

JUSTICE

# Victims' rights as standards of criminal justice

Justice for victims  
of violent crime  
Part I



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Justice for victims of violent crime  
Part I



# Foreword

Imagine you were brutally beaten or sexually assaulted, and someone was later charged with this crime. How would you feel if police officers, defence attorneys, prosecutors and judges barely registered your presence in the proceedings to follow – or even treated you like a nuisance?

It's an experience shared by all too many victims of violent crime. With crime primarily seen as an offence against the state, criminal proceedings are centred around prosecutors as representatives of the state and defendants. Victims risk being overlooked.

But violent crime is, of course, committed against people. It represents a severe violation of victims' dignity. This insight has prompted a shift. Increasingly, victims are seen as rights-holders – who are owed certain responses by the states in which they live. The European Convention on Human Rights, the EU Charter of Fundamental Rights, as well as the Victims' Rights Directive have all contributed to this change. They provide strong bases for victims' rights, including to access justice.

How are these rights playing out in practice? Are victims of violent crime properly seen, informed, empowered and heard? Do they tend to feel that justice has been done? Our four-part report series takes a closer look at these questions, based on conversations with victims, people working for victim support organisations, police officers, attorneys, prosecutors and judges.

This report – Part I – sketches out the development of victims' rights in Europe, and outlines the human rights standards that apply today. Taken together, the four reports reveal a wide gap between the law 'on the books' and the law in practice. Many victims still feel marginalised – often more so in countries with laws that accord them extensive rights. This underscores that delivering justice is about more than introducing the right legislation. Changing perceptions of victims' rights – and what these mean for victims' role in criminal justice processes – is equally vital.

We hope this series encourages policymakers to take steps to ensure that victims of violent crime receive the attention, support and consideration to which they are entitled – and so make good on states' promise to provide access to justice.

**Michael O'Flaherty**  
Director



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# Acronyms

- ECHR** European Convention on Human Rights
- ECtHR** European Court of Human Rights
- FRA** European Union Agency for Fundamental Rights
- TFEU** Treaty on the Functioning of the European Union
- VPS** Victim personal statement



# Key findings and FRA opinions

Victims of violent crime should be recognised as the person wronged by the offender, protected against repeat victimisation, granted access to justice and enabled to participate in criminal proceedings, according to Article 47 of the EU Charter of Fundamental Rights (the Charter). It applies whenever an EU Member State authority acts within the scope of the Victims' Rights Directive or any other measure of EU law. This series of four reports takes an in-depth look at how far Member States fulfil those obligations.

The opinions given below build on the key findings of research by the European Union Agency for Fundamental Rights (FRA) into the legal and factual situation of adult victims of violent crimes in seven EU Member States: Austria, France, Germany, the Netherlands, Poland, Portugal and the United Kingdom. The research included a total of 231 in-depth interviews conducted face to face: 83 interviews with adult victims of violent offences, including 54 female victims; and 148 expert interviews with practitioners – staff of support organisations, lawyers advising victims, police officers, public prosecutors and criminal judges.

The findings are based on an analysis of the rights of victims of violent crime under the Victims' Rights Directive, the European Convention on Human Rights and the EU Charter of Fundamental Rights. In particular, the analysis demonstrates why the Victims' Rights Directive should be read in light of Article 47 of the Charter as recognising a victim of violent crime as the person wronged and as granting a victim of violent crime a right to criminal proceedings and to fair trial rights in the proceedings.

## Recognising victims of violent crime as parties to criminal proceedings

In some EU Member States, victims lack recognition because legislation does not acknowledge victims of violent crime as parties to the criminal proceedings. When considering reforming their procedural codes, governments can draw inspiration from legislation in other Member States, including Austria, Germany, Poland and Portugal.

### FRA opinion 1

*To ensure that victims can enjoy their rights under EU law, Member States should fully implement the Victims' Rights Directive, bearing in mind that the Charter applies whenever Member State authorities act within the scope of the directive. The European Commission is encouraged to follow up on infringement proceedings against Member States reluctant to abide by their obligations under the directive.*

*Member States are encouraged to assess if their criminal procedural codes meet the standards of the Victims' Rights Directive, read in accordance with Article 47 of the Charter concerning victims of violent crime. Recognising victims of violent crime as parties to criminal proceedings should enhance fair trial rights. Where current codes fall short, a review of existing legislation is welcome, to enhance victims' rights.*

## Shifting perceptions of victims among practitioners

However, shortcomings are not only in legislation, this project finds, and this series or subsequent reports will publish these findings. For criminal proceedings to recognise victims, what is decisive is not only the role that legislation accords to them but also how the police, public prosecutors and criminal judges perceive them. If practitioners conceive of victims essentially as witnesses, victims will often feel that they are nothing more, regardless of their role laid down by procedural law.

Therefore, to improve how victims are treated in reality, legislative reforms are not enough. Reformers must also address the underlying basic concepts: how practitioners understand the functions of criminal justice and the tasks and proper roles of those involved in the proceedings. As long as practitioners view violent crimes as a matter between the state and offenders, not also involving victims, it will remain difficult to give victims an important role in the proceedings. Also, as long as many court practitioners fear that strengthening the position of victims risks disturbing the subtle balance between prosecution rights and defence rights, they may be reluctant to value victims' participation rights.

Human rights are meant to be not only theoretical and illusory but practical and effective. It is, therefore, not enough for the 'law in books' to acknowledge that victims of violent crime have participation rights. They must also be put into practice. However, that demands that practitioners understand criminal justice as based on human rights. That requires comprehensive communication and training measures that raise practitioners' awareness of victims' rights as fundamental rights, ensure uniform standards for training police officers and court practitioners in victims' rights, and help dissolve myths and preconceived views that stand in the way of victims' recognition.

#### FRA opinion 2

*The Victims' Rights Directive is aimed at enhancing the role of victims in criminal proceedings. When enacting procedural reform aligned with it, it is important to comprehensively and clearly communicate to practitioners involved in criminal proceedings the reasons for amending legislation and victims' underlying human rights to have access to justice. EU Member States' institutions involved in training law enforcement agencies or the judiciary and, at the European level, the European Union Agency for Law Enforcement Training and the European Judicial Training Network are encouraged to promote training for the law enforcement and the judiciary on the rights of victims of violence as human rights.*



# Introduction

## Why this report?

Victims of violent crime are entitled to an effective remedy. That means a criminal procedure that brings to the fore the wrong suffered by the victim, grants appropriate relief and entails victims' fair trial rights. Those rights include being heard at important stages of the proceedings, asking that evidence be saved, access to the case file and challenging a court's decisions. The Charter of Fundamental Rights of the European Union ('the Charter') applies whenever Member State authorities act within the scope of secondary EU law, including the Victims' Rights Directive.<sup>1</sup> Article 47 of the Charter entitles victims of violent crime to treatment by legislation and in practice on an equal footing with the other parties to the proceedings, the public prosecutor and the defendant. The Victims' Rights Directive reflects this; according to its Recital 66, it seeks to promote victims' fair trial rights.<sup>2</sup>

However, previous FRA research identified shortcomings in police and court practice, such as victims lacking awareness of their rights and of appropriate support services and hence not being able to act on their

participation rights. Hence, FRA carried out research into the legal and factual situation of adult victims of violent crimes in criminal justice systems in the EU. This series of four reports, 'Justice for Victims of Violent Crime', presents the main findings from this research.

- It assesses to what extent criminal proceedings, *in reality*, keep the promise of criminal justice entailed in Article 47 of the Charter. It assesses EU Member States' progress in granting victims of violent crimes access to justice. It evaluates whether or not legislative reforms enacted to enhance the role of victims in criminal proceedings or to raise the number of victims compensated for the damage incurred have, *in reality*, improved the situation of victims in proceedings and added to victims' sense of being recognised and taken seriously by criminal justice systems. Thus, it explores the difference between the law in books and the law in practice and, consequently, faces the challenge of explaining why, in countries whose legislation acknowledges victims' participation rights, victims often do not benefit from this legislation in practice and at times are even worse off than victims in countries lacking such legislation.

### FRA ACTIVITY

#### Scrutinising victims' access to criminal justice

This project continues a line of research by the European Union Agency for Fundamental Rights (FRA) concerned with victims' access to criminal justice, including:

- '*Victims of crime in the EU: the extent and nature of support for victims*' (2014), which was the first FRA publication to analyse victims' fundamental rights under Article 47 of the Charter and to call on Member States to take Article 47 into account when implementing the Victims' Rights Directive;
- '*Severe labour exploitation: workers moving within or into the European Union*' (2015);
- '*Ensuring justice for hate crime victims: professional perspectives*' (2016a);
- '*Handbook on European law relating to access to justice*' (2016b), Section 8.2 of which explains the rights of victims under Article 13 of the ECHR and Article 47 of the Charter;
- FRA's annual fundamental rights reports, which contain chapters on access to justice including for victims of crime.

In addition, large-scale surveys by FRA shed light on whether or not victims of certain types of crimes report them to the police and, if so, how they assess the response of the law enforcement bodies. These crimes include violence against women (FRA 2014b) and antisemitic (FRA 2013a), homophobic (FRA 2014c) and racist offences (FRA 2017). Also, these surveys identify reasons why victims do not report to the police, including victims' feelings of guilt, embarrassment or shame, which are widespread reactions to violent victimisation and account for many instances when victims are prevented or discouraged from reporting their victimisation.

1 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, p. 57.

2 FRA (2014b), p. 28.

- It compares victims' rights in the different models and traditions of criminal justice systems in the European Union, mainly the German concept of joint prosecution (*Nebenkläger*), the common law tradition, and the French *partie civile*.
- It looks at the specific situation of victims who have suffered violence as a consequence of a discriminatory societal structure, including victims of gender-based violence and victims of xenophobic and homophobic hate crimes.
- With regard to women as victims of domestic violence, it analyses how the two main rights of victims of violent crime interplay: the right to justice and the right to protection against repeat victimisation.

Hence, these reports offer a comparative perspective of how criminal justice systems operate in cases of violent victimisation across the main European legal traditions. This perspective is based on evidence gathered in seven EU Member States. The reports present practitioners' opinions on how they gauge the effectiveness of victims' rights, how they view the role of victims within criminal justice systems, and what they believe could be done to improve victims' access to justice. Importantly, they also give voice to victims of severe violence in the aftermath of their victimisation. These victims include:

- women who have survived domestic violence or rape;

- victims of racist hate crimes;
- two victims of the terrorist attacks of November 2015 in Paris;
- a victim of police brutality.

The reports convey their messages, including, in many cases, their frustration at being marginalised in criminal justice systems, at not being protected effectively against further violence and at not being able to make a difference to the course and outcome of criminal proceedings.

To some extent, the research also assesses whether or not the targets set by the Victims' Rights Directive are achieved in reality. The targets include ensuring that victims of crime receive information in a manner that allows them to understand their rights and their potential role in the proceedings; have appropriate support services available to them free of charge; and are protected against intimidation and secondary victimisation and, on this basis, are able to actively participate in criminal proceedings. This assessment should help EU institutions and Member States understand and critique the implementation of the Victims' Rights Directive in relation to victims of violent crimes. Still, the primary focus of this series of reports is on victims' human rights and not on assessing the implementation of the Victims' Rights Directive.

## Methodology

The project was implemented in two phases.

- In 2016, FRA's multidisciplinary research network, **FRANET**, conducted desk research in all 28 EU Member States, collecting comparable information on the legal and institutional framework relevant to crime victims' access to criminal justice. This information helped to choose the contents of the fieldwork and the Member States participating in it.
- In 2017, FRANET also conducted social fieldwork for FRA. It looked into the reality of procedural rights of adult victims of violent crimes in seven Member States:
  - o Austria
  - o France
  - o Germany
  - o the Netherlands
  - o Poland
  - o Portugal
  - o the United Kingdom.

Member States were selected to cover the main models and traditions of criminal justice systems in the European Union. To some extent, they are more advanced in terms of legislative reforms, the development of victim support structures and efforts made to allow victims to participate – albeit in a form that matches the paradigm of a legal culture and tradition. Hence, FRA does not claim that they are representative.

Overall, 231 in-depth interviews were conducted face to face:

- 148 expert interviews with practitioners;
- 81 interviews with adult victims of violent crimes, including 52 female victims;
- two interviews with mothers of victims killed in terrorist attacks.

The interviews conducted with mothers of victims are treated as victim interviews. In Poland, a victim was interviewed about his experiences in two different proceedings following two incidents of violent victimisation. As the interviewee's experiences in the two proceedings differed widely, it was decided to treat this as two interviews.

Interviews were conducted with:

- police officers
- criminal judges
- public prosecutors
- lawyers who advise victims
- staff members of support organisations.

Practitioners were asked about their views on the role of victims in criminal proceedings, what can be done to enhance victims' participation and how they assess victim compensation. Victims were asked about:

- the information and support they received;
- how they actively participated in the proceedings;
- if they sensed that their participation made a difference;
- how content they are with the results of the proceedings in general and with compensation received in particular;
- overall, if they felt recognised and respected by how their concerns and rights were considered and dealt with in criminal proceedings and how they experienced the attitudes of practitioners – for instance, as respectful, sensitive, discriminatory or unsympathetic.

All interviews were semi-structured, combining a series of predefined 'survey' questions and questions inviting interviewees to elaborate more freely on their experiences of specific issues. Many answers to the predefined questions are presented in tables and figures.

FRANET partners met considerable challenges in identifying victims who were willing to be interviewed. More details on this issue can be found in the country reports, which summarise the results from the research conducted in a Member State and specify how the research was carried out, including how interviewees were identified. This can shed light on certain findings. For example, victims' high satisfaction with support services provided in the Netherlands can be assessed in the light of the fact that, in the Netherlands, support organisations identified victims to interview.

On the whole, there is a gradual and profound paradigm shift in European criminal justice systems. Institutions used to assert – in the name of the people – the right of the state to punish the offender. Now systems are starting to focus on the human rights of the individuals concerned by the performance of criminal justice systems: victims, offenders and, indirectly, all other individuals living in a country's territory.

This means that, to include victims in criminal proceedings, it is not enough to add their participation to

the existing procedure. What is needed is an in-depth review of the founding concepts of criminal justice. At the core of this review lies the question of how to understand what a violent crime is: formally, as an infringement of criminal law prohibiting violent conduct, or substantively, as a severe violation of individuals' human dignity and human rights protected by criminal law. Criminal justice systems need to be reconstructed as protecting human rights. This series of reports helps lay the foundations on which to build them.

## This report as part of a series

This first part of the series clarifies the relevant human rights standards. Subsequent parts apply them to various aspects of criminal justice on the basis of the evidence gathered in this project.

