *England and Wales* such a prohibition is referred to as a non-molestation order, whereas in *Ireland* it is called a safety order. The second type of civil remedy is a court order determining who may live in the family home. Besides in *England and Wales* (occupation order) and in *Ireland* (barring order), this remedy is now also available in *Cyprus*, where in recent years an eye-catching effort has been made to deal effectively with domestic violence.

It is important to note that, although the above measures are civil remedies, it is a criminal offence to breach them. In *England and Wales*, the court may attach a power of arrest to such an order. Likewise, in *Ireland* the police may arrest and charge any person breaking an order, and the breach may result in a maximum punishment of a £1,500,- fine and/or a 12 month prison sentence.

Regarding the use that is made of the above measures in practice, the only figures that we came across in the course of this study were *Irish* ones concerning the use of the barring order in the mid-nineties. Between August 1994 and July 1995, 4,500 applications were made for such an order, of which 2,000 were granted. Following the coming into force of the 1996 Domestic Violence Act on 27 March of that year, the percentage of barring orders granted in relation to the amount of applications dropped quite considerably. In the period of April to July 1996, 1,898 applications were made, of which 567 were granted.

It should be noted that the civil remedies discussed in this section can be applied for, and granted, at any time, regardless of whether criminal proceedings have been initiated against the offender. This is an important difference with the orders discussed in the following section, which are generally tied in with criminal proceedings against the accused. The only exceptions are those orders that can be made by the police when called to a domestic violence situation.

Condition deferred or suspended sentence

In principle, in all jurisdictions the criminal court may attach special conditions to a deferred or suspended sentence. These conditions vary from an order not to approach the victim (*all jurisdictions*) to taking part in a course on self-control (*Cyprus*) or relinquishing custody of children (*Spain*). Where there are problems in relation to the observation of such conditions, these are mostly due to poor supervision of offenders. This certainly lies at the root of difficulties encountered in *Greece* and *Spain*. In the former jurisdiction, the probation service is only active in relation to juvenile offenders. In the latter, the sentencing judge does not maintain contact with the offender after his release, and there is no controlling system whatsoever. Furthermore, it is clear that the scope of providing protection through this

measure is limited to the post-trial stage, and then only in those cases that have resulted in conviction. Intervention in the pre-trial and trial stages by criminal justice authorities other than the court may also be required.

Criminal justice agencies

Prohibition orders may be granted by the police in *Austria* and *Iceland*. The power of the *Austrian* police to intercede in domestic violence situations is based on the Act on the Protection against Violence in the Family which came into force on 1 May 1997. In any situation in which a person is suspected of committing domestic violence the police may order him on the spot to immediately leave the house and not to return for a certain length of time. He may be compelled to hand in his house-key, and if he breaks the order can be fined or taken into custody. Significantly, the police does not require the permission of the court to impose such a measure. In *Iceland*, in the absence of any other means of protecting the victim, the police may caution the accused not to go near the victim. Here, too, the breach of such an order is a criminal offence.

In *Norway* and *Sweden* it is the public prosecutor who is authorized to issue a prohibition order against the accused in the pre-trial phases of the criminal proceedings. Such an order prohibits the accused from contacting the injured person. If the order is broken, the prosecutor may order the immediate arrest of the accused. It should be noted that in *Norway*, the prosecutor must inform the court within 3 days that a prohibition order has been issued. On the basis of the file, the judge then decides whether the order should remain in place or be revoked.

The examining magistrate is empowered to issue prohibition and protection orders in *Belgium*, *France*, *Luxembourg*, *Portugal*, *Spain* and *Zurich*. In *France*, local victim support workers report that in the pre-trial stages offenders are regularly ordered not to leave, or go into, a certain area. In *Portugal*, the examining magistrate may only issue orders in relation to persons accused of committing offences carrying a maximum punishment of more than 5 years. In such cases, the accused may be prohibited from visiting certain areas, leaving an area or the house without permission, or contacting certain persons. But contrary to *French* practice, Portuguese judges are reluctant to restrict the freedom of an accused person in this way. The same attitude prevails in *Spain*. In *Zurich*, the judge who decides on the question of whether or not the accused should be kept in custody in the pre-trial stages may impose a prohibition order on the accused upon his release.

Finally, it should be noted that all the orders discussed in this section which may be made in the pre-trial stages by the police, prosecutor or examining magistrate, may also be made by the criminal court in that jurisdiction. But the criminal court may also impose additional orders. For example, in *England and Wales*, the court may impose a restraining order prohibiting further harassment or threatening behaviour. In *Ireland*, in addition to a maximum sentence of 5 years imprisonment, a convicted stalker may be ordered not to communicate with the victim, or to approach his or her home or work place. Similar provisions have been proposed in *the Netherlands*. In this latter jurisdiction, it is now also possible to order a perpetrator of a sexual offence against a child to move away from the neighbourhood where the child-victim lives.

Criminal offence to threaten or intimidate a witness

In most of the jurisdictions included in this study, a person who has threatened a witness can be prosecuted on the basis of the general offence of threatening another person, and furthermore such intimidation counts as an aggravating circumstance in relation to the

punishment meted out to the offender as a result of the trial to which the intimidated person is a witness. It is obvious that sanctioning through the system of an aggravating circumstance can only have effect if the criminal proceedings actually result in a conviction.

More desirable is the situation in *France, Scotland, Spain and Sweden*. To start with *France*, in this jurisdiction the threatening or intimidating of a witness, a victim or a civil claimant may be sanctioned in two ways. First of all, it may be regarded as an aggravating circumstance and result in a more severe punishment for the offender. Secondly, it is a criminal offence to threaten or intimidate the victim with the aim of pressuring him not to file a complaint, to retract a statement or to lie to the courts. This offence carries a potential punishment of 3 years' imprisonment and a fine. *Scotland, Spain and Sweden* have similar offences. But for all these jurisdictions it is unclear whether offenders are ever actually prosecuted for the offence of intimidating a witness. Although there are no statistics available, the *Scottish* and *Spanish* interviewees asserted that such prosecutions in their respective jurisdictions were extremely rare.

This brings us to *England and Wales*. In this jurisdiction, it is not only a statutory criminal offence to intimidate a witness in the course of an investigation, but also to harm or threaten to harm a witness *after* the trial has ended. In addition, offenders who have threatened a witness may be prosecuted for the common law offence of perverting the course of justice. Significantly, there are statistics available in this jurisdiction regarding such prosecutions. As regards the two statutory offences, in 1996 almost 370 offenders were convicted in England and Wales for one of these two offences. Furthermore, an unknown proportion of the 2,000 offenders convicted or cautioned for perverting the course of justice involved witness intimidation.

5.4 Measure 3: Informing the victim of the release of the offender. Practice and policies of the individual jurisdictions

A final measure that may contribute towards lessening the risk of intimidation or retaliation by the offender against the victim is to inform the victim of release dates of the offender. This information prevents the victim from being unexpectedly confronted with the offender in the street, and also allows the victim to take precautionary measures such as avoiding the neighbourhood where the offender lives, or going out in company rather than alone. Information about the conditional or permanent release of the offender is imparted in only a few jurisdictions, and can be considered a significant stage in development towards a more victim-oriented criminal justice system.

At the time of writing, there were only four jurisdictions where the victim receives any form of information about the release of the offender on a structural basis.⁹ The first of these is *Denmark*. In this jurisdiction, the victim is informed if the accused person is released pending appeal, but not if the prison sentence has been completed. However, it is possible to make arrangements with the police in individual cases that the victim's lawyer is informed if the offender is allowed home on weekend leave. In *Sweden*, the injured person should be informed if the accused person escapes from custody, if this is deemed necessary by the authorities. Furthermore, in a circular issued by the Attorney General, it is provided that in cases involving violence against women or serious assault, it may be necessary to notify

⁹ In the Netherlands, serious consideration is at present being given by the legislature to introducing provisions for informing victims of release dates of offenders.

the victim of the release of the offender. As yet, the delivery of this information is a social service, not a legal obligation. The only jurisdiction where there is such an obligation is *Zurich*. Here, legislation provides that the victim who wants to be duly informed must be told of any temporary or final release of the offender, and any release from custody in the pre-trial stages. Furthermore, the offender may not be told of this arrangement. Although not placed on a statutory footing, the provisions found in *England and Wales* regarding the notification of victims of the release of the offender are by far the most extensive. Any witness who is known to be worried about the defendant being released on bail should be informed of such a release. Likewise, a victim of rape or sexual assault, and the family of a murder victim, should be informed if the accused is granted bail pending appeal. Once the criminal proceedings have reached their conclusion, the probation service must ask the victim where he wants to be informed of the release of the offender, and if so, is responsible for duly informing him. In addition, a victim help line has been set up so that victims can call in to relate their fears about the pending release of an offender.

5.5 Conclusions

There are many different ways of protecting the victim of crime from intimidation and the risk of retaliation by the offender. In the above we have discussed both physical protection and the deployment of legal measures aimed at deterring the offender from harming his victim. Furthermore, because the need for protection may extend well beyond the time-span of a criminal trial, we have also looked at post-trial policies as regards the provision of information to victims of crime on the release of offenders from prison.

In jurisdictions where organised crime and victim-witness intimidation is still a novelty, the protective provisions are generally – and understandably – poor. At the other end of the scale, jurisdictions that frequently suffer from organized crime such as Italy have well-established programmes for relocating threatened victim-witnesses, although it should be noted that these programmes are more often than not aimed at informants who have turned against their particular organization, rather than the victim.

A comprehensive overview of the performance of the individual jurisdictions is provided below.