## What Part I contains

This report contains three chapters. **Chapter 1** outlines how victims' rights have developed through time in Europe. **Chapter 2** presents a snapshot of the current legal state of victims' rights in Europe. **Chapter 3** categorises criminal justice systems by how procedural legislation views victims.

### Project on 'Justice for Victims of Violent Crime'

The results of this project are presented in four reports.

- Part I is on victims' rights as standards by which criminal justice systems must abide. It puts the project in context by sketching the historical development of victims' rights in Europe and by bringing a consistent human rights perspective to the discussion of victims' rights. It clarifies and spells out the human rights standards applied by Parts II to IV in assessing victims' access to justice in the seven EU Member States researched. The tensions and contradictions that surface throughout this series of reports reflect the current transitional state of criminal justice systems. They are undergoing the difficult passage from upholding public interests and public order to protecting the human rights of individuals.
- Part II is on procedural justice. It applies the standards of victims' rights in assessing the procedural aspects of criminal justice. This project distinguishes between procedural and outcome justice. Procedural justice in general relates to such aspects as the fairness of proceedings, taking all available evidence and showing respect for the parties of the proceedings, their rights and concerns. Hence, this report asks if authorities are committed to conducting effective proceedings, if victims have a voice in and can contribute to the proceedings, and if state bodies pay due attention to the contributions made by victims.
- Part III is on 'sanctions'. It applies the standards of victims' rights in evaluating whether or not the results of criminal proceedings deliver on the promise of criminal justice to victims of violent crime. That would mean convicting, sentencing and punishing offenders and ensuring that victims are compensated for the consequences of violent crimes.
- Part IV zooms in on one particular group of victims, namely women as victims of gender-based violence in general and of partner violence in particular. It analyses what criminal justice means to victims of forms of violence that express or reinforce societal discrimination. In addition, while Parts II and III deal exclusively with the right of victims of violent crime to criminal justice, Part IV is concerned with the interplay of justice and a victim's right to protection against repeat victimisation. The situation of women as victims of partner violence is a good example.





# 1

## Development of a rights-based concept of crime victimisation



Victims' rights have evolved. Formerly, if the victim had any role in criminal justice systems, it was only as one witness among others. Now victims take an increasingly significant part in the proceedings. There have been several approaches to conceptualising the victim in an appropriate manner. Overall, five models can be distinguished:

- the victim reduced to a *witness* serving to deliver evidence in the public interest;
- the *damaged victim* being allowed to pursue civil law claims to restitution on a civil-law side-track added to the criminal proceedings;
- the *harmed victim* conceptualised as an individual in need and deserving of sympathy and help;
- the *wronged victim* acknowledged as the individual whose rights are violated and who, therefore, is entitled to redress;
- finally, the victim not only acknowledged as the person wronged but, consequently, also recognised as entitled to a role as a *party* to the criminal proceedings.

During this development, the legitimate interests of victims of violent crimes were increasingly recognised and, accordingly, the role granted to victims became more and more significant. These five models can therefore be viewed as stages in the remarkable progress of the victim of violent crime, from a radically marginalised position as, at most, a witness all the way to the status of a party to the criminal proceedings.

These models do not imply that a whole criminal justice system moves from one model to another. At any given time, the reality of a criminal justice system will be a combination of traits and elements that relate to different stages of this ideal-type evolutionary process. For instance, even where victims of violence are acknowledged as potential parties to the proceedings, they are often, at the same time, also still treated as witnesses.

In addition, there can be discrepancies between the role assigned to a victim in procedural legislation and in practice. If a procedural code acknowledges that a victim of violent crime is entitled to act as a party to the proceedings, it does not mean that in reality practitioners acknowledge the victim as a potential party. Their understanding may lag behind or even be consciously adverse to how the law regards the victim.

### 1.1 The victim as a witness

It is, by now, common understanding that for a long time criminal justice systems overlooked and sidelined victims. For example, the first Recitals of the Council of Europe's Recommendation of 1985 clearly criticise that approach. It commences with the following considerations:

*"Considering that the objectives of the criminal justice system have traditionally been expressed in terms which primarily concern the relationship between the state and the offender; Considering that consequently the operation of this system has sometimes tended to add to rather than to diminish the problems of the victim [...]"*<sup>3</sup>

3 Council of Europe, Committee of Ministers (1985), Recommendation No. R (85) 11 on the Position of the Victims in the Framework of Criminal Law and Procedure, 28 June 1985.

This diagnosis was and to a large extent still is accurate: in the traditional perspective, criminal justice was – and often still is – seen and administered as a matter involving the state – represented by the police, public prosecutors and judges – and the offender, charged with having disrespected a prohibition defined by a criminal code. However, if criminal justice is a matter between the state and the offender, victims have no place in the system and, therefore, are not entitled to perform any specific role in criminal proceedings beyond serving public interests by reporting their victimisation to the police or being obliged to support the state by acting as witnesses. As Parts II to IV will show, victims often experience this devaluation as continuing the debasing treatment by the offender and hence as a form of large-scale secondary victimisation.

## 1.2 The victim as a civil party

Without altering the basic setting, the civil party system adds another function and a procedural side-track to the criminal justice system. Alongside making victims perform as witnesses, many continental European jurisdictions – for example Austria, Belgium, France, Germany, Greece, Portugal and Spain – have for a long time allowed them to participate in criminal proceedings as civil parties. The Netherlands introduced civil party proceedings only in 2011.<sup>4</sup>

However, a civil party's participation in criminal proceedings is due to the damage and not the criminal wrong incurred by the individual concerned. A civil party is bringing a civil action against the offender and this, therefore, falls under civil law and not criminal law. The civil party's presence in criminal proceedings is because a parallel civil-law track is added to the criminal proceedings. The main criminal law aspect is unaltered. Perceiving the victim as a civil party takes into account the damage incurred by the victim as a consequence of the offence, but does not acknowledge, in criminal law terms, the victim as the person wronged by the offender. Hence, it does not touch on the basic idea of criminal justice as a public matter between the state and the offender.

## 1.3 The victim as a vulnerable witness harmed by the offence

Another model emerged in the 1970s and became politically powerful in the 1980s. It centres on the harm and trauma that victims endure, on their need for support and protection against further victimisation, and on a social welfare-based orientation on the deservingness of victims.<sup>5</sup> People increasingly acknowledged that the offence affects victims to a degree that criminal justice systems cannot ignore. Moreover, they recognised that, by sidelining the victim, criminal justice systems tended to reinforce the negative impact of the crime on the victim. The term 'secondary victimisation' was coined for that phenomenon, to highlight the risk of victims being treated in a manner that adds to the abusive behaviour of the offender.

In the mid-1980s, this phase climaxed with:

- the Council of Europe Convention on the Compensation of Victims of Violent Crimes of 1983;
- Recommendation No. R (85) 11 of the Council of Europe's Committee of Ministers on the Position of the Victims in the Framework of Criminal Law and Procedure; and
- the UN General Assembly's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted in November 1985).

At this stage, the relationship between the victim and the criminal justice system is often perceived as fundamentally difficult or even antagonistic. Criminal proceedings are suspected of adding to the plight of the victim, which leads to the question of how to spare victims, as much as possible, any involvement in the proceedings.

Policies using this model mainly concern the following issues:

- *Protection of victims against secondary victimisation* means devoting attention to how to protect the traumatised and vulnerable victim from criminal proceedings and the mental stress they involve. Although in this phase the victim is seen as a witness, particularly vulnerable victims are exempt from the obligation to testify, and the overall focus is on treating victims with particular care.
- *Informal mechanisms for the resolution of disputes*, including mediation between victim and offender,

4 See Dutch Criminal Procedural Code, Art. 51f.

5 On the concept of the 'innocent' and hence 'deserving' victim and its significance within a needs-based approach, see Goodey (2002), pp. 19–22; Goodey (2005), pp. 124–128.

are valued to divert proceedings away from the formal court trial and to create a protected space *outside* the formal criminal justice system. In that space, victims can speak openly about their victimisation and they are spared the risks and strains of formal court proceedings.

- *Victim impact statements* allow victims to explain the harm suffered as a consequence of the offence (usually in writing and only to a limited extent also orally in court).
- *Women's shelters* protect women against repeat victimisation. Charities and other non-governmental organisations provide *victim support services* to help victims cope with their victimisation.<sup>6</sup>
- *State compensation paid to victims of violent crime* expresses society's solidarity with the victim in their situation of distress and alleviates the impact of the offence on the victim. It is often administered by ministries of social affairs and not ministries of justice.

The harm suffered by the victim is a *consequence* of the crime; the genuine criminal wrong is to the polity. This consequence is framed in descriptive language, as 'harm', 'loss', 'suffering' or 'damage'. It lies outside the normative context: the law forbidding behaviour; the crime violating the law; and state authorities calling the offender to answer for their offending. Hence, like a civil party system, needs-based approaches do not touch on the traditional understanding of criminal law as protecting public interests defined in criminal codes and represented by state authorities. The wrong done by the offender is a wrong to a group: the 'state', the 'public', the 'people', or 'society as a whole'.

## 1.4 The victim as wronged by the offence and as entitled to justice

In the 1990s, a radically novel perception of the victim started to gain ground. In this phase, a violent crime is interpreted as a human rights violation that entitles the victim to redress, and to criminal proceedings as a redress mechanism. This development can be regarded as a move from a needs-based to a rights-based understanding of victimisation. The victim is seen as wronged, not harmed; and because the victim is wronged they can legitimately expect that their legal community will not allow the offence to pass with impunity.

<sup>6</sup> On the development of support organisations, see Goodey (2005), pp. 104–107.

A rights-based concept views criminal laws as protecting human rights against violations defined as crimes. In this understanding, victimisation is not a *consequence* of crime; rather, violent crime *is* victimisation. Violent crimes and severe human rights violations are two sides of the same coin, and not by coincidence: acts of violence are criminal precisely because they severely violate human rights. In a rights-based paradigm of criminal justice, the system of human rights is the foundation and rationale of the criminal justice system, which, in turn, is a crucially important component of any normative order based on human rights, because without criminal justice – if severe human rights violations passed with impunity – any system of human rights would necessarily erode. Thus, the European Court of Human Rights (ECtHR) has stressed “the importance in a democratic society of upholding the rule of law and public trust in the justice system” by avoiding impunity for certain offences and a situation where perpetrators “systematically avoid prosecution and, above all, the consequences of their misconduct.”<sup>7</sup>

Rights-based and needs-based concepts are, strictly speaking, incompatible with one another. What defines victimisation is either the crime or a consequence of the crime; it cannot be both. When, for instance, a person is assaulted, the offence is understood either as a gross violation of the person's integrity and dignity as protected by criminal law, or as a violation of a provision issued by the state and prohibiting assault. In the first instance, it is the assault that victimises, and it is the victim who has been wronged. In the second case, the offence concerns the state that issued the prohibition in the name of the collective polity, and it is this collectivity – the 'people', 'society', the 'public' – that has been wronged. In this latter case, the crime as such knows nothing of the victim. In other words, in both instances the offence is formally a violation of a criminal law provision; the difference concerns the rationale for the provision. In the rights-based model, the offence is *in substance* a human rights violation; in the other models, it is not necessarily more than an individual's disobedience to criminal law.

The move from needs-based rhetoric to human rights language changes profoundly the relationship between the victim and the state. The victim is no longer pleading for help on the basis of their vulnerability, pressing needs and deservingness, but demanding that the state should take seriously what it owes to the individuals living on its territory and their human rights. The state is no longer in the comfortable and patronising position of a more or less generous Good Samaritan, but a duty bearer indebted to the individuals living under its jurisdiction as rights holders.

<sup>7</sup> ECtHR [GC], *G.I.E.M. S.r.l. and Others v. Italy*, Nos. 1828/06 and two others, 28 June 2018, § 260.

As a case in point, the movement claiming that women's rights are human rights started in the early 1990s to conceptualise violence against women as a human rights abuse.<sup>8</sup> In the face of widespread forms of gender-based violence, conceptualising violence as a human rights violation arose as a means of protesting against governments' inaction and expressing that systematic impunity for widespread forms of violence was no longer acceptable.

More than any other factor, what triggered the move from a needs-based to a rights-based understanding of victimisation was the interest of human rights practitioners in criminal justice as a means of redressing – and thus avoiding impunity for – widespread severe human rights violations. In this respect, the regional human rights courts in Europe and the Americas played a crucially important role in bringing the consequences of any impunity of human rights abuses to the fore.<sup>9</sup> In particular, the development in Europe drew inspiration from responses to situations in some Latin American countries where human rights violations and impunity for them were endemic. Already in 1988, in its famous ruling in the case of *Velásquez-Rodríguez against Honduras*, the Inter-American Court of Human Rights found:

*“The State is obligated to investigate every situation involving a violation of the rights protected by the [American Convention on Human Rights]. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdictions. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.”*<sup>10</sup>

In Europe, the novel interpretation of the rights of victims of violent offences was heralded by the judgment of the ECtHR in the *Aksoy* case of 1996, and by the Grand Chamber judgments of 1997 in the cases of *Aydın* and *Menteş and Others*, all three concerning Turkey and reflecting a time when Turkish authorities and paramilitary groups subjected the Kurdish population to severe human rights abuses with systemic impunity. In *Bilgin*, the ECtHR observed that the implementation of the criminal law in respect of unlawful acts allegedly carried out with the involvement of the security forces pointed to particular characteristics in south-east Turkey in the first half of the nineties and that the defects found in

the investigatory system in force in south-east Turkey undermined the effectiveness of criminal law protection during this period. The court held that this permitted or fostered a lack of accountability of members of the security forces for their actions, which was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the ECHR.<sup>11</sup>

### Article 13 of the European Convention on Human Rights

#### *Right to an effective remedy*

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

These judgments are the first to recognise and firmly establish the right of a victim of violence under Article 13 of the European Convention on Human Rights (ECHR) to an effective remedy in terms of an effective criminal justice response to the wrong suffered. In the *Aksoy* judgment, which concerned a case of suspicion that the victim had been tortured, the ECtHR held:

*“Accordingly, as regards Article 13 (art. 13), where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.”*<sup>12</sup>

That the state, representing a legal and political community, owes it to victims of violent crime to conduct proceedings aimed at identifying, convicting and punishing offenders, is the hallmark and new creed of this phase. In human rights terms, the development moves from conceptualising victims' rights as a *status negativus* towards perceiving them as a *status positivus*. The emphasis shifts from protecting the (harmed and vulnerable) victim *from* criminal proceedings conducted by state authorities towards asserting and defending the victim's rights *through* these proceedings.

8 Goodey (2018), pp. 24–27.

9 On the contributions of international human rights law to the development of victims' right to justice, see Doak (2008), pp. 159–180; Dearing (2017), pp. 30–48.

10 IACtHR, *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988; for a discussion of the judgment, refer to Roht-Arriaza (1990).

11 ECtHR, *Bilgin v. Turkey*, No. 23819/94, 16 November 2000, § 119.

12 ECtHR, *Aksoy v. Turkey*, No. 21987/93, 18 December 1996, § 98; see also *Aydın v. Turkey*, No. 23178/94, 25 September 1997 [GC]; *Menteş and Others v. Turkey*, No. 23186/94, 28 November 1997 [GC].

Today, the right of victims to be spared secondary victimisation remains a major concern of victim-minded policies, but the consequence is no longer accepted that the victim should, as much as possible, be removed from the proceedings. Rather, it is claimed that the proceedings must be conducted in a manner that limits and controls the risk of secondary victimisation. Ways must be found to design and organise proceedings in a manner that meets the requirements of both a fair trial and the victim's right to be protected against secondary victimisation. *S.N. v. Sweden* became the leading case in the ECtHR's case law. In it, the court had:

*"[...] regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence [...]"*<sup>13</sup>

The new orientation of criminal justice as a means of doing justice to victims of violent crime and of avoiding impunity is voiced in the guidelines adopted by the Committee of Ministers of the Council of Europe on 30 March 2011 on eradicating impunity for serious human rights violations.<sup>14</sup> The Recitals express the new creed in a nutshell: "those responsible for acts amounting to serious human rights violations must be held to account for their actions" and "impunity must be fought as a matter of justice for the victims". The guidelines offer a comprehensive synopsis of the Council of Europe's *acquis* as regards the legal situation of victims of severe human rights violations.

In the light of the necessity to distinguish between violent crimes and other offences, it is worth noting that the guidelines make the following clarification:

*"For the purposes of these guidelines, 'serious human rights violations' concern those acts in respect of which states have an obligation under the Convention, and in the light of the Court's case law, to enact criminal law provisions. Such obligations arise in the context of the right to life (Article 2 of the Convention), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention), the prohibition of*

*forced labour and slavery (Article 4 of the Convention) and with regard to certain aspects of the right to liberty and security (Article 5, paragraph 1, of the Convention) and of the right to respect for private and family life (Article 8 of the Convention). Not all violations of these articles will necessarily reach this threshold."*<sup>15</sup>

## 1.5 The victim of a violent crime acting as a party to the proceedings

The final step is to recognise the victim not only, in substantive law terms, as wronged by the violent offence but consequently, in procedural law terms, as entitled to act as a party to the proceedings. EU law and the criminal procedural codes of some Member States take this step.

In theory this may seem only a small step, but in practice it is a challenging one. Including the victim disrupts the delicate mechanism of criminal proceedings, including the clearly defined roles of those involved. It needs to be rearranged from scratch. It is, to date, not clear that a profound and consistent reorganisation of criminal proceedings has happened anywhere in Europe. Rather, most criminal justice systems are moving somewhere along the path sketched here.

What triggered the development of the fifth stage was the mounting concern of victimologists and civil society organisations about the recognition owed to the victim as the individual who was wronged. They drew attention to the fact that, by constructing the offence as an issue solely between the state, represented by the public prosecutor, and the defendant, criminal proceedings ignore the fact that a violent offence is a severe violation of the victim's dignity and rights and that the victim therefore is a concerned party and a stakeholder in criminal justice. As Wemmers puts it: "If crimes truly were directed at the state and were not committed against people, then this dual-party configuration would make sense. However, in reality crimes are committed against people. And these people – the victims – seek recognition of the crimes committed against them. Recognizing victims' rights as human rights means recognizing victims as persons before the law."<sup>16</sup>

Arguably, one of the first expressions of this new awareness of the victim's right to recognition in the proceedings was as early as 1985. Shapland, Willmore and Duff carried out empirical research on the situation of victims of violent crime and concluded by maintaining:

<sup>13</sup> ECtHR, *S.N. v. Sweden*, No. 34209/96, 2 July 2002, § 47.

<sup>14</sup> Council of Europe, Directorate General of Human Rights and Rule of Law (2011).

<sup>15</sup> Council of Europe, Directorate General of Human Rights and Rule of Law (2011), p.7.

<sup>16</sup> Wemmers (2017), p. 131.

*“Throughout this study, one theme has been apparent in the responses of these victims of violent crime to their experiences with the criminal justice system. This is their wish for respect and appreciation – their wish for recognition as an important and necessary participant in the criminal justice system. It is not an appeal for help or for charity, because they have suffered, but a desire that those who are running the criminal justice system – a system that, in general, they support and admire – should take notice of their right to be involved and to continue to be involved throughout the operation of the system.”<sup>17</sup>*

The authors argued in favour of a tripartite system of criminal proceedings that would give the victim “a real role in the criminal justice system”<sup>18</sup> and powers similar in nature to those of the offender.<sup>19</sup>

Today, this shift of paradigm is under way:

- From viewing criminal justice as a matter only between the state and the offender, it is evolving towards understanding the crime as a tripartite affair, between the offender and the victim, but also involving society. However, ‘society’ is not a collective entity, but denotes *all* individual members of a community of law and rights, enjoying equal rights and represented in the proceedings by the public prosecutor.
- From criminal proceedings that treat the victim as a witness and otherwise as an outsider, the criminal justice system is moving to acknowledge a victim of violence as the person whose rights have been infringed by the offender. The victim can legitimately expect proceedings to be instituted and carried out in a thorough and effective manner, and to give the victim a prominent role.

In the right of victims of violent crime to act as parties to criminal proceedings, Article 47 of the Charter plays a pivotal role. The ECtHR has recognised, under Article 13 of the ECHR, the right of victims to have “effective access” to the investigation. In a number of recent cases, the ECtHR has clarified this as requiring that “a victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”<sup>20</sup> This formula is rather broad and has the potential to

cover a victim’s main participation rights, but it is not yet clear if a victim of violent crime could rely under Article 13 of the ECHR on a range of participation rights that amount to fair trial rights in the meaning of Article 6 of the convention. In this respect, Article 47 of the Charter is much clearer.

### Article 47 of the EU Charter of Fundamental Rights

#### ***Right to an effective remedy and to a fair trial***

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

As will be explained in more detail in the next chapter, Article 47 of the Charter makes a significant step forward by explicitly linking the right to an effective remedy to fair trial rights. The first paragraph of Article 47 grants a right to an effective remedy “before a tribunal in compliance with the conditions laid down in this Article.” Hence, the right to an effective remedy always includes fair trial rights in accordance with the subsequent paragraphs of Article 47. It is in this regard that the right to an effective remedy under Article 47 paragraph 1 could go beyond the analogous right under Article 13 of the ECHR.

As shown in Table 1, Article 47 of the Charter combines the contents of Article 13 of the ECHR (right to an effective remedy, captured in the first paragraph of Article 47) with the contents of Article 6 (1) of the ECHR (fair trial rights, covered by the second paragraph of Article 47) and an express right to legal aid (third paragraph of Article 47) that the ECHR does not grant explicitly.

17 Shapland *et al.* (1985), p. 176.

18 Shapland *et al.* (1985), p. 193.

19 Shapland *et al.* (1985), p. 189.

20 ECtHR, *Kolpak v. Russia*, No. 41408/04, 13 March 2012, § 62.

**Table 1: Comparing the human rights of victims of violent crime under the ECHR and the Charter**

	Rights under the ECHR	Rights under the Charter
Right to an effective investigation and prosecution of offenders	Yes (Art. 13)	Yes (Art. 47, para. 1)
Fair trial rights as a party to the proceedings	Limited (Art. 13)	Yes (Art. 47, paras. 1-3)

Source: FRA, 2019

The same step as the Charter makes appears in the procedural legislation of EU Member States that grant victims of violent crime rights to act as parties to the proceedings. Examples among the countries in this project are Austria, Germany, Poland and Portugal.

This latest stage in the emergence of victims' rights has made considerable progress in terms of Member States' legislation but in practice is still in its infancy, FRA's research makes clear. Practitioners' understanding and how they view and treat victims do not always reflect the criminal procedural codes. Moreover, there are indications that some practitioners have not fully embraced a human rights-based approach to victims' rights. This can result in various hurdles and blockages. Some practitioners do not take victims' rights seriously or do not tell victims about them. Even when victims are allowed to be present and to participate in the proceedings, their views and concerns are not always given due attention. In this situation of tensions and contradictions, victims of violent offences need support and advocacy for their right to access justice.

## 1.6 The development of victims' rights in EU secondary legislation

Two legal instruments reinforce the rights of victims in secondary EU law: the Council Framework Decision of 2001 on the standing of victims in criminal proceedings and the Victims' Rights Directive of 2012. They mark significant steps towards a fuller recognition of victims' rights. Both are characteristic of the current transition from a needs-based towards a rights-based understanding of crime victimisation, progressively granting victims rights to participate actively in the proceedings. Although the Victims' Rights Directive replaced the Council Framework Decision in all other Member States, the latter is still binding on Denmark. Denmark did not adopt the directive (Recitals 65 and 71 of the directive).<sup>21</sup>

<sup>21</sup> According to Art. 10 of Protocol No. 36 on transitional provisions, as of 1 December 2014, the Framework Decision lies within the European Commission's competences under Art. 258 of the Treaty on the Functioning of the European Union (TFEU). On the transitional rules, see Peers (2011), pp. 61-64.

The secondary law instruments have a crucially important consequence. They cover comprehensively the situation of victims in criminal proceedings – and even beyond them as regards victim support services and protection measures. That means that the Charter, including Article 47, applies to them. Hence, how EU Member States' criminal justice systems treat victims of crime stands to be assessed against the standards established by Article 47 of the Charter. These standards can, at times, go beyond the requirements in the secondary law instruments as concerns victims' right to a thorough and effective investigation, victims' fair trial rights or victims' right to legal aid. Article 47 paragraph 3 of the Charter sets no conditions on legal aid. Therefore, ultimately Article 47 of the Charter remains the touchstone against which to assess the rights and standing of victims in criminal justice systems.

Even the title of the Framework Decision emphasises the victim's standing in criminal proceedings. This heralds the new orientation. The Framework Decision explicitly stops short of imposing "an obligation on Member States to ensure that victims will be treated in a manner equivalent to that of a party to proceedings" (Recital 9). Nevertheless, Article 2, under the heading 'Respect and recognition', commences with the obligation on Member States to "ensure that victims have a real and appropriate role in its criminal legal system." However, by defining the victim as a "natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State" (Article 1), the Framework Decision includes elements clearly reminiscent of a needs-based approach.

Similarly, the Victims' Rights Directive combines elements of both approaches.<sup>22</sup> It shows a rights-based concept of the victim and their rights in, for instance, the following provisions.

- Most importantly, it inherited from its predecessor the general orientation towards enabling victims to participate in criminal proceedings. According to Article 1, 'Objectives', the purpose of the directive is

<sup>22</sup> On the Victims' Rights Directive, see Hilf (2017), who comprehensively references other publications.

“to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings”. The four elements it mentions are not at the same level. Rather, the main reason why victims should “receive appropriate information, support and protection” is exactly to enable them “to participate in criminal proceedings”. In this vein, Recital 26 specifies that, when providing information, “sufficient detail should be given to ensure that victims are treated in a respectful manner and to enable them to make informed decisions about their participation in proceedings.” Article 4 (1) of the directive obliges Member States to ensure that victims are offered information “to enable them to access the rights set out in this [d]irective”.

- Arguably, the term that best and most comprehensively captures the objective of the directive is ‘recognition’. Recognition of the victim as a rights holder and social recognition are a means of countering the social disintegration that can result from the victim’s experience of being denied the status of an autonomous person. The second sentence of Article 1 begins “Member States shall ensure that victims are recognised and treated in a respectful [...] manner”. This phrase relates to Recital 9 and incorporates some of its wording. That is the first substantive recital and starts with the words: “Crime is a wrong against society as well as a violation of the individual rights of victims. As such, victims of crime should be recognised and treated in a respectful [...] manner”. In other words, criminal proceedings should recognise the victim as the individual whose rights the offender has violated. This is the clearest expression of a rights-based victim concept.
- The beginning of the recital, “Crime is a wrong against society”, should be read in the context of what follows. It indicates that criminal justice cannot be about the rights of the individual victim *alone*. By asserting the rights of one individual, the proceedings also serve the rights of all other members of the legal community, who have the same human rights as the victim and the offender. Therefore, criminal justice is never a private matter between the victim and the offender, but necessarily involves ‘society’ as the entirety of the individual members of a legal community. Therefore, criminal justice protecting human rights must necessarily remain a concern of the entire community.
- Recital 17 interprets gender-based violent offences as “a form of discrimination and a violation of the fundamental freedoms of the victim”. This is a particularly clear expression of a rights-based victim concept and a rights-based understanding

of criminal justice. Also, according to Article 25 (5), training shall aim to enable practitioners “to recognise victims”, a term that signals a rights-based victim concept.

- At times (for instance in Recitals 16, 22 and 31, as well as in Articles 6, 7 and 8), the directive refers to criminal offences committed against or suffered by the victim. Strictly speaking, that is premised on a rights-based victim concept.

However, elsewhere the directive seems closer to a needs-based approach.

- Most importantly, Article 2 of the directive defines ‘victim’ with reference to *harm* caused by a criminal offence. Family members of a person whose death was directly caused by a criminal offence are included in the definition, because they too suffered harm as a result of the death of their relative. Because of this double causation – crime causing death and death causing harm to family members – Recital 19 explains that these family members are “indirect victims of the crime”.
- Often, the directive premises rights to services on victims’ personal ‘needs’. For instance, Article 8 grants victims a right to access support services, but only “in accordance with their needs”. Article 9 (2) calls on Member States to “encourage victim support services to pay particular attention to the specific needs of victims who have suffered considerable harm due to the severity of the crime.” Victims are, according to Article 22, entitled to an assessment of their protection “needs”, and this individual assessment may be adapted according to the “apparent harm suffered by the victim”.

Overall, the directive displays a certain ambiguity. Thus, it bears witness and pays tribute to the current transition in criminal justice systems in Europe. In addition, like the Council Framework Decision, the directive often explicitly leaves Member States to specify the scope of certain rights that are crucial in determining the role of victims in the criminal justice system. Thus it ensures compatibility with more than one approach, including the French civil party system and the German system of joint prosecution (*Nebenkläger*).

The Victims’ Rights Directive grants rights to all victims of crimes and does not deal specifically with victims of violent crime. However, Article 47 of the Charter, like Article 13 of the ECHR, grants procedural rights only to victims of serious human rights violations, here captured as ‘violence’ or as ‘crimes against the person’. The interplay of Article 47 and the Victims’ Rights Directive results in all victims of crime enjoying the rights under the directive. Victims of violent crime, in addition to their rights under





the directive, have more robust fair trial rights in accordance with Article 47 of the Charter.