*Overview of measures aimed at protecting the victim against intimidation
and the risk of retaliation by the offender:*

Protection against intimidation and retaliation	
1a police protection (<i>all jurisdictions</i>)	-
1b preventive custody/refuse bail: <i>Austria, Belgium, England and Wales, France, Germany, Greece, Ireland, Liechtenstein, Portugal, Scotland, Spain</i>	-
2 personal protection equipment: <i>England and Wales, Norway, the Netherlands, Sweden</i>	R
3 relocation: <i>England and Wales, France, Germany, Ireland, Italy, the Netherlands, Portugal, Scotland, Spain, Sweden, Turkey</i>	R
4a facilities at court: <i>England and Wales, Ireland, the Netherlands</i>	+
4b pre-trial depositions: <i>France, Italy, the Netherlands, Spain, Zurich</i>	+
5a measures to discourage offender from tracing personal details victim: <i>England and Wales, Sweden</i>	+
5b right victim to remain completely anonymous: <i>Netherlands, Zurich</i>	++
Legal instruments aimed at deterrence	
1 injunction or protection order	
1.1 civil remedy: <i>all jurisdictions</i>	-
1.2 condition: <i>Austria, Cyprus, Denmark, England and Wales, France, Germany, Greece, Ireland, Liechtenstein, Luxembourg, Portugal, Netherlands, Norway, Scotland, Sweden</i>	
1.3 criminal justice agency	R
a police: <i>Austria, Iceland</i>	
b examining magistrate: <i>Belgium, France, Luxembourg, Portugal, Spain, Zurich</i>	R
c public prosecutor: <i>Norway, Sweden</i>	
2 criminal offence: <i>England and Wales, France, Scotland, Spain, Sweden</i>	+
Information on release offender: <i>Denmark, England and Wales, Sweden, Zurich</i>	++

The following table provides an overview of the implementation of all the guidelines dealing with the treatment and protection of victims:

	A.1	C.8 <i>Children</i>	C.8 <i>Handicapped</i>	F.15 <i>Closed doors</i>	F.15 <i>Dis closure</i>	F.15 <i>Media</i>	G.16 <i>Pro- tection</i>	G.16 <i>Legal instru- ments.</i>
Austria	R	+	+	R	R	+	-	R
Belgium	R	++	R	R	R	+	-	R
Cyprus	-	R	-	R	-	+	-	R
Denmark	++	++	-	+	-	+	-	R
England and Wales	R	+	+	R	+	+	+	+
France	-	-	-	R	-	+	+	+
Germany	-	++	+	R	R	+	R	R
Greece	-	-	-	R	-	-	-	R
Iceland	R	+	-	+	-	+	-	R
Ireland	+	+	+	+	-	+	+	R
Italy	-	+	-	+	-	-	+	-
Liechten- stein	-	+	-	R	-	R	-	R
Luxem- bourg.	+	+	R	+	-	R	-	R
Malta	-	R	-	R	-	+	-	-
Netherlands	+	++	-	R	R	+	++	R
Norway	+	++	++	R	-	R	R	R
Portugal	-	+	+	R	-	+	R	R
Scotland	-	+	+	R	+	+	R	+
Spain	-	R	-	R	R	-	+	+
Sweden	-	++	-	R	-	R	+	+
Turkey	-	-	-	R	-	+	R	-
Zurich	-	R	-	R	+	-	++	R

Chapter 28

In Conclusion

1 MAIN FINDINGS

The main findings regarding the implementation of Recommendation (85) 11 can be categorised on the basis of the tables represented in the Chapters 25, 26 and 27 along the three main themes: information, compensation, and treatment and protection.

Information

In the majority of the 22 jurisdictions included in the study, the information flows from the authorities to the victim, as well as those between the authorities to safeguard victims' rights, do not yet meet the criteria set in Recommendation (85) 11.

In 17 jurisdictions (85%), the police provide the victim with general information concerning his rights and interests. In four jurisdictions (18%), the victim stands a fair chance of being informed about the final decision concerning prosecution. Six jurisdictions (27%) have set up standard procedures to notify victims of the date and place of a hearing concerning an offence that caused them suffering. The implementation of the right to obtain the outcomes of the police investigation and the trial has a perfect score (100%). Full implementation of Recommendation (85) 11 is achieved because it does not impose an active information strategy on its member states, but allows the jurisdictions to leave the initiative to the victim.

With respect to the flow of information between the criminal justice authorities, in four jurisdictions (18%) the police give as clear and complete a statement as possible on the victim's injuries and losses. The duty to inform the court of the victim's need for compensation is carried out adequately in 19 jurisdictions (86%). This is, however, almost exclusively due to participating victims who personally inform the court of their losses and injuries (16 jurisdictions: 73%). Nine jurisdictions (41%) oblige the public prosecutor to take the victim's need for compensation into account when addressing the court. Finally, a perfect score (100%) is reached concerning the duty to inform the court of any compensation or restitution made by the offender, because the defence counsel will never fail to tell the court.

Compensation

Concerning the victim's right to be compensated for his losses and injuries and the obligation of the criminal justice authorities to take the victim's need for compensation into account, the formal and actual implementation of the standards included in the Recommendation

are not yet met in any of the 22 jurisdictions.

Of the 13 jurisdictions adhering to the expediency principle, 10 take the question of compensation into account when taking the decision whether to prosecute the offender (77%). The right to oppose this decision is safeguarded in all jurisdictions (100%) either through a private prosecutor and/or a right to ask for a (judicial) review of the decision not to prosecute. A judicial review is available in seven jurisdictions (32%).

Three jurisdictions (14%) fail to give the criminal court a general right to order compensation by the offender to the victim. All but one of the jurisdictions (95%) award compensation in the form of a penal sanction, a substitute thereof, or in addition to a penal sanction. None of the jurisdictions adhering to the civil claimant model (0%) pay attention to the preference of compensation over fines. In the jurisdictions adhering to the compensation order model, legislation is in place but implementation on occasion lags behind. Where financial conditions can be attached to a certain sentence or order, two jurisdictions (9%) give great importance to the question of compensation.

Finally, concerning the enforcement of compensation, only five jurisdictions (23%) either enforce compensation on behalf of the offender or provide the victim with adequate assistance to collect the money.

Treatment and Protection

With respect to treatment and protection, the training of the police is the first requirement. Thirteen jurisdictions (59%) fail to train the police on how to deal with victims. Only nine jurisdictions (41%) provide victim-awareness training to recruits and incumbent personnel.

The special needs of children and persons with mentally disabilities during questioning are taken into account in 19 (86%) and 9 jurisdictions (41%) respectively. In addition, seven jurisdictions (32%) allow the questioning of the victim in the absence of the defendant, if this is considered necessary for the prevention of secondary victimization or for the victim's protection. Four jurisdictions (18%) have introduced legal reforms to improve the treatment and protection of victims of sexual crimes and/or domestic violence within criminal proceedings.

Concerning the frequency of questioning, eleven jurisdictions (50%) have limited repetitive questioning of vulnerable victims as much as possible.

The protection of victims against publicity which unduly affects their private life or dignity is safeguarded in all jurisdictions by the opportunity to hold a trial *in camera*. However, in three jurisdictions (14%) trials rarely take place behind closed doors. With respect to the disclosure of personal details of the victim, eight jurisdictions (36%) have established reforms to limit the disclosure of personal details in the press. Two jurisdictions (9%) have created formal rules that prevent the offender from learning any personal details of the victim-witness, and another two jurisdictions discourage the offender from attempting to find out where the victim-witness lives.

Finally, the victim should be protected against intimidation or retaliation by the offender. The protection of the victim is adequately safeguarded in 13 jurisdictions (59%). Legal instruments aimed at deterrence have been implemented in all but three jurisdictions (86%). Four jurisdictions (18%) notify the victim of (early) release dates of the offender.

2 LEGISLATIVE INITIATIVES AND BEST PRACTICE

To trace whether a member state has fulfilled its obligation of means (*obligation de moyen*),¹ i.e., its duty to undertake certain activities to achieve the goal of full implementation of Recommendation (85) 11, the number of victim-oriented reforms that have been issued in a jurisdiction can be used as an indication of the legislature's efforts to improve the position of victims in criminal law and procedure. Though realizing that this does not necessarily reflect substantial progress, an overview of initiatives is made to try to indicate progress regarding the law in the books. The overview (represented fully as a Supplement to this chapter) entails both an enumeration of victim-oriented legislative activities before 1985, and between 1985 and mid 1999, i.e., from the introduction of the Recommendation until the close of this study. The legislative initiatives in the period before 1985 are needed as a point of departure for the assessment in the period 1985 - mid 1999. By comparing the two periods, conclusions can be drawn on the impact of the body of thought of Recommendation (85) 11.

The relative success of attempts to bring about positive changes in the law in action can be assessed either by using a short list of indicators, representing factors that are critical to a genuine improvement of the position of victims within criminal proceedings, or by using the ratings as represented in the tables at the end of the Chapters 25 through 27. The ratings and tables are based on the developmental schemes. The results of the assessment based on genuine progress indicators and on the basis of the scores in the tables allow for an assessment of the member states that have achieved best practice. The results of the assessment of legislative initiatives are compared to the results of the best practice analysis in order to see whether there are similarities or dissimilarities. This will allow us to make tentative remarks on the value of victim-oriented legal reforms. If the outcome would be that member states which have issued most victim-oriented laws and reforms are also the ones that have achieved best practice, the results are easier to interpret than if these are not the same member states. In the case of dissimilarities, this can be explained by the fact that the number of laws and regulations does reflect their effectiveness in improving the position of victims in criminal proceedings. In certain jurisdictions, legislative initiatives focus mainly on one of the main themes of the Recommendation, i.e. information or compensation. However, the outcome may highlight certain shortcomings or say something about the value of the reforms for improving the position of victims in criminal proceedings.

Legislative initiatives

The number of victim-oriented reforms, measures and policies that have been issued need to be assessed both in the period before 1985, and in the period between 1985 and mid 1999. On the basis of the country reports, and in particular the sections 4.3, several criminal justice systems already had specific victim-oriented sources of law and guidelines 1985, as well as for the period 1985 through mid 1999. On the basis of the lists of legislative initiatives, which is represented in full in a supplement to this chapter, a table can be drawn:²

¹ See Chapter 27 § 1.

² The lists and table should be read with care. On the one hand, regarding the jurisdictions with Penal Codes and Codes of Criminal Procedure, it is possible that not all reforms are included in the list because they were incorporated in these Codes and were not traced individually. On the other hand, the common law systems do not have Codes and may, therefore, have a

Table on Legislative Initiatives (before 1985 : 1985-mid1999):

Austria:	1: 1	Liechtenstein:	0: 0
Belgium:	0: 15	Luxembourg:	1: 2
Cyprus:	0: 2	Malta:	0: 0
Denmark:	2: 5	the Netherlands:	1: 8
England &W:	6: 9	Norway:	2: 5
France:	3: 9	Portugal:	0: 5
Germany:	1: 4	Scotland:	1: 5
Greece:	0: 0	Spain:	0: 5
Iceland:	0: 3	Sweden:	1: 6
Ireland:	1: 7	Switzerland:	0: 2
Italy:	0: 4	Turkey:	0: 1

1:2 means that in the period before 1985, one victim-oriented law or regulation was issued, whereas two such laws or regulations were issued in the period 1985-mid 1999, bringing it to a total of 3.