Other secondary EU law instruments complement the Council Framework Decision and the Victims' Rights Directive. They either concern certain aspects of the criminal justice response to crimes or serve the rights of specific groups of victims.

- The Compensation Directive<sup>23</sup> obliges all Member States to ensure that there is a scheme for state compensation to victims of violent intentional crimes committed in their territories. The scheme must guarantee fair and appropriate compensation to victims. Recital 10 of the directive argues that victims will, for practical reasons, "often not be able to obtain compensation from the offender, since the offender may lack the necessary means to satisfy a judgment on damages or because the offender cannot be identified or prosecuted". This assumes that it should primarily be the offender who compensates the victim and that state compensation is a fall-back solution.
- Articles 18 to 20 of the directive on sexual child abuse of 2011<sup>24</sup> contain important provisions on assistance, support and protection for child victims of sexual abuse and sexual exploitation.
- The EU Anti-Trafficking Directive,<sup>25</sup> in Recital 18, considers that it "is necessary for victims of trafficking in human beings to be able to exercise their rights effectively. Therefore, assistance and support should be available to them before, during and for an appropriate time after criminal proceedings. Member States should provide for resources to support victim assistance, support and protection." Accordingly, Articles 11 and 12 of the directive oblige Member States to ensure that victims of trafficking benefit from assistance, support, legal counselling and protection against secondary victimisation. Articles 13 to 16 contain additional obligations in favour of child victims of trafficking. According to Article 17 of the directive, state compensation schemes must include victims of trafficking.

23 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6.8.2004, p. 15–18.

24 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, p. 1–14.

25 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1–11.

- Similarly, the Terrorism Directive<sup>26</sup> contains specific provisions concerning the rights of victims of terrorism to assistance, support, and protection against intimidation, retaliation and secondary victimisation. Under Article 26 of the directive, Member States have to ensure that victims who are resident in another Member State are entitled to benefit from support services and compensation schemes and receive assistance to access such services.

According to Article 29 of the Victims' Rights Directive, the Commission should, by 16 November 2017, have submitted a report to the European Parliament and to the Council, assessing Member States' compliance with the directive, "accompanied, if necessary, by legislative proposals". This report is still pending.

On 30 May 2018, the European Parliament adopted a Resolution on the implementation of the Victims' Rights Directive,<sup>27</sup> criticising the Commission's failure to submit a report. The Parliament itself assessed the implementation of the Directive and submitted a plethora of recommendations. In particular, the European Parliament's Resolution "[r]ecalls that one of the most important objectives of the Victims' Rights Directive is to improve the position of victims of crime across the EU and to place the victim at the centre of the criminal justice system".

Denying victims of violent crime recognition as parties to the criminal proceedings clearly falls short of placing victims centre-stage. In this respect, the Victims' Rights Directive can be criticised for being overly willing to compromise. It is, therefore, worth noting that the Resolution of the European Parliament "[a]sks the Commission and the Council to further develop the rights of victims so that the EU can play a leading role in the protection of victims' rights".

This recalls the simple fact that the Victims' Rights Directive, while marking significant progress in the development of victims' rights, will not remain the last word on the matter.

Developments at the European Union level reverberate at Member State level. One fundamental question is whether or not victims of violence are entitled to effective criminal proceedings. Courts in Germany and the United Kingdom dealt with that. Starting with a ruling in 2010, the German Constitutional Court has found in a series of decisions that victims of violence are,

26 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6–21.

27 European Parliament Resolution of 30 May 2018 on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (2016/2328(INI)).

under certain conditions, entitled to effective criminal proceedings.<sup>28</sup> On a similar note, in February 2018 the United Kingdom Supreme Court ruled on the case of *Commissioner of Police of the Metropolis v. DSD and another*. Two women alleged that the police had failed to conduct effective investigations into a series of sexual offences and maintained that these failures violated their rights under the ECHR.<sup>29</sup> The Supreme Court accepted that ECtHR case law demonstrates a clear and constant line of authority to the effect that the state has a duty to conduct an effective investigation into crimes involving serious violence to the individual.<sup>30</sup>

Since the turn of the millennium, the number of contributions from academia to the project of reinventing the criminal justice system on the basis of human dignity and

human rights has been slowly but steadily increasing.<sup>31</sup> The growing consensus stresses that criminal justice systems have the objective of righting the wrong suffered by the victim. The concept of 'wrong' links substantive criminal law to a system of human rights based on human dignity. The assumption that criminal justice is importantly about the wrong done to the victim prompts the claim that the victim should be entitled to participate in criminal proceedings. More recently, some critics have challenged the rise of victims' rights, stimulating the debate.<sup>32</sup>

Importantly, considerable progress has been made at the level of EU Member States' procedural legislation. A growing number of Member States recognise victims of violent crime as parties to criminal proceedings. **Chapter 3** showcases this.

## 1.7 Overview

Table 2 sketches the various stages of the development of the rights of victims of violent crime in Europe.

**Table 2: Development of status of victims of violent crime**

Status	Focus of victim concept	Victim's position in proceedings	Main human rights aspects
Victim of violent crime as a potential <b>witness</b>	Focus on the victim's obligation to provide evidence in the public interest if needed	Witness	None
Victim of violent crime as a <b>civil party</b> (and a potential witness)	Focus on damage suffered as a consequence of the offence; the victim participates in the proceedings because of the damage suffered, not the criminal wrong	Witness and civil party	Article 6 of the ECHR: fair trial rights as a civil party
<b>Harmed</b> victim of violent crime (also as a potential witness)	Focus on the harm suffered as a consequence of the crime; victim impact statements as an expression of the harm suffered; focus on the victim's vulnerability and protection needs, services answering to the victim's particular needs, including victim support services and state compensation as attempts to limit the harm suffered by the victim	Vulnerable witness	Article 8 of the ECHR and Article 7 of the Charter: right to protection against secondary victimisation
Victim of violent crime as <b>wronged</b> by the offence and as entitled to justice (and a potential witness)	Focus on the rights violation constituting a criminal wrong and the victim as the individual wronged; focus on criminal justice as redressing the wrong suffered by the victim; the victim's entitlement to an investigation and prosecution capable of leading to the identification and punishment of offenders	A special type of witness with legitimate interests in the case	Article 13 of the ECHR and Article 47 (1) of the Charter: criminal justice as an effective remedy
Victim of violent crime as entitled to <b>access to justice</b> as a <b>party</b> to the proceedings	Because the victim is recognised as the person wronged by the offender, focus on the victim's entitlement to be recognised and respected in the proceedings as the individual wronged and hence entitled to active participation in the proceedings and full fair trial rights	Victim is a party to the proceedings (and not a witness)	Article 13 of the ECHR and Article 47 of the Charter: fair trial rights due to criminal victimisation

Source: FRA, 2019

28 On this case law of the German Constitutional Court, see Giehring (2015); Hörnle (2015); Dearing (2017), pp. 48-50; Beulke and Swoboda (2018), p. 3.

29 As the Human Rights Act 1998 does not include Art. 13 of the ECHR, the Supreme Court ruled under Art. 3 of the ECHR.

30 On this case, see Conaghan (2017).

31 Reemtsma (1999); Dearing (2002); Dearing (2004); Dearing (2017); Goodey (2005); Goodey (2018); Hampton (2007); Doak (2008); Weigend (2010); Weigend (2017); Wemmers (2012); Wemmers (2017); Schmidt (2015); Holder (2017); Holder (2018).

32 On these views opposing the rise of victims' rights, see Jesionek (2017).

# 2

## Victims' rights and states' obligations: a human rights view on the position of the victim in the criminal justice system



Chapter 1 recalled from a historical and political perspective how the rights of victims developed. This chapter analyses through a legal lens the result of this development – the current state of affairs of victims' rights – and locates victims' rights in a wider human rights context. A criminal justice system with a rights-based victim concept contains the following elements:

- Legislation criminalises violent crimes to express their significance as human rights violations and to assure citizens that, if they become victims, they will not stand alone, as their community will not allow the offence to pass with impunity and will see to it that the wrong suffered by the victim is remedied.
- Victims of violent crime have (at least) two rights:
  - a right to justice
  - a right to be protected against further victimisation.

Firstly, this report analyses these various elements on the basis of the European Convention on Human Rights, drawing extensively on case law of the ECtHR. Later, it explains the contributions made by the Charter.

### 2.1 Rights of victims of violent crime under the ECHR

#### 2.1.1 A state's obligation to ensure human rights to everyone within its jurisdiction

Human rights are not only – or primarily – about the state *respecting* rights of individuals, but also about the state *securing* rights against interference by others. The ECHR's official name is the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 1 begins by stating: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". Article 2, for instance, echoes this objective with the words: "Everyone's right to life shall be protected by law".

The ECtHR has consistently dealt with violent offences from the angle of a state's obligation to protect the rights of one individual against violations by another. In a case of domestic violence, the ECtHR explained:

*"As regards the question whether the State could be held responsible, under Article 3, for the ill-treatment inflicted on persons by non-state actors, the Court reiterates that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to*

*ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals*".<sup>33</sup>

A state's general obligation to protect human rights entails various aspects. Six components can be distinguished. The first five are preventive in a wider sense of the term, meaning that they aim to prevent human rights violations from happening in the future and hence are a matter of the security of individuals' rights. The last element, criminal justice, reacts to a crime that has been committed and aims to limit the negative impact of the crime and, in the aftermath, restore the victim's confidence in their personhood and rights.

1. *Prevention* spans a wide range of institutional and organisational measures, and means of communication, by which a state promotes human rights and dissuades or impedes infringements.
2. *Criminal law protection* is one important means of such communication. Criminal codes emphatically denounce conduct that severely violates human rights. By adopting a criminal code, a state underlines the importance of the rights protected and the respect due to them. It announces to everyone living within its jurisdiction that it will, whenever necessary, suit the action to the word by taking concrete steps to prevent, fend off or punish violations.
3. *Criminal proceedings must implement criminal codes*. The criminal code may announce that the state will not allow offenders to violate human rights with impunity, but it will dissuade offenders only if state authorities put it into practice. Therefore, the ECtHR has held that a state's duty "to secure the right to life by putting in place effective criminal law provisions" must be "backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions".<sup>34</sup>
4. *Protection against an imminent risk* of a rights violation can be imperative. If the authorities can no longer rely on human rights education or the criminal code to promote human rights, they have to adopt concrete protection measures to defend rights in peril. According to the ECtHR, state authorities violate their obligation to protect human rights if, when they knew or

ought to have known of a real and immediate risk of a human rights violation, they "failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk".<sup>35</sup>

5. *Protection against further victimisation* is called for if a severe human rights violation has occurred and if the risk of victimisation persists. The state owes the victim a thorough assessment of whether or not the risk that led to the victimisation still continues. If so, state authorities need to adopt protective measures to counter the risk. In cases of domestic partner violence, the ECtHR has repeatedly examined "whether the national authorities have taken all reasonable measures to prevent the recurrence of violent attacks against the [victim's] physical integrity".<sup>36</sup>
6. *Criminal justice* is a means of defending the victim's personhood and rights against the offender's attack and of refuting the messages sent by the offender, which call the victim's personhood and rights into question. Thus, criminal justice stops the offence impairing the rights and social status of the victim and restores the victim as a full member of the legal community.<sup>37</sup> As a concept, criminal justice goes beyond conducting criminal proceedings to preserve the credibility of criminal law provisions. Firstly, the concept of criminal justice emphasises the aspects of procedural justice, meaning that the shape of proceedings recognises the victim as one of the main stakeholders in criminal justice. Secondly, in terms of outcome, the concept of criminal justice encompasses all sanctions that aim at undoing the offence, prominently including compensating victims and confiscating the proceeds of crimes.

## 2.1.2 Criminal law protection

The state, by adopting a criminal code, emphatically highlights the importance of the rights it protects. It assures all individuals living on its territory that competent state authorities will not allow human rights violations to pass unchallenged and that if individuals become victims they will not be left alone. The criminal justice system contributes to crime prevention by demonstrating the community's resolve to insist on

<sup>33</sup> ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, § 159.

<sup>34</sup> ECtHR, *Alex Menson and Others v. the United Kingdom* (decision), No. 47916/99, 6 May 2003.

<sup>35</sup> ECtHR [GC], *Osman v. the United Kingdom*, No. 23452/94, 28 October 1998, § 116.

<sup>36</sup> ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, § 162; *Rumor v. Italy*, No. 72964/10, 27 May 2014, § 62.

<sup>37</sup> On criminal justice as a means of restricting the damage done to the victim by the offender, see Reemtsma (1999), pp. 25-27.



the respect owed to the rights that criminal law protects. Criminal justice is indispensable in this function of asserting and preserving a society's value basis.

When it comes to denouncing severe human rights violations, such as physical, sexual or psychological violence, there is no alternative to a criminal justice response. No other remedy is appropriate to express the importance of what is at stake for victims, society's indignation towards offenders and solidarity with those whose rights have been violated. The ECtHR has, for example, held:

*"[I]n the area of unlawful use of force by State agents – and not mere fault, omission or negligence – civil or administrative proceedings aimed solely at awarding damages, rather than ensuring the identification and punishment of those responsible, were not adequate and effective remedies capable of providing redress for complaints based on the substantive aspect of Articles 2 and 3 of the Convention".<sup>38</sup>*

Judge Ress explained the reasoning behind the necessity to enact criminal law provisions in his Opinion in the case of *V.O. v. France*:

*"In general, it is through the criminal law that society most clearly and strictly conveys messages to its members and identifies values that are most in need of protection. [...] One might consider that imposing a disciplinary penalty [...] could be regarded as equivalent to imposing a criminal penalty in certain circumstances. [...] However, it is equally clear that, as unpleasant as the consequences may be professionally, a disciplinary penalty does not amount to general condemnation (Unwerturteil)."<sup>39</sup>*

By condemning rights violations as wrong, the state asserts and defends the rights violated. It follows that criminal codes must be complex enough to reflect essential rights violations. For instance, in a case of racially motivated violence, the ECtHR made clear that criminal law must not overlook the additional significant aspect of discrimination:

*"Moreover, when investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would*

*be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights".<sup>40</sup>*

To allow the police, the public prosecutor and the court to deal with and highlight the entire wrong of racist hate crime, a criminal code must clearly distinguish between crimes of simple violence and racially motivated violence.

Similarly, in cases of domestic partner violence the ECtHR has insisted that criminal justice must not content itself with judging single acts of violence in isolation but must take into account the situation of a victim who, over an extended time, had to live in fear and helplessness. Creating and maintaining circumstances that expose the victim to constant fear of violence can in itself amount to inhuman and degrading treatment in the sense of Article 3 of the ECHR.<sup>41</sup> Therefore, criminal law provisions must capture and express the substance of the abuse suffered by an individual forced to live in a violent relationship, including prominently the fear and derogation.

From the perspective of individuals as potential victims of violent crime, criminal codes contain two promises. Firstly, the state affirms its commitment to promoting and protecting all human rights against violent crime. Secondly, if this protection fails and a violent crime is committed, victims will not be abandoned but can count on the solidarity of their community. Conducting an investigation and prosecuting, convicting and sentencing offenders will not only do justice but preserve the credibility of this promise.

### 2.1.3 The right of a victim of violent crime to justice

In a human rights paradigm, the objective of criminal justice is to redress the wrong done to victims and thus to restore victims' confidence in the validity and binding nature of their rights and in their status and recognition as persons before the law. All individuals share in one human dignity and equal rights. Therefore, if justice is done and the wrong suffered by the victim is redressed, all other members of the community are reassured that their rights are binding and respect is due to them.

Hence, criminal justice is primarily concerned not with preventing future offences but with redressing a present wrong by settling a debt to victims owed by offenders and society. Both criminal proceedings and their outcomes convey a message, recognising the victim as a person and their rights, and the equal rights of all who share in the same dignity.<sup>42</sup>

<sup>38</sup> ECtHR, *Lopes de Sousa Fernandes v. Portugal*, No. 56080/13, 19 December 2017 [GC], § 135.

<sup>39</sup> ECtHR, *V.O. v. France*, No. 53924/00, 8 July 2004.

<sup>40</sup> ECtHR, *Angelova and Iliev v. Bulgaria*, application no. 55523/00, 26 July 2007, § 115–116.

<sup>41</sup> ECtHR, *Valiulienė v. Lithuania*, No. 33234/07, 26 March 2013, §§ 69–70.

<sup>42</sup> Hampton (2007), pp. 134–147; Murphy (2011); Dearing (2017).

## Procedural aspects of the victim's right to justice: effective criminal proceedings and victims' access to the proceedings

Criminal justice redresses the victims' grievances and thus functions as an 'effective remedy' in the sense of Article 13 of the ECHR. According to this provision, everyone who can tenably claim that their human rights have been violated has the right to an effective remedy that sets right the wrong done to them. In this perspective, criminal justice has two objectives. It asserts the rights of victims of violence, which the offender has infringed, and it attests to the status of the victim as a person holding rights that are to be respected. Criminal justice is a means of protesting against and redressing the offence. Thus it confirms the victim's rights and minimises the offence's negative impact on the rights and personhood of the victim and on society's normative fabric.

If state authorities suspect that a violent offence has been committed, they have an obligation to investigate the suspicious circumstances of the case, to prosecute, convict and sentence offenders as far as appropriate, and to allow the victim to perform an appropriate role in the proceedings. In numerous cases concerning violent offences, the ECtHR has held that, as concerns Article 13 of the ECHR, "the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure".<sup>43</sup>

The court's vast case law under Article 13 of the ECHR coexists with a similar number of judgments that view a victim's right to an effective remedy as an element – a 'procedural aspect' – that substantive convention articles (including Articles 2, 3, 4 and 8 of the ECHR) already entail. For example, in one case someone had made a 12-year-old the subject of an advertisement of a sexual nature on an internet dating site. Thus, the minor became a target for approaches by paedophiles. The ECtHR maintained:

*"For the Court, States have a positive obligation inherent in Article 8 of the Convention to criminalise offences against the person, including attempted offences, and to reinforce the deterrent effect of criminalisation by applying criminal law provisions in practice through*

*effective investigation and prosecution [...] As to the Government's argument that the applicant had the possibility to obtain damages from a third party, namely the service provider, the Court considers that it was not sufficient in the circumstances of this case. It is plain that both the public interest and the protection of the interests of victims of crimes committed against their physical or psychological well-being require the availability of a remedy enabling the actual offender to be identified and brought to justice, in the instant case the person who placed the advertisement in the applicant's name, and the victim to obtain financial reparation from him".<sup>44</sup>*

After dealing with the victim's right to effective criminal proceedings under the heading of Article 8 of the ECHR, the court found that no additional issue remained to be dealt with under Article 13 of the ECHR.<sup>45</sup> In other instances, the court found violations of both the procedural aspect of the substantive convention article and Article 13, in both regards relying on the same facts.<sup>46</sup> Instead of dealing with a victim's right to an effective remedy exclusively under Article 13 of the ECHR, the court has opted to replicate this right under substantive convention articles – as what the court refers to as their 'procedural limbs' or 'aspects'. The reason is not entirely clear. However, Article 13 contains the wider concept. Thus, for instance, the court deals with the right of a victim of violence to compensation exclusively under Article 13.

Although the formula used by the ECtHR seemingly focuses on the investigation, the court has made it clear that the procedural requirements may well go beyond the stage of the investigation. The court has held that, where the investigation has "led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, are to be taken into account".<sup>47</sup>

The investigation must be effective in the sense that it can lead to the identification and punishment of those responsible. The result is not compulsory, but the means and due diligence are. Promptness and reasonable expedition are implicit in the requirement of an effective investigation.<sup>48</sup> Overall, the ECtHR has emphasised that, "while there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering

43 ECtHR, *Aksoy v. Turkey*, No. 21987/93, 18 December 1996, § 98. This formula has later been used in numerous cases, including *Aydın v. Turkey* [GC], No. 23178/94, 25 September 1997, § 103. For more recent cases, see for example *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], No. 39630/09, 13 December 2012, § 255; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], No. 47848/08, 17 July 2014, § 149; and *Tagayeva and Others v. Russia*, No. 26562/07, 13 April 2017, § 618.

44 ECtHR, *K.U. v. Finland*, No. 2872/02, 2 December 2008, § 46.

45 ECtHR, *K.U. v. Finland*, No. 2872/02, 2 December 2008, § 51. More recently, ECtHR, *Gulyan v. Armenia*, No. 11244/12, 20 September 2018, § 95.

46 ECtHR, *Tsakoyevy v. Russia*, No. 16397/07, 2 October 2018, §§ 147–148.

47 ECtHR, *S.M. v. Croatia*, No. 60561/14, 19 July 2018, § 59.

48 ECtHR, *S.M. v. Croatia*, No. 60561/14, 19 July 2018, § 60.

offences and grave attacks on physical and mental integrity to go unpunished".<sup>49</sup>

The obligation to investigate does not depend on a victim's complaint. Once allegations of trafficking have been brought to the authorities' attention, they must act of their own motion.<sup>50</sup>

Finally, the victim must have access to the procedure to an appropriate extent. Only relatively recently has the ECtHR given more substance to this requirement. In a plethora of cases, the court had found that, if the offender killed the victim, the victim's next of kin must have as much access to the procedure as necessary to allow them to safeguard their legitimate interests.<sup>51</sup> In a judgment of March 2012, the ECtHR for the first time used this formula in favour of the victims themselves:

*"The minimum standards of 'effectiveness' defined by the Court's case-law also require that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness [...]. In all cases the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests [...]"*.<sup>52</sup>

Later in the same judgment, the court noted "that throughout the inquiry the applicant was not questioned in connection with his allegations. Moreover, it does not appear that he or his lawyer were able to access the materials of that inquiry." Hence, the court found that "the inquiry into the applicant's allegations of ill-treatment was inadequate and ineffective".<sup>53</sup>

After this judgment, the court continued to use the formula entitling victims to be involved in the procedure to the extent necessary to safeguard their legitimate interests in a number of cases. It did not further clarify the range of a victim's participation rights under Article 13 of the ECHR.<sup>54</sup>

## Outcome aspects of the victim's right to justice: establishing the truth, convicting and punishing offenders, and compensating victims

For a remedy to be effective, it must grant the victim appropriate relief.<sup>55</sup> For victims to receive appropriate relief and sense that, in the end, criminal justice is done, they must experience throughout the proceedings that they are recognised, heard and taken seriously, but the judgment passed by the criminal court must also achieve the purposes of the proceedings:

- to establish the truth by determining the pertinent conduct of the offender and its relevant circumstances;
- to clearly define the wrong done by the offender to the victim in terms of the victim's rights violated;
- to convict the offender and thus hold the offender accountable for the wrong done to the victim;
- to sentence the offender;
- to ensure that the offender compensates the victim for the damages incurred as a consequence of the offence.

Thus, the proceedings 'undo' the offence, as far as possible. The offender's violent conduct implies that the victim's rights and status need not be respected; the proceedings reject that claim. They also annul its immediate consequences in terms of harm done to victims and illicit profits gained. This keeps to a minimum the crime's negative impact on the authority of the victim's rights and the status of the victim as a full member of the community.

Rights are a matter of communication. The offence directly denies the victim recognition of their rights and indirectly denies them recognition of their status as a rights holder. This continues to call into question and undermine the victim's rights and personhood as long as the offence goes unchallenged and is not rejected by a powerful body. If a court emphatically denounces the offender's behaviour as wrong, insists that it is the offender who is to be held accountable (and not the victim), and on this basis convicts and sentences the offender, it sends a clear and powerful message to the offender, to the victim and to all other members of the

49 ECtHR, *S.M. v. Croatia*, No. 60561/14, 19 July 2018, § 59.

50 ECtHR, *S.M. v. Croatia*, No. 60561/14, 19 July 2018, § 60.

51 E.g. ECtHR, *Tahsin Acar v. Turkey* [GC], No. 26307/95, 8 April 2004, § 225; *Khamzatov and Others v. Russia*, No. 31682/07, 28 February 2012, § 141.

52 ECtHR, *Kolpak v. Russia*, No. 41408/04, 13 March 2012, § 62.

53 ECtHR, *Kolpak v. Russia*, No. 41408/04, 13 March 2012, §§ 68–69.

54 ECtHR, *Bureš v. the Czech Republic*, No. 37679/08, 18 October 2012, § 125; *S.M. v. Croatia*, No. 60561/14, 19 July 2018, § 60.

55 E.g. ECtHR, *Tanrikulu v. Turkey*, No. 23763/94, 8 July 1999, § 117.

community. It reaffirms that the victim has rights that are to be respected, and all those who hold the same rights as the offender and the victim can see that their rights are taken seriously and that justice is done, in line with the promise made by the criminal code.<sup>56</sup>

A human rights perspective sees the violent offender as trespassing on the victim's freedom and autonomy. Criminal codes define limits to individual freedom due to the equal rights and personhood of others. Offenders claim excessive freedom and implicitly diminish the victim. Doing criminal justice rejects the detriment to the victim. It recognises the victim as the rightful owner of the freedom that the offender arrogated. Thus, it restores the victim as a holder of rights that others are to respect.<sup>57</sup> This requires establishing the facts, marking the offender's conduct as wrong, placing blame and responsibility on the offender, making the offender contribute their due share to the costs of a norm of equal freedom and autonomy, and undoing illicit allocations of assets resulting from the offence. Once this has been achieved, the offender and the victim can overcome their transitional status as offender and victim and can be reintegrated in their societies. Their community can support them in this process.

The severity of punishment expresses the severity of the wrong done to the victim, including in comparison with other offences. The ECtHR grants state authorities considerable leeway on proportionate sentencing and punishment. However, the court has held:

*"It follows that while the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by State agents, it must exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. Were it to be otherwise, the States' duty to carry out an effective investigation would lose much of its meaning [...]".*<sup>58</sup>

In the same vein, a Grand Chamber held in the *Gäfgen* judgment:

*"[I]n accordance with the principle that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective, the Court has to ensure that a State's obligation to protect the rights of*

*those under its jurisdiction is adequately discharged [...]. It follows that while the Court acknowledges the role of the national courts in the choice of appropriate sanctions for ill-treatment by State agents, it must retain its supervisory function and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. Otherwise, the State's duty to carry out an effective investigation would lose much of its meaning".*<sup>59</sup>

Hence, a sanction that is not manifestly disproportionate is a significant element of the right of a victim of violent crime to an effective remedy under Article 13 of the ECHR. Another is compensation where appropriate.

However, whether or not the authorities can reach a decision that does justice to the victims also depends on circumstances that are not within their control. Hence, the ECtHR has made it clear that "the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant."<sup>60</sup> What the authorities owe to victims is not the conviction and punishment of offenders, but due diligence. This means that they must cautiously take all measures that are feasible and can reasonably be expected of them to achieve the purpose of the proceedings.

Compensation is different. EU Member States are obliged to see to it that victims of violent crime receive effective compensation for the damage they suffered as a consequence of the offence. The offender, who is primarily responsible for compensating the victim, will not always have the financial means to do so. The state is liable and able to fill in for the offender. Hence, victim compensation is an obligation of result. Advocate General Lenz explained the rationale of state compensation in the *Cowan* case in the following, precise terms:

*"Compensation for victims of crime [...] is compensation for infringement of a right which it is the duty of the State to protect but which in the specific case it was not able to safeguard. [...] In enacting legislation for the compensation of victims of crime it takes a position analogous to that of a guarantor with regard to compensation for harm which could not otherwise be redressed, harm arising from the infringement of rights which it was the State's duty to protect but which it was not able to guarantee".*<sup>61</sup>

<sup>56</sup> The communicative functions of criminal justice have been emphasised and elaborated by Duff (2001); Duff (2018); Hampton (2007); Hörnle (2017).

<sup>57</sup> On restoring the victim as a member of society as a primary objective of criminal justice, see Fletcher (1995), p. 257; Dearing (2002), pp. 182–184; Dearing (2017), pp. 381–384; Hilf (2006); Hampton (2007); Sautner (2010).

<sup>58</sup> ECtHR, *Nikolova and Velichkova v. Bulgaria*, No. 7888/03, 20 December 2007, § 62.

<sup>59</sup> ECtHR, *Gäfgen v. Germany* [GC], No. 22978/05, 1 June 2010, § 123.

<sup>60</sup> ECtHR, *De Souza Ribeiro v. France*, No. 22689/07, 13 December 2012, § 79.

<sup>61</sup> Opinion submitted by Advocate General Carl Otto Lenz in *Cowan v. Trésor Public*, No. 186/187, 2 February 1989, § 51–52.



In several cases, the ECtHR has made clear that, for severe human rights violations, the victim's right to justice encompasses compensation not only for pecuniary losses. In principle, it also includes *non-pecuniary* losses, such as "pain, stress, anxiety and frustration".<sup>62</sup>

### 2.1.4 The right of a victim of violent crime to protection against further victimisation

When someone is at imminent risk of victimisation, the police must no longer rely on the persuasiveness of criminal law provisions but must intervene in a targeted manner, according to the case law of the European Court of Human Rights. When an offence has been committed and hence a severe human rights violation has occurred, the state owes to the victim a thorough assessment of whether or not the concrete risk that led to the victimisation continues to threaten the victim's rights. If it does, state authorities – the police and courts – are obliged to adopt protective measures aimed at ending the threat.