For the period before 1985, the table on legislative initiatives shows that eleven jurisdictions (50%) had not issued any victim-oriented laws or guidelines. Seven jurisdictions (32%) issued one victim-oriented enactment, whereas only four jurisdictions (18%) issued more than one law or guideline (*Denmark, England and Wales, France and Norway*).

During the period 1985 and mid 1999, three jurisdictions (14%) did not issue any victim-oriented law or directive (*Greece, Liechtenstein and Malta*). Two jurisdictions issued one victim-oriented law (*Austria, Turkey*). Seventeen jurisdictions (66%) issued more than one such law or guideline. Five jurisdictions (23%) issued five victim-oriented laws or guidelines and six jurisdictions (27%) issued even more than five (*Belgium, England and Wales, France, Ireland, the Netherlands, Sweden*).

If we compare the two periods before and after 1985, the table shows, first of all, that the number of jurisdictions which issued more than one law or guideline concerning victims went up from 18% to 66%. At the same time, the number of jurisdictions that issued no such laws or guidelines went down from 50% to 14%. This is a significant difference in the number of victim-oriented laws and guidelines. It demonstrates without a doubt that the body of thought of Recommendation (85) 11 has had an impact on the vast majority of the criminal justice systems of the Council of Europe's member states.

Concerning the individual member states, the table demonstrates that *Belgium* has made the greatest effort to improve the position of victims (from 0 to 15), followed by *England and Wales* (from 6 to 9: total 15) and *France* (from 3 to 9: total 12). The latter two jurisdictions, which already issued a significant number of reforms before 1985, issued a further signifi-

numerical advantage over the other jurisdictions because all their Acts, Charters and Circulars have been incorporated in the list.

cant number of victim-oriented laws and guidelines (9). These three jurisdictions are followed by *the Netherlands* (from 1 to 8), *Ireland* (from 1 to 7) and *Sweden* (from 1 to 6).

If we add the legislative initiatives of both periods (before and after 1985), we find that the same jurisdictions emerge: *Belgium* (15), *England and Wales* (15), *France* (12), *the Netherlands* (9), *Ireland* (8), *Sweden* and *Norway* (7).

The least number of victim-oriented laws and regulations were issued in *Greece* and *Liechtenstein* (0), followed by *Turkey* (1), *Cyprus* and *Zurich/Switzerland* (2). The latter, however, is a good example of the fact that by a limited number of legislative initiatives the obligation of means can be achieved. In *Switzerland* (and *Zurich*) substantial progress was made by issuing only two enactments.

Best practice on the basis of genuine progress indicators

We consider the following indicators as genuine signs of development and sophistication:

- (1) the creation of opt-in information and/or notification systems;
- (2) enforcement of compensation by the state on behalf of the victim, in particular in jurisdictions traditionally adhering to the civil claimant model;
- (3) a system of judicial review;
- (4) the protection of the victim's personal details;
- (5) the provision of information on the offender's release from prison; and finally
- (6) the undertaking of victimological research and implementation studies of legal reforms and new policies.

- ad (1) The creation of opt-in information systems is preferable to general formal commitments because it requires setting up an information-infrastructure for the authorities to keep track of the victim's wish to be informed throughout the criminal proceedings. Such systems have been created in *Belgium, England and Wales, the Netherlands* and *Sweden*.
- ad (2) Enforcement of compensation by the state on behalf of the victim has been implemented in *England and Wales, Ireland, the Netherlands, Norway, Scotland* and *Sweden*. Among these jurisdictions, the adhesion procedure exists in *the Netherlands, Norway* and *Sweden*.
- ad (3) Judicial review of the final decision not to prosecute has been set up in *Germany, Italy, Malta, the Netherlands, Portugal, certain Swiss cantons* and *Turkey*.
- ad (4) The victim's personal details may be withheld from the offender in *England and Wales, the Netherlands, Sweden* and *Zurich (Switzerland)*.
- ad (5) Information about the offender's release is provided to the victim in *Denmark, England and Wales, Sweden* and *Zurich (Switzerland)*.
- ad (6) Victimological research and implementation studies are regularly undertaken in *England and Wales, Germany, the Netherlands, Norway, Sweden* and *Switzerland*.

On the basis of these critical factors, the best overall practice is achieved in *the Netherlands*, followed closely by *England and Wales* and *Sweden*. These jurisdictions represent all three types of legal systems included in this study, i.e. civil law, common law and Nordic systems. This clearly demonstrates that the implementation of Recommendation (85) 11 and the achievement of best practice do not depend on the type of legal system. Nor does one particular legal system offer, in itself, an advantage for meeting the criteria set by the Recommendation. If, however, the Recommendation would have focussed on other aspects of criminal proceedings, e.g. the right of victims to have a status and a voice, the type of

legal system would have made a difference. Meeting such demands would have been particularly difficult for the common law systems.

Best practice on the basis of ratings

The three tables shown at the end of the comparative analysis Chapters 25, 26 and 27, allow us to evaluate the markings for all guidelines. In the table represented below, we have added all ratings of these tables indicating the ways of implementing Recommendation (85) 11. The below table does not specify the ratings according to the themes of information, compensation, and treatment and protection. It represents overall achievements by adding all poor, adequate, good, and excellent scores.

Overall results of the Tables on Information, Compensation, and Treatment and Protection³

	Poor:	Adequate:	Good:	Excellent:
Austria:	-: 8	R: 9	+: 6	++: 1
Belgium:	-: 4	R: 14	+: 3	++: 3
Cyprus:	-: 14	R: 8	+: 2	++: 0
Denmark:	-: 9	R: 8	+: 5	++: 2
England:	-: 3	R: 9	+: 9	++: 3
France:	-: 7	R: 10	+: 7	++: 0
Germany:	-: 7	R: 10	+: 5	++: 2
Greece:	-: 15	R: 8	+: 1	++: 0
Iceland:	-: 11	R: 7	+: 6	++: 0
Ireland:	-: 7	R: 8	+: 8	++: 1
Italy:	-: 13	R: 6	+: 5	++: 0
Liechtenstein:	-: 11	R: 10	+: 3	++: 0
Luxembourg:	-: 9	R: 10	+: 4	++: 1
Malta:	-: 16	R: 5	+: 3	++: 0
Netherlands:	-: 2	R: 11	+: 4	++: 7
Norway:	-: 3	R: 13	+: 6	++: 2
Portugal:	-: 9	R: 8	+: 7	++: 0
Scotland:	-: 7	R: 9	+: 7	++: 1
Spain:	-: 7	R: 12	+: 5	++: 0
Sweden:	-: 8	R: 8	+: 6	++: 2
Turkey:	-: 13	R: 7	+: 4	++: 0
Zurich:	-: 8	R: 10	+: 4	++: 2

Analysis of the table shows that none of the included criminal justice systems have implemented Recommendation (85) 11 perfectly. They all scored poorly, at least twice, in the developmental schemes. *The Netherlands* has implemented the Recommendation in the best overall manner. It has the lowest counts on poor implementation (2), the highest counts on outstanding implementation (7). *The Netherlands* has also reached the best overall implementation of the Recommendation (22). It is followed by *England and Wales* and *Norway*, which have 3 poor scores and 3 and 2 excellent scores respectively. On an overall implementation scale these jurisdictions have reached the score of 21. Though, *England and Wales* has a higher number of guidelines that have been well or excellently implemented (12) than *the Netherlands* (11) or *Norway* (7).

³ The scores on state compensation are not included in this rating because the Recommendation does not oblige its member states to provide these schemes. Where double ratings were given for one guideline, the lowest rating is used.

These three jurisdictions are followed closely by *Belgium*, which has implemented three poor and three excellent scores, with an overall implementation rate of the Recommendation of 20. The high score of *Belgium* is remarkable because in the not so distant past it was a jurisdictions that did not give much attention to victims. *Belgium's* good score reflects the enormous effort of the legislature to improve the position of victims in criminal proceedings. At the same time, the example of *Belgium* demonstrates that it is indeed feasible to make genuine formal and actual improvements in a very short period of time.

The jurisdictions which implemented the Recommendation in the poorest way are *Cyprus*, *Italy*, *Malta*, *Greece* and *Turkey*. They have scored poorly in the implementation of 14, 13, 17, 15 and 13 guidelines respectively. Of this group, *Malta's* manner of implementing Recommendation (85) 11 represents worst practice. It has the highest number of poor scores (17). This means that the victim's rights to information, compensation, and protection are not incorporated into the criminal justice system and are generally not respected by the criminal justice authorities. The poor score of *Italy* is surprising, particularly if one considers that it has recently revised its criminal laws and justice system, and thus had the perfect opportunity to bring about real changes. *Italy* is, moreover, one of the most powerful and richest states in the world; it is one of the G7 countries and should be able to afford a state compensation scheme with a general scope.

Conclusions

Based on the number of legislative initiatives *Belgium*, *England and Wales*, *France*, *Ireland*, *the Netherlands* and *Sweden* reach the highest scores. Following the list of indicators, *England and Wales*, *the Netherlands*, *Sweden* (all four scores), followed closely by *Zurich*, have achieved best practice. On the basis of ratings, *the Netherlands* has achieved best practice, followed by *England and Wales*, *Norway* and *Belgium*.

If we compare our findings regarding the legislative initiatives with the analysis of best practice, the high scores in the table on the number of laws and regulations of *Belgium*, *England and Wales*, *the Netherlands* and *Sweden* are not surprising. The first three jurisdictions have a very high overall score, whereas *Sweden* also scores high on the basis of indicators, and rather well on the basis of ratings. The high score of *France* seems surprising compared with its average score on best practice. This can be explained by the fact that most reforms, except for the ones of 1998 and 1999, are almost exclusively concerned with compensation, either from the offender or from the state. *France* has average scores on information and many poor scores regarding the treatment and protection of victims. The relatively high score of *Ireland* regarding the law in the books, compared to the actual implementation of the guidelines, can be explained by the fact that legislative initiatives focus mainly on the position of vulnerable victims within the criminal justice system, e.g. victims of rape, incest, domestic violence. At the same time this explains the relative high scores on treatment and protection. However, much less attention is given to the provision of information, which is generally poor, and the question of compensation.

Regarding the jurisdictions on the other side of the spectrum, those with the lowest scores, we find that the least initiatives to improve the position of victims are undertaken in *Greece* and *Liechtenstein* (0), followed by *Austria*, *Turkey*, *Cyprus*, and *Zurich* (*Switzerland*). None of these findings are really surprising compared with the findings on actual implementation of the Recommendation (*Liechtenstein* scores relatively poorly: 11 poor, 3 good), except for the last one: *Zurich* (*Switzerland*). This jurisdiction ranks among the highest in Europe regarding actual implementation assessed on the basis of indicators and scores rather well on the basis of ratings. An explanation for this finding is that its two enactments are very

comprehensive, and have greatly improved the treatment and protection of victims. Furthermore, victimological studies are undertaken on a regular basis. Together, these developments account for positive scores on three of the six indicators for best practice.

For a final analysis on the formal and actual implementation of Recommendation (85) 11, we can conclude that *the Netherlands* and *England and Wales* are the two jurisdictions that have achieved best overall practice.

3 CONCLUSIONS ON THE IMPLEMENTATION OF R (85) 11

The main findings and the measurements of formal progress and actual achievements seem to indicate that perfect implementation of the Recommendation cannot be realized. It is probably too ambitious to expect that the criminal justice authorities treat all victims of crime in accordance with the 16 guidelines of the Recommendation, which is not to say they should not aim for 100% implementation. No jurisdiction is able to give basic information to every victim who comes into contact with the police. Nor have efforts to encourage the criminal courts to award compensation to the victim as a matter of course had the desired effect. National studies and legal practice indicate that implementation of, for instance, information has an upper limit of treating approximately 70% to 80% of victims in accordance with the Recommendation's standards. It seems impossible to implement the Recommendation in a manner that safeguards the rights and interests of all victims who report an offence to the authorities. Most criminal justice systems, however, are not even close to treating 70% to 80% of victims according to the Recommendation's requirements. Concerning compensation, treatment and protection, our findings indicate that the ceiling may be even lower. The answer to the question why is not easily provided, particularly where the valiant efforts were undertaken. Reaching the perfect implementation score is difficult because of a lack of training, guidance on the work floor, standardization of procedures, genuine interest of high-ranked officers and prosecutors, and financial incentives for the criminal justice authorities to perform victim-oriented activities in an outstanding way. Furthermore, legal culture and public pressure, or lack thereof, on the authorities to bring about real change may be important factors regarding the implementation of Recommendation (85) 11.

More generally, our data indicate that a successful implementation of victim-oriented reforms depends on, *inter alia*, the clarity and conciseness of reform measures, the absence of easy escape clauses, a favourable attitude of the criminal justice authorities, and whether the reforms also benefit the offender and/or the criminal justice system as a whole. It is crucial that legislative initiatives are clear-cut and leave no doubt about the agent responsible for carrying out any victim-related duties. The legislature should avoid escape routes for not applying regulations as much as possible. One of the critical factors of failure of the adhesion model is the fact that the law allows criminal courts to refer the claim to civil court if the claim is 'too complicated' or 'disputed'. This escape route causes many legal reforms concerning the adhesion procedure to fail. Clearly, the attitude of the criminal justice authorities is a critical factor for a successful implementation of any duties towards victims. Influencing or changing a negative attitude is not easily achieved. However, victim-oriented training for the criminal justice authorities and including victim-oriented duties into performance assessments of the criminal justice authorities may be useful instruments in combating an unfavourable attitude. Furthermore, the best implemented victim-oriented

reforms are those that benefit not only the victim but also the offender or the functioning of the criminal justice system as a whole. This is demonstrated by the fact that if the payment of compensation has a mitigating effect, information is always provided to the court and payments are actually made to the victim. It is also shown by the success of reform measures introducing the use of special questioning facilities for vulnerable victims, i.e. interviewing studios for children, rape suites, audio-visual registration of pre-trial examinations and video-linked questioning. These reform measures are implemented successfully because they upgrade the quality of the criminal justice process.

Concerning the guidelines on information, the findings demonstrate that if a jurisdiction has not issued a formal obligation for the criminal justice authorities to provide the victim with information, or only a limited duty, the actual provision of information is, as a rule, of a significantly lower standard and frequency than in jurisdictions with a (full) formal duty. Likewise, it is critical that a responsible agent is indicated for informing or notifying the victim. The actual implementation of the guidelines on information can, furthermore, serve as an indicator for implementation of the other guidelines. If the victim is provided with inadequate information, the implementation of guidelines dealing with compensation, and treatment and protection is generally equally poor. The only exceptions to this rule are the Nordic jurisdictions. A possible explanation for this phenomenon may be that victims of serious crime have the right to have a state-paid lawyer. It is also highly probable that the provision of information to victims about their rights and opportunities is an indicator for the level of success in exercising them. However, due to a lack of statistical data, and the general lack of national victimological and empirical studies, this hypothesis could not be tested.

Concerning compensation, the conclusion that the compensation order is a more effective instrument than the adhesion procedure to safeguard the victim's right to be compensated by the offender seems justified. Currently available data seem to indicate that victims seldom make use of the adhesion procedure. Our findings demonstrate that the formalities of the adhesion procedure are in itself an impediment which keeps numerous victims from claiming compensation from the offender within the criminal process. Moreover, *Dutch* and *German* studies, which are the only studies available today, as well as our own data demonstrate that many judges object to dealing with rules of civil law within criminal proceedings. The escape clauses in the law also allow judges to act accordingly and refer claims for compensation to civil court. The nature of the compensation order, a penal sanction in its own right, prevents the 'intrusion' of private law in criminal proceedings. This, and its enforcement by the state on behalf of the victim, are its main strengths. The advantage of enforcement, however, can also be introduced within the adhesion procedure, as is demonstrated by *Swedish* and *Norwegian* practice. Here, the national debt collection agency enforces the civil claim of compensation against the offender if the victim so wishes.

Concerning the compensation order and the compensation measure, the CDPC recommends that imprisonment for non-payment of the compensation order should be avoided. Imprisonment in default cancels the obligation to pay compensation to the victim. Recently, suggestions have been made in *England and Wales* that imprisonment in default should not release the offender from his duty to pay compensation.⁴ However, the *Dutch* experience argues against such a move. Many judges are discouraged from ordering

⁴ The Magistrates' Association, Victim Support, Justices' Clerks Society, Metropolitan Stipendiary Magistrates, *Payment of Compensation Orders*, London, April 1995, p. 4.

compensation because imprisonment in default does not excuse the offender from paying the compensation. They feel that the offender risks to be punished twice. Viewed in this light, the CDPC's advice should be followed.

The hypothesis that state compensation funds for victims of violent (and sexual) crimes represent a genuine sign of development is backed by our findings. Adequate state compensation schemes are only found in jurisdictions where compensation for the victim's losses and injuries is already more or less safeguarded through the courts, the public welfare system, and (private) insurance. In jurisdictions where state compensation is most needed, no such schemes have been set up.

With respect to treatment and protection, the hypothesis that training is a sign of sophistication as well as an indicator of the manner victims are questioned is corroborated by our data. Similarly, the hypothesis that training is an indicator of the level of protection available to victims is corroborated. Not only regarding the most common protective measures but also if one considers very poorly implemented measures, e.g. keeping the victim's personal details from the offender, and informing victims of the offender's release. Only five jurisdictions have implemented one of these indicators, or both. Among the three jurisdictions implementing both measures (*England and Wales*, *Sweden* and *Zurich*), and the two jurisdictions implementing one (*Denmark* and *the Netherlands*), only one jurisdiction (*Zurich*) scores poorly for training.

Another conclusion that can be drawn from our findings is that specialization is more effective than generalization. In jurisdictions stipulating that certain activities, such as the questioning of children and victims of sexual offences, are to be undertaken by specially trained members of the criminal justice authorities, better results are achieved.

Finally, in the light of the standards set by the Recommendation, the widely held contention that the victim is *per definition* worse off in an accusatorial than in a more inquisitorial system is not corroborated by our findings. Although the questioning of the victim is potentially harsher in the accusatorial systems, one of these, namely *England and Wales*, scores very well as far as implementation of the Recommendation is concerned. However, one might reach a different conclusion if different parameters were included, such as the right to participate actively in the proceedings.

The findings of this study demonstrate the need to reflect on the current position of victims within the criminal justice system. The question of procedural justice for victims is still as pertinent as it was 15 years ago, when the Council of Europe adopted Recommendation (85) 11. The research shows without a doubt that victims are still frequently confronted with a criminal justice system that largely neglects their rights and interests. Many victims are deprived of information, though it is a right and a service that does not conflict with the rights of the offender in any way. Criminal courts order or award compensation to the victim in far fewer cases than possible under national law. Although it is an elementary requirement of justice that the offender compensates the victim for his losses and injuries suffered as a result of crime. Furthermore, many victims are not assisted in the enforcement of compensation. State compensation schemes are available in 16 jurisdictions, however, they differ greatly with respect to who can claim compensation, the period of limitation and the amount awarded for comparable offences. In addition, victims are not necessarily aware of the schemes they qualify for. Regarding the questioning of vulnerable victims, in particular children, significant efforts are being made. The protection of victims against intimidation or retaliation and from publicity is still by and large inadequate.

4 RECOMMENDATIONS FOR A BETTER IMPLEMENTATION OF R (85) 11

A.1: Victim-Awareness Training

Training of the police, public prosecutors, (examining) magistrates and judges on how to deal with victims should be an integral part of the functioning of the criminal justice system. Concerning the police, training should not only be provided to recruits but also to incumbent personnel, who should be offered follow-up and refresher courses. It is, furthermore, advisable that mechanisms to measure the effects of training in job-evaluations are introduced, and that the performance in victim-oriented duties is assessed in a manner similar to the assessment of other basic police duties.

Training of public prosecutors and judges is still very exceptional but nonetheless vital for improvement of the position of victims within criminal proceedings. Training should, first of all, be directed at combating negative attitudes towards victim-oriented duties. It should also teach the judicial authorities how to meet the needs of victims for information, compensation and protection by making a more effective use of traditional and new legal options. The arguments against training, such as the assumption that training would compromise their objectivity and impartiality, are outdated and false. Training on how best to implement formal rules does not affect impartiality. This is best demonstrated by the fact that most jurisdictions offer training to public prosecutors and judges on offender-related laws and regulations.

A.2/D9b: General Information

The police should have the opportunity to hand over leaflets and brochures to inform victims. The state should print brochures for the 'average' victim of crime, but also leaflets for special groups of victims, such as children, the mentally disabled, victims of sexual offences and domestic violence. The combination of oral and written transferral of information is most effective in ensuring that the information comes across. A standard policy to refer victims to victim support services, legal and social services should be set up in all jurisdictions. To this end, the police should be given a pocket-booklet containing all local services, telephone numbers and contact persons. In addition, it might be very useful to give victims a second opportunity to obtain information by visiting them at home, a few days after the crime. The provision of information to the victim by the criminal justice authorities is best safeguarded if a general notification duty or an opt-in information system is established. However, this should be complemented with the creation of information and reception desks at the courts. Such information desks are easily accessible services where victims can turn to for information about, for instance, the criminal proceedings.