For instance, in cases of domestic partner violence, the ECtHR has repeatedly examined "whether the national authorities have taken all reasonable measures to prevent the recurrence of violent attacks against the applicant's physical integrity".<sup>63</sup>

In another case concerning domestic violence, the ECtHR held that "[s]tates are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals".<sup>64</sup>

## 2.2 Rights of victims of violent crime under the Charter

### 2.2.1 The right of a victim of violent crime to justice

This section clarifies the Charter's contributions to the rights of victims of crime. It makes the following points.

- The Victims' Rights Directive covers a wide range of rights of victims of crime, so whenever Member State authorities deal with victims of crime they are

acting within the scope of EU law and are implementing it. Hence, the Charter applies.

- The most relevant provision is Article 47 of the Charter. Firstly, it grants the right to an effective remedy to everyone who can argue that their rights and freedoms guaranteed by EU law have been violated. According to Article 52 of the Charter, the first paragraph of Article 47 must be read as granting at least as much as Article 13 of the ECHR. Article 52 of the Charter stipulates that, in so far as Charter rights correspond to rights granted by the ECHR, the meaning and scope of Charter rights is the same as in the ECHR, except where the Charter grants more extensive protection. Thus, the ECHR only "establishes the minimum threshold of protection."<sup>65</sup> As Article 13 of the ECHR grants victims of violent crime a right to proceedings capable of leading to the identification and punishment of offenders, access to the procedure and a right to compensation, where appropriate, so does Article 47 of the Charter. Hence, like Article 13 of the ECHR, Article 47 of the Charter draws a distinction between victims of violent crimes and other victims or their family members. It is only for direct victims of violent crimes that the provisions of the Victims' Rights Directive are to be read in the context of the standards defined by Article 47 of the Charter.

- Secondly, the extent of a victim's right to participate in the proceedings is more precise – and probably also wider – in Article 47 of the Charter than in Article 13 of the ECHR. Article 47 (1) of the Charter explicitly grants the right to an effective remedy "in compliance with the conditions laid down in this Article". Hence, under the Charter, victims of violent crime enjoy fair trial rights in criminal proceedings as specified by Article 47 (1), (2) and (3).

- One important aspect of a fair trial is equality of arms among its parties, according to the case law of the ECtHR. This means that parties have equal opportunities to voice and assert their views and interests. Victims of violent crime must have rights that allow them to act on an equal footing with the defendant and the public prosecutor. As the defendant and the public prosecutor are parties to the criminal proceedings, so a victim of violent crime is likewise entitled to have the status of a party and must not be subjected to regulations that significantly disadvantage them compared with the defendant or the public prosecutor.

<sup>62</sup> ECtHR, *Kontrová v. Slovakia*, No. 7510/04, 13 June 2006, § 64; see also ECtHR, *Keenan v. United Kingdom*, No. 27229/95, 4 March 2001, § 130; ECtHR, *Bubbins v. United Kingdom*, No. 50196/99, 17 March 2005, § 170.

<sup>63</sup> ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009, § 162; also ECtHR, *Rumor v. Italy*, No. 72964/10, 27 May 2014, § 62.

<sup>64</sup> ECtHR, *Eremia v. the Republic of Moldova*, No. 3564/11, 28 May 2013, §§ 51–52.

<sup>65</sup> FRA (2018), p. 22.

## The applicability of the Charter

Whether the Charter is applicable to a situation or not depends on whether or not the situation in question is governed by EU law, or, in other words, whether or not the situation falls within the scope of EU law. Thus, the CJEU has explained:

*“It is the settled case-law of the Court that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations. In this respect, the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of EU law. However, if such national legislation falls within the scope of EU law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures”.<sup>66</sup>*

Member States have obligations to ensure that victims of crime “are able to participate in criminal proceedings” and “are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner in all contacts with [...] a competent authority, operating within the context of criminal proceedings”, according to Article 1 of the Victims' Rights Directive. Therefore, the Victims' Rights Directive covers:

- victims' access to support services (Article 8 of the directive),
- victims being heard or requesting that evidence be taken (Article 10),
- victims being entitled to an effective prosecution (Article 11),
- victims being protected against repeat or secondary victimisation (Article 18).

All these situations and many more are thus “governed by EU law”.<sup>67</sup> Hence, the Charter applies to a wide range of procedural aspects of criminal justice. Whenever Member State authorities act within the scope of the Victims' Rights Directive, they have to bear the Charter in mind.

<sup>66</sup> CJEU, C-532/15, *Eurosanamientos and Others*, 8 December 2016, § 52; on the applicability of the Charter, see Lenaerts (2012); FRA (2018).

<sup>67</sup> FRA (2018), p. 38.

Denmark must “ensure that victims have a real and appropriate role in its criminal legal system”, says Article 2 of the Framework Decision binding on Denmark, under the heading ‘Respect and recognition’. The subsequent articles of the Framework Decision specify the elements that constitute a victim's appropriate role.

The Victims' Rights Directive goes beyond criminal proceedings. Its purpose is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings, according to Article 1. Support services, information and protection are already important before formal proceedings have started, and support services and protection against repeat victimisation and retaliation can remain necessary for some time after the proceedings. Hence, these tasks are not restricted to enabling or enhancing victims' participation in criminal proceedings.

Both secondary law instruments – the directive and the Framework Decision – today have their legal basis in Article 82 (2) (c) of the Treaty on the Functioning of the European Union (TFEU). According to this provision, as far as “the rights of victims of crime” are concerned, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. “Minimum rules” means that Member States are free to grant victims more, but not less, extensive rights. Again, these rights are not restricted to criminal cases (unlike Article 82 (2) (b) of the TFEU concerning “the rights of individuals in criminal procedure”).

Importantly, the reach of Article 82 (2) (c) of the TFEU is restricted to “the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension”. One important purpose of such minimum rules is to ensure that the authorities of all Member States respect the rights of defendants and victims of crime. Cooperation among authorities and mutual recognition of their decisions is possible only if Member States' authorities are confident that in all their procedures the authorities of other Member States pay due attention to the rights of the individuals concerned, including prominently the rights of victims and defendants. Hence, firmly establishing standards for the rights of victims and defendants is an important means of enhancing cooperation among the police and judicial authorities.

Minimum rules adopted on the basis of Article 82 (2) of the TFEU “shall take into account the differences between the legal traditions and systems of the Member States”. However, the concept of “legal traditions and systems” can hardly be meant to preserve traditionally low standards of victims' rights. Otherwise, a directive under Article 82 (2) of the TFEU could not facilitate mutual recognition and cooperation by



ensuring, throughout the Union, minimum standards of victims' rights. The Victims' Rights Directive could not achieve its purpose to ensure minimum standards of rights to all victims, wherever in the EU a crime is committed, if Member States could invoke their legal traditions to justify a lower level of rights.

In some places, the Victims' Rights Directive provides that Member States shall deal with victims "in accordance with their role in the relevant criminal justice system" (Recital 20, Article 6 (2), Article 7 (1), Article 11 (1) and Article 14 of the Victims' Rights Directive).<sup>68</sup> However, such clauses cannot keep the Charter from applying in any given situation. Even where Member State actors exercise discretion conferred on them by the directive, they still act within the scope of EU law and are bound by the Charter.<sup>69</sup> Member States are free to implement the Victims' Rights Directive in a way that is consistent with the role of the victim in their proceedings, e.g. as a joint prosecutor, a private prosecutor or a civil party. They nevertheless have to ensure that in all instances they implement it in a manner that respects the Charter.

The Victims' Rights Directive quite comprehensively covers a wide range of procedural aspects of justice, but has few provisions relating to outcome aspects. In the course of the criminal proceedings, the victim has a right to a decision on compensation from the offender, according to Article 16. This provision should be read in the light of the ECtHR's case law on Article 13 of the ECHR. A victim of a violent offence is entitled to compensation, where appropriate, as an element of criminal justice, the case law considers.

A victim also has a right to the return of their recoverable property under Article 15 of the Victims' Rights Directive.

However, the directive does not deal with the convicting, sentencing or punishing of offenders. Article 13 of the ECHR protects victims of violent crime against a manifest disproportion between the gravity of the act and the punishment of the offender. Article 47 of the Charter – by way of Article 52 (3) of the Charter – 'inherits' this potential from the Convention. However, in convicting and sentencing offenders, criminal courts are not implementing the law of the Union so Article 47 of the Charter does not apply to these functions.

Hence, when it comes to outcome aspects of criminal justice, the Charter applies only to the victim's compensation from the offender and to the return of the victim's recoverable property. It does not apply to convicting and punishing offenders.

<sup>68</sup> Such provisions cannot be read as Member States reserving powers. The EU has jurisdiction over all "rights of victims of crime" under Art. 82 (2) (c) of the TFEU.

<sup>69</sup> FRA (2018), pp. 41 and 51.

## Relationship between the Victims' Rights Directive and Article 47 of the Charter

Article 47 of the Charter grants victims of violent crime a right of access to justice. It combines a right to proceedings and a right to participate in the proceedings. The following sub-sections deal with these rights in some detail. However, it is important to realise from the beginning that the Victims' Rights Directive far exceeds the scope of Article 47, in two ways. Firstly, while the Victims' Rights Directive accords rights to *all* victims of crime, Article 47 concerns only victims of violence. They are a clear minority among all victims of crime. Article 47 is not about shoplifting or any other forms of theft, damaging another person's property, purely economic offences such as industrial espionage or the disclosure of trade secrets, or unintentional crime, including road traffic offences. It concerns only intentional in-person crimes that directly affect individual integrity or autonomy as a core aspect of human dignity and personhood.

Secondly, while the Victims' Rights Directive extends rights to family members, Article 47 of the Charter concerns only victims themselves, that is, individuals who can argue a serious violation of *their* fundamental rights. Article 47 grants rights to whoever can tenably claim that *their* "rights and freedoms guaranteed by the law of the Union are violated". These "rights and freedoms" of victims of violent crimes are in the Charter. They include, in particular:

- human dignity (Article 1);
- the right to life (Article 2);
- the right to the integrity of the person (Article 3);
- the right to be protected against torture and inhuman or degrading treatment (Article 4);
- the right to be protected against slavery and forced labour (Article 5);
- the right to liberty (Article 6); and
- the right to respect for private life (Article 7).

However, Article 47 of the Charter does not apply only to the criminal procedure in its entirety as a remedy in response to a violent crime. It also applies to the single and concrete rights under the Victims' Rights Directive, which forms part of "the law of the Union". Whenever a victim can argue that one of the numerous rights under the directive is violated, the victim has the right to an effective remedy before a tribunal and fair trial rights in the proceedings. Hence, the victim's general right to criminal justice in terms of effective criminal

proceedings runs alongside the victim's rights to effective remedies in relation to specific rights granted by the directive. These include the right to have access to appropriate support services, to interpretation, to participation in the trial, to legal aid, to protection against secondary victimisation and so on.

### The right to an effective remedy

Rights that correspond to rights under the ECHR are to be interpreted as providing at least the protection of human rights granted by the convention as interpreted by the ECtHR, according to Article 52 (3) of the Charter. Hence, Article 47 paragraph 1 of the Charter covers at least as much as Article 13 of the ECHR, and Article 47 paragraph 2 of the Charter grants at least the fair trial rights under Article 6 (1) of the ECHR.<sup>70</sup>

It follows that the right of victims of violent crime to an effective remedy under Article 47 paragraph 1 of the Charter, in line with the case law of the ECtHR, means at least:

- the right to a thorough and effective investigation capable of leading to the identification and punishment of offenders;
- the right of effective access for the complainant to the investigatory procedure;
- the right to the payment of compensation, where appropriate.

The right to an investigation does not imply that the victim also has a right to prevent a criminal investigation from being conducted. That would not be compatible with the public nature of human rights.<sup>71</sup> A criminal justice response to violent crime is due not only to the victim as a person but also to the rights of all other members of the legal community, who share in one dignity and have the same rights as the victim and the offender. Therefore, whenever a suspicion arises that a violent offence has been committed, a criminal investigation cannot depend on a report or request by the victim. The police must institute it on their own initiative (*ex officio*).

### Fair trial rights implied

Article 47 establishes a strong link between the right to an effective remedy and fair trial rights. Article 47 paragraph 1 grants a right to an effective remedy "before a tribunal in compliance with the conditions laid down

in this Article". Hence, the right to an effective remedy *always* includes fair trial rights in accordance with Article 47, paragraphs 2 and 3.

As observed above, victims of violent crime have a right of access to the criminal procedure under Article 13 of the ECHR, according to the case law of the ECtHR. This means that "the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests".<sup>72</sup> Beyond this rather abstract formula, there is not yet much ECtHR case law on crime victims' fair trial rights. Hence, the precise extent of a victim's participation rights under Article 13 of the ECHR is not entirely clear. The right to an effective remedy under Article 47 of the Charter is more explicit: the right of a victim of violence to criminal justice as an effective remedy under the first paragraph of Article 47 of the Charter comes with fair trial rights under the subsequent paragraphs of Article 47.

In supporting the development of victims' rights in the Union, FRA's publications have for some years consistently pointed to Article 47 of the Charter as the crucial yardstick in assessing victims' rights under EU law.<sup>73</sup> A report that FRA published in January 2014 called on EU Member States to meet their obligations under Article 47 of the Charter. It stressed "the rights of victims to actively participate in criminal proceedings, such as the right to be heard and the right to provide evidence".<sup>74</sup> Later FRA publications have further explained the fundamental rights perspective on victims' rights.<sup>75</sup> The Handbook on European law relating to access to justice dedicates a section to the significance of Article 47 for the understanding of victims' rights. As a key point, the Handbook highlights: "Under the Charter, therefore, victims of crime enjoy both – the right to an effective remedy (Article 13 of the ECHR) and fair trial rights (Article 6 (1) of the ECHR). Article 47 of the Charter gives victims of crime the right to a fair and public hearing by an independent tribunal, the right to be advised and represented, the right to legal aid and the right to an effective remedy."<sup>76</sup>

In determining the range of fair trial rights, the primary question concerns the concept of a 'fair' hearing. This notion means that a victim has a right to be heard by a tribunal under fair conditions. That is, the conditions must allow the victim to comprehensively and effectively state their case and to put forward their views and concerns, including where they disagree with the

70 For a synopsis of rights under the ECHR, the Charter and other instruments, see FRA (2018), pp. 82–92.

71 While Weigend (2012), p. 38, argues in favour of such a right in exceptional cases, it is not clear that he would include cases of violent crime.