A.3: The Outcome of the Investigation

The victim should be informed of the outcome of the investigation. This can be facilitated by providing the victim with a report-number, a contact person and telephone number to find out what happened in his case. It would, however, be preferable if the police take the initiative and notify the victim of the outcome of their investigation. In addition, it is important to stress that the victim should be notified of all decisions concerning the investigation, including the decision to put the case on hold, i.e., the decision not to dismiss nor to prosecute the case.

A.4: The Statement on the Victim's Losses and Injuries

The authorities' statement on the victim's losses and injuries should not be recorded on the same form that is used to indicate the items of proof against the suspect. The statement should be recorded on a separate form which is added to the legal file. It is advisable that the criminal justice authorities seek the cooperation with victim and/or legal services to improve the quality of the statement. The cooperation with services best safeguards the provision to the courts of as accurate and complete a statement as possible on the victim's losses and injuries. Furthermore, the introduction of a Victim (Impact) Statement would give the victim an excellent opportunity of informing the court of the moral and material losses and injuries sustained. The Victim (Impact) Statements may either entail the right to address the court during the trial or at the sentencing stage, or the right to provide the court with a written assessment of the impact of crime. Giving victims the right to speak during the trial might make them vulnerable to cross-examination or questioning by the defence counsel on his Statement. The Victim (Impact) Statement in the form of a report either written by the victim, a social worker or a psychologist can be added to the legal file in most criminal justice systems. As such, it would be an excellent instrument of informing the court, even in jurisdictions where the victim is allowed to participate in the proceedings.

B.5: The Decision Not to Prosecute and Compensation

The prosecuting authorities should be more aware of the consequences of their decision not to prosecute the offender, particularly the financial consequences for the victim and his (reduced) chance of obtaining compensation. The best ways to safeguard the victim's right to be compensated for his losses are the power of the authorities to mediate between victim and offender, and the duty for the prosecuting authorities to try to obtain compensation from the offender on behalf of the victim. Common law jurisdictions should reflect on ways that would authorize mediation between victims and (juvenile) offenders.

B.6: The Final Decision on Prosecution

The provision of information on the final decision concerning prosecution is, first of all, greatly enhanced by a formal duty to notify victims of both negative and positive decisions. Regarding negative decisions, jurisdictions should consider the introduction of notification letters which offer proper information on the reasons why the case is not prosecuted. These letters can be standardized for a number of frequently occurring situations, such as a technical waiver or non-prosecution for certain, specific policy reasons. It is important that legal phrases are avoided as much as possible, or they should at least be explained by giving examples. Decisions should, furthermore, be relayed to the victim as soon as they are taken. Informing victims at a much later stage, through the summons, is unacceptable. Victims of serious crime should be informed in person, preferably by the authority taking the decision. Informing victims of serious crime in person expresses that the criminal justice authorities take their interests into account. Informing victims of the decision not to prosecute allows the authorities to explain why the serious offence will not or cannot be prosecuted. At the same time, victims can be informed of how to oppose this decision, through either private prosecution or (judicial) review. Personal communication of the decision to prosecute has the advantage that the criminal proceedings, and the victim's role therein, can be explained, as well as what he should expect from the trial.

B.7: Private Prosecution and Review

Though the Recommendation puts private prosecution and (judicial) review on a par, the

practical value of private prosecution does not correspond with the substantial support for this institution still voiced in legal and academic writings. The victim's right to private prosecution seems to have primarily a symbolic value, especially in jurisdictions where this is the victim's only opportunity to participate in the criminal proceedings. Moreover, it entails important disadvantages compared to review. The private prosecutor has to invest greatly to piece together a solid case against the defendant, and he runs the risk of having to pay all legal costs, including that of the defendant, if the case is lost. It is, therefore, advisable that the victim's right to institute a private prosecution is complemented by the opportunity to ask for a review - and preferably judicial review - of the decision not to prosecute. Judicial review offers the victim an easy way to have the decision not to prosecute re-examined by neutral and objective magistrates or judges, who are able to determine the merits of the case, and its chances of success in court.

C.8: Questioning

At the police stations, specially trained officers should conduct the questioning of children, persons with learning disabilities, and victims of sexual crimes. These vulnerable victims should moreover have the right to be accompanied by a person they trust, to support them morally during the questioning. Vulnerable victims should be offered the opportunity to be questioned in a special child-studio or rape suite during the pre-trial stages, or via a closed-circuit television-link during the trial. If a television-link is established, the questioning should be done through an intermediary. If a studio or suite is used, the questioning should preferably be registered on tape and used as evidence in court. To safeguard the rights of the defence, the counsel should be allowed to be present during the questioning and to ask questions through the officer who is conducting the examination. In addition, registration of pre-trial questioning sessions has the advantage of reducing the frequency of questioning.

The number of times a victim is questioned by the criminal justice authorities should receive much more attention, since it is vital to the victim's perception of the functioning of the criminal justice system. During the trial, the criminal courts should make more use of existing possibilities to intervene in (cross-) examinations by defence counsels or defendants that are unnecessarily harmful or disrespectful to the victim-witness.

D.9a: The Date and Place of a Hearing

The criminal justice authorities should inform all known victims, irrespective of their formal role, of the date and place of the trial. The notification should be done by the same authority who is responsible for informing the other parties and persons involved in the case. The letter informing the victim of the date and place of the trial should also contain information about the victim's right to claim compensation from the offender within the criminal process. This letter can serve as a safety-net to ensure that those victims who have been overlooked by the criminal justice authorities at an earlier stage are reached.

D.9c: The Outcome of the Trial

The outcome of the trial should be communicated to victims, either by creating a formal duty or through an opt-in procedure. The court's office seems to be the indicated body to notify victims of the outcome of their case. The letter of notification should be incorporated in the computerized system that has been developed to inform other involved parties or persons, i.e., the defence counsel, the defendant and the prosecuting authority. If possible, the letter should not only contain information on what is of direct interest to the victim,

e.g. compensation, but should also contain the verdict of the court.

D.10: The Court and Compensation

The courts should have a general power to order compensation to the victim. This power should not be restricted to those occasions in which the court can impose a conditional sentence or a probation order.

Compensation should be dealt with as an integral part of criminal proceedings and be imposed in the form of a compensation order. Practice demonstrates that the *English* compensation order is the best way to deal with compensation. Under the compensation order model, the courts impose a penal sanction, and, therefore, are not obliged to deal directly with private law (an 'alien subject') within a criminal process. In addition, the compensation order can be imposed by the court without a formal request by the victim, and does not require active participation of the victim. The compensation order can be related to the financial capacity of the offender which contributes greatly to the actual payment of compensation, and it is enforced by the state. The main disadvantage of the compensation order model is that the victim cannot participate in the proceedings. This disadvantage can, however, be overcome by introducing participatory elements into the criminal process. The most appropriate choice for a common law system seems to be introducing the opportunity for victims make a Victim (Impact) Statement.

The adhesion or civil claimant model has the intrinsic advantage of offering the victim the opportunity to participate. The adhesion model should, therefore, be maintained for participatory ends. If, however, jurisdictions insist in pertaining to the adhesion model as a means of allowing the victim to claim compensation, special attention should be given to combating the negative attitude of the judiciary towards dealing with compensation (a matter of private law) within criminal proceedings.

In this particular model, as well as in others, the introduction of training courses for the judiciary may be helpful to teach judges how to deal with the victim's losses and injuries in a less formal manner. Training would also enhance their awareness of the fact that referral of a relatively small claims to the civil court means, in fact, that victims are deprived of compensation, since they cannot afford to start civil proceedings. Today, members of the judiciary seem often unaware of the fact that for most victims the opportunity to start civil proceedings is merely a symbolic one, with little practical value.

D.11: Compensation and Priority over other Financial Obligations

The payment of compensation by the offender to the victim should have priority over financial obligations of the offender to the state. This should be irrespective of whether compensation is awarded in the form of a penal sanction, a substitute thereof, or in addition to a penal sanction. The priority of compensation over fines, amongst others things, is a subject that is still ignored by most jurisdictions where compensation is a matter of private law incorporated into the criminal process. This shortcoming should be remedied.

D.12a: Informing the Court of the Victim's Need for Compensation

The best manner to inform the court of the victim's need for compensation is to establish a formal duty for the public prosecutor in combination with the victim's right to provide additional information to the court. Or, where this would be incompatible with the criminal justice system, give the victim the right of informing the court of his need for compensation from the offender. Providing the court with such information may be done by giving the victim the right to participate in the criminal process or by allowing him to make a Victim

(Impact) Statement, or both.

D.12b: Informing the Court of Any Compensation Made

Informing the court of any compensation or restitution made by the offender is well safeguarded in all jurisdictions due to the fact that the defence counsel will inform the court. Lawyers, however, often claim to have difficulty with convincing their clients to make any payments prior to the trial because they cannot give an indication of the mitigating effects. It might be helpful to follow the example of *Italy* and *Turkey* and clearly stipulate the mitigating effects of any full or partial payments of compensation to the victim prior to the trial. It is true that by allowing the court to take any payments made by the offender into account when deciding on the quantum or form of the sentence inequality is created between offenders who can afford to pay and those who cannot. However, courts in all criminal justice systems take such payments into account but only few legislatures have stated what the mitigating effects are. This also entails the risk of inequality before the law.

D.13: Compensation and Financial Conditions

Attaching financial conditions to a deferred or suspended sentence should be given more attention by the courts. The common assumption among judges, particularly those operating within the adhesion model, that this is a superfluous option should be combated. Compensation attached to a deferred or suspended sentence is very likely to be paid. It is, therefore, a highly effective instrument to secure compensation for the victim.

E.14: Enforcement of Compensation

The responsibility for enforcement of compensation should be placed with the state. The compensation order is, by nature, enforceable by the state but compensation awarded to the civil claimant is not. The compensation order model is, therefore, preferable over the adhesion procedure model. However, jurisdictions adhering to the latter compensation model can adapt their enforcement systems. It is advisable that they empower the state to collect money from the offender on behalf of the victim. The national debt collection agency seems the indicated representative of the state to fulfil this task: it is an official body that has competence and ample experience in enforcing financial sanctions, such as fines. This competence can be expanded, with relative ease, to enforcing payments by the offender to the victim (see the *modus operandi* of *Sweden* and *the Netherlands*).

F.15: Protection From Publicity

The legislature should take measures to protect the victim against the publication of his personal details in the (tabloid)press. If the press are particularly adamant in making sensational press releases on victims, the introduction of penal sanctions, such as considerable fines (enough to discourage future publications), should be considered. In jurisdictions with a less sensationalist press, gentleman's agreements between the authorities and the press not to publish names or photographs without the victim's consent may be sufficient to prevent publications affecting his private life or dignity. Victims and defendants alike should only be indicated by their initials and through pictures which do not reveal their identity in press articles and television programmes, unless they give their explicit permission or contact the press on their own initiative.

During the trial, the opportunity to hear victims *in camera* should be applied more frequently to protect the victim-witness against unwanted publicity. The victim-witness should also be offered the opportunity to be heard in the absence of the defendant in a

manner that does not prejudice the rights of defence. The defence counsel should be allowed to be present and the court should inform the defendant of the content of the victim's statement. Alternatively, the defendant should be able to follow the questioning via an audio-system in an adjacent room, after which he should have the opportunity to react to the statement.

G.16: Protection Against Intimidation and Retaliation

To protect victims against intimidation, attention should be given, besides police protection and preventive custody or the refusal of bail, to withholding personal information about the victim from the offender. This can be done, amongst other things, by allowing victims to choose domicile at the police station, by deleting personal details from the legal file, and by allowing threatened victim-witnesses to remain anonymous, in the manner as prescribed by the European Court of Human Rights. The protection of threatened victims may benefit from the use of personal alarm equipment. Furthermore, the criminal justice authorities should pay more attention to the manner in which the victim is required to identify the offender. If a line-up is used, the victim should be sheltered from the offender by a one-way screen, or any other means to prevent identification of the victim by the offender. In court, separate waiting rooms for victim-witnesses and defendants, their family and friends at the courts. Having to wait in one and the same waiting room causes unnecessary tensions and opportunities for intimidation of witnesses. During the trial, the questioning of the victim by the defendant (instead of by his counsel) should be avoided. The opportunities of using the victim's pre-trial depositions or installing closed-circuit television links should be studied.

Several measures exist to prevent intimidating or retaliation, e.g. creating penal sanctions for such acts, issuing protection or prohibition orders, and attaching conditions to a suspended or deferred sentence. Furthermore, more attention should be paid to the role of public prosecutors and examining magistrates. They are the indicated authorities to intervene in potentially dangerous situations. The judicial authorities should be given general powers to issue prohibition and protection orders as well as specific instructions on when or how to use these orders. Today, the reluctance to restrict the freedom of the accused stands frequently in the way of an effective protection of an intimidated or threatened victim-witness. This situation prejudices not only the safety of the victim but also the course of justice. Victims of serious crime should be able to receive information on the (early) release of the offender, if they so wish. Similarly, they should be notified if the offender is granted bail pending appeal. It is, furthermore, advisable to inform the local police force of decisions regarding (early) release or bail.

5 GENERAL RECOMMENDATIONS

The individual guidelines of the Council of Europe's Recommendation (85) 11 should make the member states' authorities more aware of the conditions that have to be met to change not only the law in the books but also in practice. However, the body of thought of the Recommendation, that is to improve the position of victims within criminal proceedings, should also be given more attention. Primary conditions should be met and fundamental changes are vital to improve the position of victims within the criminal justice system.

The victim should have effective access to the criminal justice system and should not be prevented from seeking redress in criminal court because of limited resources. Therefore,

victims should be given the right to apply for free or subsidized legal aid. However, ideally, the victim should not be forced to hire the services of a lawyer due to the sheer complexity of criminal procedures or formal rules concerning compensation. Legislatures should give more attention to avoiding unnecessarily complicated procedures. The criminal justice authorities should be more willing to guide the victim through the system, in particular with regard to his need to be compensated by the offender.

The concept of the *alleged* victim should be abandoned. This concept has no positive effects on the functioning of the criminal justice system nor on the procedural position and/or rights of the accused. The effects of this concept are only negative: 1) it erodes the victim's right to legal protection; 2) it reduces the victim's right to have effective access to the criminal justice system as far as his right to be compensated for his losses and injuries is concerned; and 3) it stimulates a negative attitude among legal practitioners, and particularly judges, towards the participation of victims within criminal proceedings as well as towards dealing with the question of compensation within such proceedings.

Jurisdictions should give more attention to the victim's right to be compensated by the offender for his losses and injuries in the course of the criminal proceedings. It is unacceptable that victims are still deprived of the right to be compensated for *moral* damage suffered as a result of crime. Legislatures should, therefore, make sure that the courts are empowered to award or order compensation for material *and* moral damage.

The adhesion procedure should be maintained for participatory purposes. It has the major advantage of allowing the victim to have a voice in the criminal process and of granting him several important participatory rights in the pre-trial stages. Compensation, however, should be awarded by the criminal courts in the form of a penal sanction, i.e., the compensation order.

Irrespective of the system, judges and magistrates should be made aware of how to deal with compensation within the criminal process during their training at schools for the judiciary or during any other practical training for future judges and magistrates. Their formal approach towards substantiation of losses, as well as their negative attitude toward compensation as a whole, should be seriously combated and, ultimately, renounced.

Similarly, the judiciary should be more perceptive of the efficiency of the legal system as a whole. Dealing with compensation in an effective way within criminal proceedings will save the legal system, and the judiciary, a considerable amount of time and money. In short, the judiciary needs to embrace a more holistic approach.

In Recommendation (85) 11 (part II), the Council of Europe advises its member states to conduct comparative research on the practical consequences of victim-oriented reforms, and on the solutions that exist in the different legal systems. The underlying research is essentially an analytic and comparative study that draws up an inventory of the ways in which the Recommendation is implemented in the 22 jurisdictions. Where relevant national criminal justice statistics and (empirical) studies were available, we incorporated them in this study. However, in many jurisdictions such data are missing. Furthermore, the criminal justice statistics are generally unsuitable for comparison. Statistics, for example, do not always include the same points of reference: some only contain data on felonies, others include data on both felonies and misdemeanours. More importantly, however, no accurate data are kept on essential data that would allow for a detailed comparative analysis. Only if statistics are kept on a standardized basis can they be compared and definite conclusions be drawn. We, therefore, strongly recommend that national empirical studies are carried out, and that criminal justice statistics are standardized in all member

states of the Council of Europe to allow for further, more detailed, studies on the position of the victim in criminal law and procedure.

The criminal justice authorities should record the number of victims who reported a crime and who wished to be informed of their rights and opportunities. In addition, the number of victims who were provided with basic information, referred to victim or social services, and notified of relevant developments during the proceedings should be recorded. These data need to be registered in the same way as data on the number of reports, prosecutions and penal sanctions imposed on offenders. The authorities should also monitor the treatment and protection of victims. It would be advisable to include all these data in the criminal justice statistics. Statistics must also include data on the frequency in which victims act as private prosecutors, civil claimants, compensation order beneficiaries and/or auxiliary prosecutors; the number of victims who have suffered losses and injuries as a result of crime; the number of victims who want to be compensated; the number of victims who inform the courts of their need for compensation; the amount of money claimed or needed to cover the losses; the number of victims who are the beneficiaries of a court decision on compensation; the amount of compensation ordered or awarded by the courts; the number of victims who receive payments from the offender, whether they are compensated in full or in part, and within what period of time they received the money; and the frequency in which protective measures are used by the authorities.

Research should be undertaken on a national and comparative level to allow policy makers to propose victim-oriented reforms and to evaluate any such reforms or policies in order to effectively remedy any shortcomings. Also, implementation by the criminal justice authorities of new reforms should be monitored. Phenomena that are taken for granted and seldom questioned should also be studied. Member states should undertake studies to measure, *inter alia*, the need for, and effectiveness of, private prosecution in all member states of the Council of Europe; to evaluate the (dis)advantages of different legal systems and compensation models for victims; to study potential benefits of other systems; and to carry out in-depth examinations of the reasons why the prosecuting authorities and the judiciary are generally so unwilling to deal with victims and their need for compensation within criminal proceedings. In addition, research should be carried out to study indicators that influence the functioning of the criminal justice system and that determine how it is funded. As far as funding is concerned, clearly, the criminal justice authorities should have adequate resources and the allocation of resources should no longer be exclusively related to offender-related activities. Many questions remain to be resolved. What is the rationale behind the allocation of funding for the police forces, prosecution services, the courts and criminal justice partners? Which decisive factors cause reallocation of funding towards victim-oriented duties? What is the amount of resources needed to improve the position of victims in the criminal justice system, compared to the actual funding? These and other questions need to be addressed in national and comparative studies.

Concerning the functioning of the criminal justice system, officials should promote the creation of criminal justice steering groups composed of representatives of the criminal justice authorities and partners. Steering groups that meet on a regular (monthly) basis are essential to the provision of key-services to victims, cooperation between the agents and job demarcation. The state, in cooperation with the criminal justice authorities and partners, should promote the creation of a national victim support organization where lacking. These organizations not only improve the provision of free and easily accessible assistance to victims, but they are also important partners for the criminal justice authorities

in providing information, legal assistance, and practical help to victims. Furthermore, the criminal justice authorities should set up systematic referral systems to victim support and social services. The attitudes of all officials involved, in particular the criminal justice authorities, should be supportive of victim-oriented reforms and measures. As the CDPC has correctly stated, judges and lawyers should inspire the law with life.