72 ECtHR, *S.M. v. Croatia*, No. 60561/14, 19 July 2018, § 60; *Tahsin Acar v. Turkey*, No. 26307/95, 8 April 2004 [GC], § 225.

73 FRA (2014a), pp. 25–28; FRA (2015), pp. 20, 26, 73; FRA (2016a), p. 13; FRA (2016b), p. 157.

74 FRA (2014a), p. 12; a section on p. 28 of the report is dedicated to the additional rights Article 47 grants beyond the ECHR.

75 FRA (2015), p. 73; FRA (2016a), p. 13.

76 FRA (2016b), p. 157.

defendant or the public prosecutor or both. Victims must have equal means to those of the other parties in the proceedings to assert their point of view and their rights. The ECtHR has explained the concept of a fair hearing in the following terms:

*“The Court reiterates that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a ‘fair hearing’ within the meaning of Article 6 § 1 of the Convention. They require a ‘fair balance’ between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents”.*<sup>77</sup>

Therefore, the fair trial rights of victims of violent crime require that the victim be able to act on an equal footing with the defendant and the public prosecutor. That is, they must be a full-fledged party to the proceedings. The principle of equality of arms demands that the victim must have the same means of determining the contents and the course of the proceedings and must have the same access to effective remedies in cases where the victim feels that their participation rights are not being respected. For instance, the victim should have access to the case file under the same conditions

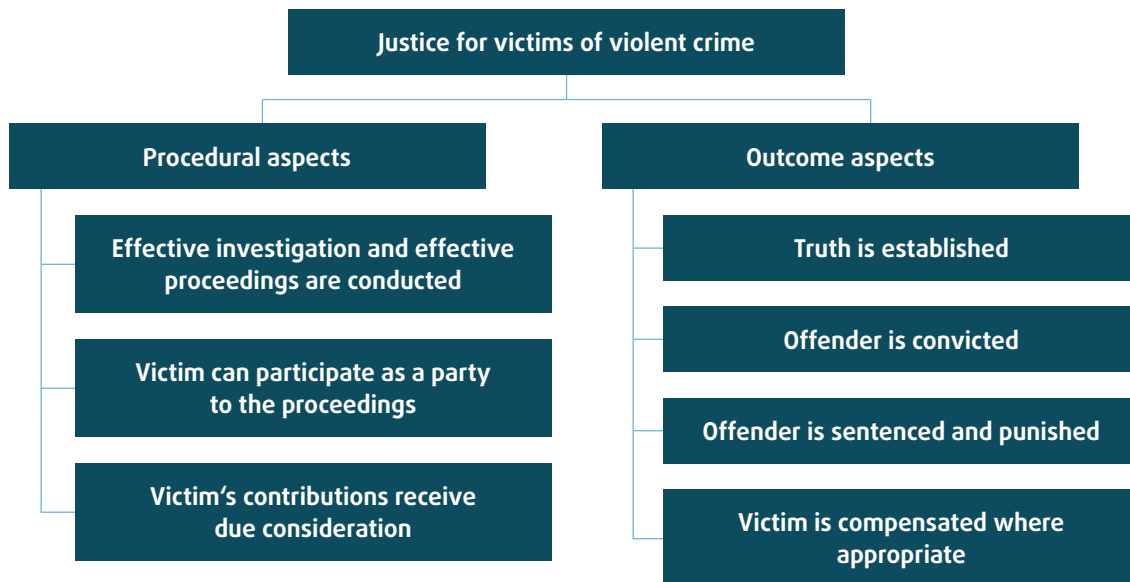
as the defendant, and should have the same means of challenging court decisions as the public prosecutor. However, that is not the case in all jurisdictions.

The rights under Article 47 paragraphs 2 and 3 of the Charter can be broken down into the following aspects:<sup>78</sup>

- The right to a hearing that is
  - fair,
  - public,
  - conducted within a reasonable time,
  - by an independent and impartial tribunal previously established by law.
- The right to be advised and represented in the course of the hearing, including the right to legal aid for those who lack sufficient resources, as far as such aid is necessary for their right to access justice to be effective.

Figure 1 provides an overview of the various elements of procedural and outcome justice

**Figure 1: Justice for victims of violent crime**



Source: FRA, 2019

<sup>77</sup> ECtHR, *Regner v. the Czech Republic* [GC], No. 35289/11, 19 September 2017, § 146.

<sup>78</sup> For an analysis of the rights implied in the parallel provision of Article 6 of the ECHR, see Goss (2014), pp. 89–111.

## 2.2.2 The right of a victim of violent crime to protection against further victimisation

### The applicability of the Charter to protection against further victimisation

The Victims' Rights Directive recognises the victim's right to protection from retaliation, intimidation and repeat victimisation (Article 18), and obliges the competent authorities to assess the necessity to adopt protection measures (Article 22). This assessment should "take into account the type or nature and the circumstances of the crime such as whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive, sexual violence, violence in a close relationship, whether the offender was in a position of control" and

other aspects that indicate an increased risk of repeat victimisation, Recital 56 observes.

Hence, when EU Member State authorities adopt measures aimed at protecting victims against further victimisation, they are implementing EU law.

### Relevant Charter articles

Just like the ECHR, Charter articles that grant rights to be protected against violence apply to situations where there is a genuine risk of further victimisation. They include Article 1 ('Human dignity'), Article 2 ('Right to life'), Article 3 ('Right to the integrity of the person'), Article 4 ('Prohibition of torture and inhuman or degrading treatment or punishment'), Article 5 ('Prohibition of slavery and forced labour'), Article 6 ('Right to liberty and security'), Article 7 ('Respect for private and family life').



# 3

## How national legislation conceptualises victims of violent crime: three approaches



This series of reports distinguishes three models, depending on how criminal justice systems conceptualise the victim. It follows a categorisation that other researchers introduced<sup>79</sup> and a previous FRA publication adopted:<sup>80</sup>

- EU Member States that have enacted legislation relating the concept of the crime victim to the violation of rights that the victim has suffered – Austria, Germany, Poland and Portugal – are ‘type 1’ countries.
- In contrast, criminal justice systems in the Netherlands and the United Kingdom, ‘type 2’ countries, regard the harm that the victim has suffered as a *consequence* of the offence and consider victims’ specific needs in their situation of victimisation.
- Finally, France founds the civil party concept on civil law categories. It is a ‘type 3’ country.

### 3.1 Type 1: Rights-based approaches and comprehensive participation rights

Of the seven EU Member States in this project, four – Austria, Germany, Poland, and Portugal – recognise that violent offences directly concern the victims, who therefore have rights to participate actively in criminal proceedings as parties, in line with Article 47 of the Charter.

The defining characteristic of this group is that the law understands a violent offence as a violation of an individual’s rights – or legitimate interests – as *protected by criminal law*. If, for instance, criminal law provisions protect the individual’s human right to integrity against assault, and an assault has been committed, at least one individual’s right to integrity has been violated. Hence, the violent offence implies a human rights violation, and the individual whose rights are violated is referred to as a ‘victim’. Thus, the legal order of a type 1 country anchors its concept of the ‘victim’ in substantive criminal law. Criminal law definitions, by protecting rights or legitimate interests, define who – by virtue of their ownership of the right, or interest protected – is a victim (in Austria, *Opfer*; in Germany, *Verletzter*; in Poland, *pokrzywdzony*; in Portugal, *ofendido*).

The procedural codes of all four countries of this group distinguish two levels of procedural rights: firstly, rights that any victim of violence holds; secondly, additional rights, which the victim of a violent offence can attain by making a declaration. In Germany, all victims have certain rights, including the right to legal representation and the right to inspect the case file. However, a victim of violent crime can acquire full fair trial rights only by declaring that they are joining the proceedings as a joint prosecutor (*Anschluss als Nebenkläger*). In Poland, the victim is party to the pre-trial proceedings by virtue of that very status. They become party to the court proceedings by formally joining the proceedings as a joint prosecutor (*oskarżyciel posiłkowy*). In Portugal, the victim can obtain additional participation rights by opting to act as ‘the party assisting the public prosecutor’ (*assistente*). In Austria, the situation is slightly different. Most rights belong to the victim as such, but some additional procedural rights are dependent on a victim’s announcement that they wish to also pursue their civil law claims as part of the criminal proceedings (*Privatbeteiligtenanschluss*).

79 Goodey (2000), p. 20; Goodey (2005), pp. 121–150; Dearing (2017), pp. 9–23.

80 FRA (2014), pp. 28–30.

### 3.1.1 Austria

Austria recognised the victim as a party to the proceedings in the course of a fundamental procedural law reform. It was enacted in 2004 and came into force on 1 January 2008.<sup>81</sup> Since then, it has recognised victim participation as a principle of Austrian procedural law under Article 10 of the Criminal Procedural Code. Victims have a general right to participate in the proceedings in accordance with specific provisions. All authorities, involved in the proceedings, are under a duty to inform victims of their rights and of available means of receiving support services and compensation.

Not only state authorities but everyone acting within the scope of the proceedings must treat victims with dignity, according to Article 10 of the Code.

The notion of 'victim' comprises, firstly, victims of various forms of violent crime, secondly, family members of deceased victims, thirdly, all who suffered damage as a consequence of the offence, and fourthly, and in the most general terms, everyone whose legal interests as protected by criminal law are affected, according to Article 65.<sup>82</sup> While this definition lumps together elements of various approaches, it acknowledges, in the end, that everyone is entitled to be recognised as a victim with legitimate interests protected by criminal law provisions. This focus accounts for the description of the Austrian victim concept as pursuing a rights-based approach. Accordingly, the Austrian procedural code grants victims a wide range of participation rights.

To understand the architecture of the Austrian model, one can look at the structure of Part 1 of the Procedural Code, which contains general provisions and, in a way, sets the stage for criminal proceedings. Chapter 1 of Part 1 comprises the principles of the criminal procedure, such as its accusatorial nature or the presumption of innocence. Chapter 2 introduces the public authorities involved in the proceedings, including the police, the public prosecutor and the courts. Chapter 3 concerns the defendant and the defence lawyer (*'Beschuldigter und Verteidiger'*), followed by Chapter 4, which deals with the victim and their rights (*'Opfer und ihre Rechte'*). Thus it introduces the victim as one of the parties to the proceedings. The first article of Chapter 4 contains the definition of the victim. Under the heading 'Rights of victims' (*'Opferrechte'*), the next provision, Article 66, stipulates the following rights of victims of violent crime:

- to be accompanied, throughout the proceedings, by a psycho-social support person and by a lawyer, free of charge (*"psychosoziale und juristische Prozessbegleitung"*);
- to be represented in proceedings;
- to have access to the case file;
- to be informed
  - about the subject of the case and their main procedural rights before their statement is taken,
  - about the progress of the case,
  - about the release of the defendant;
- to interpretation and translation;
- to be present
  - if the statement of the defendant or a witness is recorded before the trial,
  - at the reconstruction of the offence at the crime scene,
  - at the court trial;
- to ask that proceedings be continued if the public prosecutor discontinues them;
- to challenge a judge as biased;
- to ask questions of any person who is heard during the court trial;
- to be heard about to their compensation claims;
- if victims claim compensation, to request that evidence be taken and to explain the damage suffered and their compensation claims at the end of the court trial.

In spite of granting extensive rights to victims, the Austrian Procedural Code remains ambivalent and hybrid in two ways. Firstly, victims have certain rights only if they claim compensation from the offender, which they can do only if they have suffered damage. Thus, elements of a civil party system overlap with a rights-based notion of the victim as a person whose rights criminal law protects.

Secondly, Austrian procedural law – in spite of all the rights of the victim as a party to the proceedings – does not abandon the perception of the victim as a witness.

<sup>81</sup> *Strafprozessreformgesetz, BGBl. I 19/2004.*

<sup>82</sup> Criminal Procedural Code (*Strafprozessordnung*), § 65, § 66 and § 66a.



However, this function necessarily interferes with the position of the victim as a party to the proceedings. While the defendant has the right to remain silent (Article 49 (4) of the Procedural Code), the victim does not. In addition, the victim can be denied access to the file on the grounds that such access could affect their witness statement, according to Article 68 of the Procedural Code. Thus, the Austrian Procedural Code clings to the idea that the victim is, on the one hand, a substantially affected stakeholder and party to the proceedings and, on the other, still expected to perform the function of a witness.

The rights of victims of domestic violence were significantly enhanced by two packages to reform protection from domestic violence. The Act on Protection from Violence (*Gewaltschutzgesetz, BGBl. 759/1996*) and the Second Act on Protection from Violence (*Zweites Gewaltschutzgesetz, BGBl. I 40/2009*) provide for the protection of victims of domestic violence by means of an emergency barring order that the police issue, an extensive system of court orders and a powerful structure of specialised support services (*Gewaltschutzzentren*) staffed with professional social workers, psychologists and lawyers. These protection measures and the Criminal Procedural Code are interdependent. For example, if the police have issued an emergency barring order, the victim is treated as particularly vulnerable under the relevant provisions of the Procedural Code.

State measures are backed by various initiatives from civil society such as *Weißer Ring*, established in 1978, which is a non-profit organisation to support all crime victims; child protection centres (*Kinderschutzzentren*), which support children who are victims of violence and abuse; and the Ombudsman for Victim Protection (*Unabhängige Opferschutzanwaltschaft*), established in 2010 to support victims in response to numerous allegations of child sex abuse committed in institutions under the aegis of the Catholic Church.

### 3.1.2 Germany

For a long time, the victim performed various roles in German criminal proceedings, including as a private prosecutor, joint prosecutor (*Nebenkläger*) and civil party. These functions remained rather insignificant until the 1980s.<sup>83</sup> This changed in December 1986, when the first Victims Protection Act (*Opferschutzgesetz*) was passed.<sup>84</sup> It changed the role of the joint prosecutor and gave victims more participation rights such as access to the case file and the right to receive information about the proceedings. It granted victims of severe crimes – in particular, women who had experienced sexual violence – the right to actively participate in

the proceedings. The aim was to reject attempts by the offender to blame the victim and to insist that the offender be held accountable.<sup>85</sup> Today, scholars recognise joint prosecution as a means of enabling the victim to actively participate and thus to perform an appropriate role in the proceedings.<sup>86</sup>

In the following years, more legislation aimed to strengthen the interests of victims. Among these reforms were the Law for the Suppression of Crime (*Verbrechensbekämpfungsgesetz*) from 1994,<sup>87</sup> the Victims' Rights Reform Act (*Opferrechtsreformgesetz*) from 2004,<sup>88</sup> and the Second Victims' Rights Reform Act (2. *Opferrechtsreformgesetz*) from 2009.<sup>89</sup> They focused on extending the scope of application of joint prosecution and on broadening the rights to participate in the proceedings.<sup>90</sup> The Act to Strengthen the Rights of Victims of Sexual Abuse (*Gesetz zur Stärkung der Rechte von Opfern sexuellen Mißbrauchs*)<sup>91</sup> was introduced in 2013 and the Third Victims' Rights Reform Act (3. *Opferrechtsreformgesetz*) in 2015.<sup>92</sup> This last was mainly to implement the Victims' Rights Directive.<sup>93</sup>

In the German criminal procedure, victims can obtain a strong position by opting to act as joint prosecutor (*Nebenkläger*). This position is open to victims of a list of offences, including crimes against sexual autonomy, attempted murder and homicide, crimes against physical integrity, offences against personal liberty (including stalking), crimes against 'honour' (slander, libel, defamation), violations of protection orders and some other offences. Hence, victims of violent crime can choose to act as joint prosecutor.