Supplement

VICTIM-ORIENTED LEGISLATIVE INITIATIVES IN THE 22 MEMBER STATES:⁵

In the period before 1985:

Austria:	The Victim Support Act of 1972
Cyprus:	none
Denmark:	The State Compensation Act (1976), the Damages Liability Act (1984).
England & W:	The Criminal Justice Acts of 1948, 1972 and 1982 on the compensation order, the Powers of Criminal Courts Act (1973), the Home Office Circulars no. 27 and 143 of 1979 and 1983 on the Criminal Injuries Compensation Scheme.
France:	Decree 113 (1978), the State Compensation Act for Victims of Crime (1979), the Act on the Facilitation of the Participation of Victims in Criminal Proceedings (1983), and other enactments incorporated into the Codes of Criminal Procedure.
Germany:	The Victim Compensation Act (1976).
Greece:	none
Iceland:	none
Ireland:	The Criminal Law Rape Act (1981).
Italy:	none
Liechtenstein:	none
Luxembourg:	The State Compensation Act (1984).
Malta:	none
Netherlands:	The State Compensation Act (1974).
Norway:	The State Compensation Act (1976), the Legal Aid Act (1980).
Portugal:	none
Scotland:	The Criminal Justice Act (1980) on compensation orders.
Spain:	none
Sweden:	The Damages Act (1972).
Switzerland:	none
Zurich:	none
Turkey:	none

In the period between 1985 and mid 1999:

Austria:	The Act on the Protection Against Violence in the Family (1997).
Belgium:	The Act on State Compensation (1985), the Act on Victims of Sexual Offences (1989), the Act on Penal Mediation (1994), the Act on the Prevention of Violence between Spouses (1997), the Act on Stalking (1998), the Act Franchimont (1999), the Act on Conditional Release (1999).

⁵ This list should be read with care. On the one hand, regarding the jurisdictions with Penal Codes and Codes of Criminal Procedure, it is possible that not all reforms are included in the list because they were incorporated in these Codes and were not traced individually. On the other hand, the common law systems that do not have Codes and may, therefore, have a numerical advantage over the other jurisdictions for their Acts, Charters and Circulars have been incorporated in the list.

- The Guideline OOP15 (1991), the Guideline OOP15bis (1994), the Guideline on Penal Mediation (1994), the Guideline on the Tracing of Missing Persons (1997), the Guideline on the Reception of Victims at the Prosecutor's Offices and the Courts (1997), the Guideline on a Dignified Farewell to Deceased Victims in Case of Intervention by the Judicial Authorities (1998), the Guideline on the Audio-Visual Recording of Interrogations of Underage Victims (1999), and the Set on Sexual Aggression (1999).
- Cyprus: The Act on State Compensation (1991), the Violence in the Family Act (1994).
- Denmark: The Act on the Position of the Injured Person in Rape Cases and Cases of Violence (1987), Executive Order no. 214 on Questioning of Children (1995), Executive Order no. 548 on Psychological Help to Victims (1995), Act nr. 349 on the position of victims in criminal proceedings (1997).
- England & W: The Criminal Justice Act (1988), the Criminal Justice and Public Order Act (1994), the Proceeds of Crime Act (1995), the Criminal Injuries Compensation Act (1995), the Crime and Disorder Act (1998).
Home Office Circulars no. 20 on Victims of Crime (1988), no.85 on Compensation in the Criminal Courts (1988), no. 40 on Victims of Crime and Witnesses (1992), no. 53 on Compensation in the Criminal Courts (1993), and no. 31 on the Revised Victims of Crime Leaflet (1999).
- France: The Act on the State Fund for victims of terrorism (1986), the State Funds for victims of crime (1990), the Act on the enforcement of claims (1991), the Act on Legal Aid (1991), Act no. 2 (1993) on Mediation, Act no. 1163 on the Accessibility of the Courts and Conflict Resolution, the Act on the Rights of Victims (1998), the Act on Exercise of Public Action (1999).
Ministry of Justice Circular on the *maisons de justice* (1996), Ministry of Justice Circular on victim policy (1998)
- Germany: The Victim Protection Act (1986), the Child Witness Protection Act (1996), the Witness Protection Act (1998), the Victim's Surety Act (1998).
- Greece: none
- Iceland: Act on the position of Victims of Sexual Crimes in Criminal Proceedings (1992), Act no. 69 on State Compensation (1995), Act nr. 36 on legal assistance (1999).
- Ireland: The Criminal Law Amendment Rape Act (1990), the Criminal Evidence Act (1992), the Criminal Justice Act (1993), the Criminal Law (Incest Proceedings) Act (1995), the Domestic Violence Act (1995), the Victim's Charter (1997), The Circular no. 21 on Victim Support (1998).
- Italy: Act no. 81 on the new Code of Criminal Procedure (1987), Act nr. 302 on State Compensation for Victims of Terrorism and Organized Crime (1990), the Free Legal Aid Act (1992), the Indecency Offences Act (1996).
- Liechtenstein: none
- Luxembourg: the Act on the Judiciary (1994) which created the information services at the courts, Act on Free Legal Aid (1995)
- Malta: none
- Netherlands: The Act on Legal Aid (1992), the Victim Act Terwee (1995), the Witness Protection Act (1999).
The Media Guideline (1990), the Guideline on Information to the Media (1992), Guideline De Beaufort on Victims of Sexual Crimes (1986), the Guideline Vaillant on Victims of Serious Crime (1987), the Guideline Terwee (1995).
- Norway: The Act on Mediation (1991), Directive on Mediation (1993)
NOU no. 29 on the Investigation of Incest Cases (1988), no. 13 on Sexual Offences against Children (1991), no. 16 on Strengthening Protection and Support for Victims of Crime (1992).
- Portugal: the Act on the Access to the Courts (1987), the Act on Free Legal Aid (1988), the Act on the Protection of Women (1991), the State Compensation Act (1991/1993),

- the Act on the Protection of Witnesses (1999).
- Scotland: The Law Reform Act (1990), the Justice Charter (1991), the Criminal Justice Act (1995) on protection against intimidation and from publicity, the Criminal Injuries and Compensation Act (1996).
- Spain: The Scottish Home Office Circular no. 3 on Domestic Violence (1990). The PC Reform Act (1989), CCP Reform Act (1992), the State Compensation Act (1995) also dealing with the treatment of victims of sexual offences, the PC Reform Act (1996), the Act on Free Legal Aid (1996).
- Sweden: the Act on Assistance to the Injured Person (1988), the Act on Protection Orders (1988), the State Compensation Act or Victim Fund Act (1994), The Circulars 1: 114 (1989) and 1: 122 (1994), the Directive POB (1993).
- Switzerland: The Victim Support Act (OHG: 1991), Victim Support Regulation (OHV: 1992).
- Zurich: The Implementation Acts EV-OHG (1992) and EG-OHG (1996).
- Turkey: The Act on a State Compensation Fund for Victims of Terrorism (1991).

Samenvatting

(Summary in Dutch)

INLEIDING

In dit onderzoek wordt de positie van slachtoffers van misdrijven in 22 Europese strafrechtssystemen bestudeerd. Gedurende het onderzoek fungeerde als richtsnoer Aanbeveling (85) 11 van de Raad van Europa over the positie van het slachtoffer van een misdrijf binnen het straf(proces)recht. De Aanbeveling bevat richtlijnen over hoe de strafrechtsautoriteiten slachtoffers zouden moeten behandelen en welke rechten deze hebben tijdens het strafproces in brede zin. De richtlijnen spitsen zich toe op drie hoofdthema's, namelijk *informatie*, *schadevergoeding* en *bejegening en bescherming*. De implementatie van het gedachtegoed van de Aanbeveling is onderzocht in de 22 jurisdicties die lid waren van de Raad van Europa in 1985 toen de Aanbeveling werd aangenomen.

HOOFDSTUKKEN 1 EN 2: RECHTSVERGELIJKEND RAAMWERK EN METHODOLOGIE

Het raamwerk voor de rechtsvergelijking tussen 22 jurisdicties wordt in de eerste twee hoofdstukken vastgesteld. *Hoofdstuk 1* concentreert zich op de Aanbeveling. Het begint met een algemene inleiding op het onderzoek, gevolgd door een korte omschrijving van de Raad van Europa, haar geschiedenis en doeleinden, en de historische context van de Aanbeveling. Vervolgens wordt het gedachtegoed van de Aanbeveling geanalyseerd, alsmede de stilzwijgende en expliciete premissen en veronderstellingen. De Aanbeveling heeft vier opvallende kenmerken. Allereerst bevatten de richtlijnen van de Aanbeveling ogenschijnlijk eenvoudige en basale regels. Een nadere analyse toont echter aan dat de richtlijnen een pakket ambitieuze doeleinden vormen die tamelijk moeilijk na te leven zijn. Deze observatie wordt bevestigd in de loop van het onderzoek. Geen van de betrokken jurisdicties is er voorsnog in geslaagd de Aanbeveling volledig te implementeren. Een tweede opvallend kenmerk is de neutraliteit van de Aanbeveling. Het is opgesteld ten behoeve van verschillende rechtssystemen die gebaseerd zijn op uiteenlopende rechtstradities. Ten derde bevat de Aanbeveling een tweeledige aanpak. Enerzijds doelt de Aanbeveling op het verbeteren van de procedurele positie van het slachtoffer en anderzijds op het voorkomen van secundaire victimisatie. Ten slotte bepleit de Aanbeveling het verlenen van zowel rechten als diensten aan het slachtoffer.

Hoofdstuk 1 eindigt met de conceptualisering van het slachtoffer. Het is opvallend dat het slachtoffer in het strafproces in het algemeen wordt gedefinieerd als diegene die aangifte doet, een klacht neerlegt of als benadeelde partij, aanklager of getuige optreedt. Het woord 'slachtoffer' komt veelal niet eens voor in regelgeving. Pijnlijk is de situatie waarin het slachtoffer regelmatig als een *vermeend* slachtoffer wordt beschouwd door de strafrechtsautoriteiten.

De 22 strafrechtssystemen worden in *Hoofdstuk 2* ingebed in hun historische, politieke, culturele en sociaal-economische omgeving die van invloed is op de wijze waarop dat rechtssysteem werkt. Daarnaast is de interne dynamiek, zoals de aard van het rechtssysteem, belangrijke principes en procedures, bronnen van recht en rechtstradities ook van invloed op het rechtssysteem. Deze externe en interne elementen vormen de 'lokale realiteit' van een rechtssysteem.

Na het belichten van de verschillende elementen van de lokale realiteit worden de onderzoeksmethoden en technieken uiteengezet. Het onderzoek is in vier fases verricht. In de beginfase zijn het doel van de studie en de onderzoeksvragen ontwikkeld. Het doel van de studie is tweeledig: het vergaren van kennis over de stand van zaken in de 22 lidstaten van de Raad van Europa betreffende de rechten van en mogelijkheden voor slachtoffers in het strafproces, en het vaststellen van de invloed van het gedachtegoed van de Aanbeveling. Deze twee elementen zijn vertaald in de volgende vijf onderzoeksvragen. Ten eerste, hebben de jurisdicties de richtlijnen van de Aanbeveling formeel geïmplementeerd? Ten tweede, hoe hebben de jurisdicties dit dan vormgegeven? Ten derde, heeft de regelgeving ook tot werkelijke implementatie geleid? Ten vierde, hoe is dit bereikt? En ten slotte, hoe effectief is de implementatie in de praktijk? Sleutel begrippen zijn *formele* en *werkelijke* implementatie. Formele implementatie refereert aan regelgeving terwijl werkelijke implementatie doelt op de dagelijkse praktijk. Verder is in het beginstadium ook de keuze voor een thematische aanpak gemaakt. Hiertoe zijn de richtlijnen van de Aanbeveling gegroepeerd naar hun inhoud aangezien dit het mogelijk maakte om de hoofdthema's (informatie, schadevergoeding, en bejegening en bescherming) beter te beschrijven en te analyseren.

De tweede fase van het onderzoek behelsde het verzamelen van gegevens. Op basis van talenkennis van de twee onderzoekers zijn de 22 jurisdicties onderling verdeeld. Om niet alleen wetgeving maar ook de rechtspraak te bestuderen is er in iedere jurisdictie veldwerk verricht. Primaire en secundaire bronnen van recht zijn geraadpleegd en verder zijn onderzoekers en academici, vertegenwoordigers van de verscheidene strafrechtsautoriteiten en hun netwerkpartners, zoals de Reclassering en Slachtofferhulporganisaties, geïnterviewd. Bovendien is kennisgenomen van de resultaten van plaatselijk juridisch en criminologisch onderzoek alsmede statistieken, voor zover voorhanden. Tenslotte observeerden de onderzoekers de gang van zaken in de rechtszaal.

De derde fase behelsde het schrijven van de rapporten over de individuele strafrechtssystemen. Ieder rapport opent met een paragraaf getiteld 'scenery'. Deze term is ontleend aan de theaterwereld waar het gebruikt wordt ter aanduiding van het decor of de setting van een stuk. In de 'scenery' worden onder andere de externe elementen van de lokale realiteit beschreven die van invloed zijn op de wijze waarop het rechtssysteem in dat land werkt. Vervolgens wordt in elk rapport in Deel I de interne dynamiek van het strafrechtssysteem beschreven alsmede de rollen die het slachtoffer daarbinnen kan spelen. Deel II van elk rapport omvat een inventarisatie van de formele en werkelijke implementatie van de desbetreffende jurisdictie aan de hand van thematisch gerangschikte richtlijnen. De rapporten over de individuele landenrapporten zijn neergelegd in de *Hoofdstukken 3-24*.

In fase vier van het onderzoek zijn de vergelijkende implementatieanalyses van de richtlijnen over informatie, schadevergoeding, en bejegening en bescherming gemaakt, gevolgd door conclusies (*Hoofdstukken 25, 26 en 27*). Het belangrijkste conceptuele instrument voor de analyse is het *ontwikkelingsschema*. Dit schema geeft alle verschillende stadia van ontwikkeling weer waarin de jurisdicties zich bevinden ten aanzien van de implementatie van (een onderdeel van) één van de richtlijnen van de Aanbeveling. Naast het feit dat de

ontwikkelingsschema's een overzicht bieden van het niveau van implementatie van een bepaalde richtlijn, maken zij het ook mogelijk om een onderlinge vergelijking van de individuele jurisdicties te maken. Tevens kunnen de schema's gebruikt worden als een handleiding voor een succesvolle implementatie van de Aanbeveling.

HOOFDSTUKKEN 3-24: DE 22 EUROPESE STRAFRECHTSSTELSELS

De implementatie van Aanbeveling (85) 11 is onderzocht in *België, Cyprus, Denemarken, Duitsland, Engeland en Wales, Frankrijk, Griekenland, Ierland, Italië, IJsland, Liechtenstein, Luxemburg, Malta, Nederland, Noorwegen, Oostenrijk, Portugal, Schotland, Spanje, Turkije, Zweden en Zwitserland (kanton Zürich)*. Sommige jurisdicties, in tegenstelling tot andere, zijn welvarende, moderne en economisch machtige landen. Ook de bevolkingsaantallen lopen uiteen van slechts 32.000 in Liechtenstein tot 64.479.000 in Turkije. Onder de rechtssystemen bevinden zich verder leden van zowel de civielrechtelijke als de common law en de noordelijke rechtsfamilies. Deze rechtssystemen hebben zich ontwikkeld in zeer uiteenlopende rechtstradities, hetgeen resulteert in aanzienlijke verschillen in de benadering van slachtoffers van misdrijven binnen het straf(proces)recht. In de civielrechtelijke en noordelijke jurisdicties heeft het slachtoffer altijd veel uitgebreidere mogelijkheden gehad om actief deel te nemen in de strafprocedures dan in de common law jurisdicties. Het 'partie civile' model, ook wel voegingsprocedure genoemd, dat wijdverbreid is op het continent, is onbekend in de common law jurisdicties. Deze jurisdicties hebben in plaats daarvan een schadevergoedingsstraf. Karakteristiek voor de noordelijke jurisdicties is het recht van slachtoffers van ernstige zeden- of geweldsdelicten op een door de staat betaalde advocaat. Dit is een constructie die niet (op dezelfde schaal) bestaat in andere jurisdicties. Deze lokale realiteiten leiden er soms toe dat er verschillende oplossingen moeten worden toegepast voor vergelijkbare problemen. In de rapporten over de individuele jurisdicties wordt ieder systeem op zijn eigen merites beoordeeld en gezien tegen de achtergrond van zijn eigen lokale realiteit.

HOOFDSTUKKEN 25-27: RECHTSVERGELIJKENDE ANALYSES EN CONCLUSIES

De aandacht voor de individuele jurisdicties wordt in de *Hoofdstukken 25, 26 en 27* verruild voor een vergelijkend, supra-nationaal gezichtspunt. In deze drie hoofdstukken over respectievelijk informatie, schadevergoeding, en bejegening en bescherming worden de prestaties van de jurisdicties gezamenlijk tegen de meetlat van de ontwikkelingsschema's gehouden. Alle niveaus en methodes van implementatie worden naast elkaar gelegd. Dit biedt niet alleen ruimte voor een vergelijking van de mate waarin de implementatie in de individuele jurisdicties is geslaagd of mislukt, maar ook voor een kritische evaluatie van de richtlijnen zelf in het licht van de rechtspraktijk. Voorbeelden van slechte en goede praktijken komen bovendien, en algemene en specifieke problemen en oplossingen worden aangeduid. Ieder hoofdstuk eindigt met een overzichtstabel die de mate van implementatie van de richtlijnen aangeeft in alle jurisdicties. Implementatie is 'slecht', 'in overeenstemming met de Aanbeveling', 'goed' of 'heel goed'. De tabellen tonen aan dat sommige richtlijnen breed geïmplementeerd zijn, terwijl andere slechts een enkele keer geïmplementeerd zijn. Het doel van de rechtsvergelijkende analyses is het isoleren van de

redenen van slagen of mislukken van slachtoffergerichte initiatieven, en om oplossingen aan te dragen voor gesignaleerde problemen terwijl rekening gehouden wordt met lokale realiteiten.

HOOFDSTUK 28: CONCLUSIES

In het slothoofdstuk wordt een overzicht gegeven van de belangrijkste resultaten van dit onderzoek. De gemiddelde implementatie van de richtlijnen van Aanbeveling (85) 11 is teleurstellend. De politie informeert het slachtoffer over zijn rechten en mogelijkheden in 85% van de jurisdicties. In 18% van de jurisdicties heeft het slachtoffer een redelijke kans dat hij op de hoogte wordt gesteld van de beslissing over de vervolging. In 27% van de strafrechtssystemen zijn standaard procedures ingevoerd ten behoeve van het informeren van slachtoffers over de datum en plaats van de behandeling van de zaak voor de rechter. Met betrekking tot schadevergoeding is de belangrijkste bevinding dat de schadevergoedingsstraf significant succesvoller is dan de voegingsprocedure voor wat betreft het toekennen en daadwerkelijk innen van schadevergoeding. Nog een duidelijk resultaat is dat de persoonlijke vervolging van de dader door het slachtoffer aangevuld of vervangen zou moeten worden door het recht van slachtoffers op rechterlijke herziening van de beslissing om niet te vervolgen. Betekenisvol is verder dat 59% van de jurisdicties er niet in slagen om de politie adequaat te trainen in de omgang met slachtoffers. De helft van alle jurisdicties heeft het herhaald ondervragen van kwetsbare slachtoffers zoveel mogelijk weten te beperken. Hervormingen om het onthullen van persoonlijke gegevens van het slachtoffer in de media te beperken zijn in 36% van de jurisdicties ingevoerd. In 18% worden slachtoffers geïnformeerd over de datum van (vervroegde) invrijheidstelling van de dader.

De beoordeling van de prestaties van de individuele jurisdicties is gemaakt op basis van drie typen meetmethoden van implementatie. Deze meetmethoden zijn allereerst de mate waarin voldaan is aan de inspanningsverplichting om regelgeving te veranderen en/of slachtofferwetten en richtlijnen in te voeren, ten tweede het succes van de rechtspraktijk gemeten aan de hand van enkele cruciale progressie-indicatoren, en ten derde de mate waarin de jurisdicties de richtlijnen van de Aanbeveling werkelijk hebben geïmplementeerd. Het voldoen aan de inspanningsverplichting wordt vastgesteld aan de hand van het aantal slachtoffer-gerichte hervormingen, maatregelen en beleidsbeslissingen die de positie van het slachtoffer significant verbeterd hebben en die ingevoerd zijn tussen 1985 en 1999. De beste jurisdicties in deze categorie zijn *België, Engeland en Wales, Frankrijk, Ierland, Nederland en Zweden*. Aan de hand van indicatoren die daadwerkelijke vooruitgang meten blijken *Engeland en Wales, Nederland en Zweden* het beste resultaat te behalen. Tenslotte is *Nederland* het meest geslaagd in haar pogingen om de positie van slachtoffers conform de Aanbeveling te verbeteren gevolgd door *Engeland en Wales, Noorwegen en België*. Dit leidt tot de conclusie dat *Engeland en Wales*, en *Nederland* zowel regelgeving hebben ingevoerd, de meeste progressie hebben gemaakt en de Aanbeveling het best hebben geïmplementeerd. Gemiddeld genomen hebben *Malta, Griekenland, Cyprus, Italië en Turkije* de minst goede resultaten geboekt.

Hoofdstuk 28 culmineert in een verzameling praktische aanbevelingen om een betere implementatie van Aanbeveling (85) 11 te bewerkstelligen en bevat tot slot een lijst algemene aanbevelingen.