Article 397 of the German Criminal Procedural Code lists the rights of a joint prosecutor. They are similar to the rights of victims in Austria listed above. However, the position of the joint prosecutor is more prominent in Germany. The joint prosecutor has also the following rights:

- to plead at the end of the trial (as a victim and not only as a civil party);
- to summon witnesses to the court trial;
- to make motions that help the proceedings establish the truth.

85 Herrmann (2010), p. 241.

86 Kilchling (2006); Kilchling (2010).

87 Federal Law Gazette No. 76 of 4 November 1994.

88 Federal Law Gazette No. 31 of 30 June 2004.

89 Federal Law Gazette No. 48 of 31 July 2009.

90 Herrmann (2010), p. 236.

91 Federal Law Gazette No. 32 of 29 June 2013.

92 Federal Law Gazette No. 55 of 30 December 2015.

93 RL 2012/29/EU, ABl. 2012 l, 315, 57.

83 Weigend (1989), pp. 150–167.

84 Federal Law Gazette No. 68 of 24 December 1986.

For a long time, the victim has not had an enforceable right to have the offender prosecuted. However, since 2014, the Federal Constitutional Court has stated in several decisions that in certain circumstances such a right may exist. These circumstances include offences against life, physical integrity, sexual autonomy and personal liberty, as well as crimes committed by state officials.<sup>94</sup>

German legal scholars have recently discussed more intensively a victim's right to redress (*Genugtuung*) in terms of criminal justice.<sup>95</sup>

Like in Austria, in the German system the victim, while acting as a joint prosecutor, also remains a witness. This second role interferes with the position of the victim as a party to the proceedings. One example concerns the presence of the victim in the courtroom. Although witnesses must wait outside the courtroom until they give evidence, it is clear that the victim has an unconditional right to be present in the courtroom. The law gives precedence to the role of the victim as a party to the proceedings over the duties of the victim as a witness. Nevertheless, German courts often order the victim to wait outside, thus treating the victim primarily as a witness. Handbooks written to advise victims' lawyers suggest accepting such practices, as the absence of the victim from the courtroom would enhance the credibility of their statement as a witness.<sup>96</sup>

Clearly, if the victim is absent from the courtroom, they cannot act on their right to participate. However, it appears that at times people treat these rights as if they were rights of the lawyer representing the joint prosecutor (*Nebenklagevertreter*) rather than rights of the victim. Thus, instead of only advising and empowering the victim as joint prosecutor, there is a tendency for the lawyer to act in the victim's stead or even to rein in victims' conduct when perceived as too emotional or subjective.<sup>97</sup> This fits the position of German lawyers as agents of the public administration of justice.

### 3.1.3 Poland

Since 2013, Polish criminal procedural law has undergone various fundamental changes, including allowing victims to enjoy extensive participation rights. As a rule, the victim is a party to the pre-trial proceedings, and

a party at the trial stage if the victim opts to act as a joint prosecutor (*oskarżyciel posiłkowy*).

Various provisions of the Criminal Procedural Code oblige the authorities to inform the victim about certain developments in the proceedings, such as:

- information on the initiation, refusal to initiate or discontinuation of proceedings (Article 305);
- information on the revocation of pre-trial detention (Article 253);
- information on the submission of the bill of indictment to the court (Article 334);
- notice of the date and location of the main trial (Article 350);
- at the victim's request, information on the result of proceedings (Article 299a).

In the investigation, victims have rights to submit evidentiary motions (Article 315) and, to a certain extent, to participate in evidentiary proceedings, the right to have a legal counsel, and, within limits, the right to access the case file.

If victims opt to act as joint prosecutors, they have extensive participation rights in the trial phase, including the right to present their final assessment after the public prosecutor has pleaded. The victim also has a right to appeal against the ruling of the court of first instance. Thus, for instance, if the joint prosecutor asks a court to take evidence and it decides not to, the victim can challenge the decision by appealing against it as a violation of procedural law that affected the contents of the judgment.

### 3.1.4 Portugal

Based on the Constitution of 1976, Portugal introduced a Criminal Procedural Code in 1987. It created a new role, peculiar to the Portuguese system: the victim as assistant to the public prosecutor (*assistente*). In paragraph 4, the Preamble to the Procedural Code refers to this role as a novel and unique element of the procedure, which demonstrates efforts to combine legal traditions and new victimological insights. The victim (*ofendido*) is recognised as the person whose legitimate interests substantive criminal law protects. On this basis, they are entitled to act as 'assistant to the public prosecutor', like the joint prosecutor under German and Polish procedural law.

To become joint prosecutor (assistant to the public prosecutor), the victim has to appoint a lawyer to represent them and has to pay a court fee.

94 Germany, BVerfG, *Beschluss der 1. Kammer des Zweiten Senats vom 26. Juni 2014*, 2 BvR 2699/10.

95 On the state of the discussion, see Dearing (2017); Weigend (2017).

96 Schroth and Schroth (2018), p. 198; Peter (2013), p. 180.

97 Schroth and Schroth (2018), p. 202, recommend that the lawyer representing the victim as joint prosecutor should prevent his client from pursuing a personal vendetta against the defendant. ("*Der Nebenklagevertreter sollte aber immer darauf bedacht sein, persönliche Rachezüge und unsachlich vorgetragene Angriffe seines Mandanten zu verhindern.*")

In spite of the name, the victim as assistant to the public prosecutor can fulfil an accusatorial function that is independent of the public prosecutor. The role implies rights similar to victims' rights in the other type 1 countries. The victim as assistant to the prosecutor has wide leeway. They can, for instance, appeal against the public prosecutor's decision to suspend the proceedings, actively participate in drafting the orders to provisionally suspend the proceedings, or request the opening of a court investigation.

## 3.2 Type 2: Needs-based approaches

Two EU Member States that this research covers – the Netherlands and the United Kingdom – characterise victimisation by someone having suffered harm as a *consequence* of a criminal offence. The United Kingdom's revised (2015) Victims' Code defines a 'victim' as a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by a criminal offence, or a close relative of a person whose death was directly caused by a criminal offence.

It addresses the harm as a separate fact, *caused* by the offence. Hence, the victim remains outside – or at best on the periphery of – the proper criminal justice system. Essentially they are a potential witness, even if a special category of witness deserving of the community's compassion due to the harm they have suffered, their resulting vulnerability and the risks of secondary victimisation.

Victim impact statements are a clear expression of a needs-based approach. They focus on the harm that victims suffered, not their violated rights. Impact statements are about the harmful consequences of a crime, not about the crime itself. Hence, they usually relate to sentencing and not to convicting the offender for the wrong done to the victim.

Therefore, needs-based approaches conceptualise the victim as a person with specific needs flowing from their situation of distress, like victims of accidents or natural catastrophes. Society approaches the victim from the angle of solidarity and sympathy towards the plight of an unfortunate and innocent member. Needs-based approaches stress the vulnerability of victims. In the rights-based paradigm, normative categories such as 'rights', 'wrong' and 'redress' are central. In contrast, the needs-based approach conceptualises victimisation in descriptive terms, such as 'harm', 'suffering', 'vulnerability' and 'needs'.

Type 2 countries do not perceive the victim as a party to the criminal proceedings. Therefore, criminal justice in this model remains a matter between the state – which the public prosecutor represents – and the defendant.

### 3.2.1 United Kingdom

The Ministry of Justice issued the Code of Practice for Victims of Crime in October 2015.<sup>98</sup> It defines a 'victim' as a "natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly *caused* by a criminal offence". Hence, the victim is not a party to the criminal proceedings, neither as the person whose rights the offender violated nor by virtue of the victim's civil law claims to compensation.

On participation in the proceedings, Chapter 2, sub-section 3.4, informs victims that "[i]f you are not a witness in the case you are entitled to observe court proceedings from the public gallery".

Therefore, criminal justice in the United Kingdom remains a matter essentially involving the state, acting through the public prosecutor, and the offender. The victim's only parts are to report the offence to the police and serve as a witness. In criminal proceedings, the victim's position is no different from any other member of the public, entitled to observe the proceedings from the gallery.

One way to enable the victim to contribute to the proceedings is victim personal statements (VPSs). These exist in all three jurisdictions of the United Kingdom. A VPS goes beyond a witness statement. It concerns not the offence – which is against the state – but the aftermath of the offence from the victim's perspective. The victim has an opportunity to explain in their own words how a crime has affected them, whether physically, emotionally, financially or in any other way. The VPS can allow the court to have a fuller understanding of the impact of the crime when passing sentence, but must not include the victim's views about how the offender should be punished. The police are responsible for obtaining the VPS and for submitting it to the public prosecutor. The police must also pass on the victim's preference to read their VPS aloud at the trial, to record it and have it played or have someone else read it aloud for them – for example, a family member or the public prosecutor.

<sup>98</sup> Ministry of Justice, Code of Practice for Victims of Crime, Presented to Parliament pursuant to section 33 of the Domestic Violence, Crime and Victims Act 2004, October 2015.

The United Kingdom is the only country in the project that does not allow victims to act as a civil party to the criminal proceedings and to claim compensation from the offender as part of criminal proceedings. Allowing them to do so is often referred to as the adhesion model. Rather, the court can order offenders to pay compensation to victims as part of the sentence. Since 1972 in England and Wales, 1977 in Northern Ireland and 1981 in Scotland, criminal courts have been able to impose a compensation order as part of an offender's sentence. Since victims cannot apply for a compensation order, the victim is dependent on the public prosecutor to raise the question with the court and provide the court with information about the extent and value of any injury, loss or damage sustained.

### 3.2.2 Netherlands

The Netherlands, like the United Kingdom, defines victimisation by the personal *consequences* of the criminal offence for the victim. However, unlike the United Kingdom, recent legislative reform in the Netherlands acknowledges that the harm suffered entitles the victim to be present in the proceedings beyond serving as an 'ordinary' witness. Victims of violent crime have rights to be heard in the court trial and can ask that evidence be secured. In 2005, the victim gained the right to deliver a victim impact statement. Victims can choose to either explain in court the crime's effect on their personal lives or submit a written statement, which is added to the case file and read out in court.

Overall, in the Dutch model the victim is a witness with a somewhat privileged position due to the harm suffered and their resulting vulnerability and needs. In addition, since an amendment of the Procedural Code enacted in 2011, a person who has incurred damage as an immediate result of the offence can join the criminal proceedings to claim compensation from the offender as a civil party (Article 51f of the Dutch Criminal Procedural Code). Hence, the Dutch system combines elements of a needs-based approach and of the French and Belgian civil party system.

## 3.3 Type 3: The civil law-based civil party system

Under Articles 2 and 3 of the French Criminal Procedural Code, a person who personally suffers material, physical or moral *damage directly caused by an offence* has the right to bring civil action for compensation within the criminal justice system. Thus, the Criminal Procedural Code recognises the right of a victim to be a civil party

before the criminal court, which allows them to assert their civil-law based claims within criminal proceedings and spares them having to bring separate proceedings before a civil court. In addition, parents may bring civil action on behalf of their children. Some associations, which advocate the rights of victims of certain types of crime – e.g. hate crimes or domestic violence – can exercise rights of civil parties under certain conditions.<sup>99</sup>

Civil parties have a wide array of rights during criminal proceedings. They may make requests, receive information about the case and the progress of the investigation, and access and copy the case file, and they are informed of important decisions. Still, a civil party's procedural rights do not match the participation rights of victims in type 1 countries. For instance, the victim is not entitled to be present when material evidence is taken during the investigation, to receive assistance from a person they trust, to be informed of their rights by the police or to have unimpeded access to the case file. The procedural rights of a civil party are not equal to the rights of defendants, experts interviewed in France noted.

Also, a civil party's participation in criminal proceedings is due to the damage and not the wrong that the victim incurred. A civil party is a plaintiff bringing a civil action against the offender. They rely on civil law, not criminal law. The civil party system joins a civil law side-track to the criminal proceedings, leaving the main criminal law trajectory unaltered. Hence, perceiving the victim as a civil party in no way touches on the basic view of criminal justice as an exclusively public matter between the state and the offender. Even if the victim acts as a civil party, the public action based on criminal law nevertheless remains the sole responsibility of the public prosecutor. While a civil party enjoys fair trial rights under Article 6 ECHR, these are civil rights, not due to their status as victims as a category of criminal law.<sup>100</sup>

If victims do not constitute themselves as civil parties, the criminal proceedings will treat them merely as potential witnesses. That is not much different from the status of victims in the United Kingdom or in the Netherlands.

## 3.4 Overview of the three types of victim concepts

The three models of procedural legislation express three different views of what essentially constitutes crime victimisation. Table 3 contrasts the ideal types.

<sup>99</sup> France, Criminal Procedural Code, Art. 2 and Art. 3.

<sup>100</sup> ECtHR, *Perez v. France*, No. 47287/99, 12 February 2004; *Arnoldi v. Italy*, No. 35637/04, 7 December 2017.

Table 3: Comparison of criminal justice systems of types 1, 2 and 3

Feature	Type 1	Type 2	Type 3
Objective of criminal law	Protect the rights of individuals	Protect public interests	Protect public interests
Definition of victim of violent crime	The individual wronged, i.e. the individual whose rights the offender(s) violated	The individual who has specific needs due to the harm suffered as a consequence of the violent offence	The individual who suffered damage as a consequence of the violent offence
Position of the victim of violent crime	Entitled to act as a party to the criminal proceedings	Can be called as a witness	Can act as a civil claimant
Countries covered by the research	Austria, Germany, Poland and Portugal	Netherlands and United Kingdom	France

Source: FRA, 2019

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This report – Part I – sketches out the development of victims' rights in Europe, and outlines the human rights standards that apply today. Taken together, the four reports reveal a wide gap between the law 'on the books' and the law in practice, showing that many victims still feel marginalised. We hope this series encourages policymakers to take steps to ensure that victims of violent crime receive the attention, support and consideration to which they are entitled.



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