



VICTIMS AND CORPORATIONS



Legal Challenges and Empirical Findings

Editor in chief
GABRIO FORTI

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CLAUDIA MAZZUCATO, ARIANNA VISCONTI, STEFANIA GIAVAZZI

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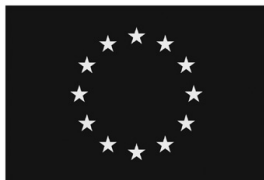
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INTRODUCTION

by Gabrio Forti

CONTENTS: 1. ‘Epistemic’ Dominance of Corporate Organisations, ‘Epistemic Injustice’ for Victims. – 2. Saliency of the Victim and Prevention of Corporate Violence. – 3. The Victimological Paradigm Shift. – 4. The Long Way, Mostly Ahead, to Real Victim Protection.

1. ‘Epistemic’ Dominance of Corporate Organisations, ‘Epistemic Injustice’ for Victims

There are many sound reasons why, in considering the Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime, and being conscious of its great relevance and ground-breaking implications, we decided to undertake a research project which focuses on a very peculiar kind of victim (‘peculiar’, at least as seen from the perspective most frequently found, if not indeed taken for granted, in the scholarship and legislation).

We could indeed have drawn on the massive repository of research—as well as the vast national, international, and EU legal framework—dealing with women and children as victims of physical abuse, or victims of violent crime in general. We resolved instead to devote our efforts to the victims of corporate crimes, and particularly of corporate violence. This notion (and the ambiguity thereof) is especially analysed in chapter six. It encompasses those criminal offences committed by corporations in the course of their legitimate activities, which result in harms to natural persons’ health, integrity, or life. As described therein, the fact that ‘managers murder and corporations kill’ (Punch 2000) has been acknowledged in the criminological literature for several decades, and the term ‘corporate violence’ has come to be used to refer to that ‘specific subset of corporate deviance’ (Punch 2000: 243) that causes deaths, injuries, or illnesses to physical persons through illegal or harmful behaviours that occur in the course of the legitimate business activity of such economic

organisations—primarily through violations of health and safety regulations and the consequent harm to workers; the production and marketing of unsafe products; and the pollution of air, water, and soil by industrial production or waste disposal.

More specifically, we focused our research on three main strands of corporate violence victimisation, namely environmental crime, food safety violations, and offences in the pharmaceutical industry. Part I of this volume (chapters one to five) addresses the fundamental principles as enshrined in the relevant treaties and inscribed in EU policy, before examining the relevant EU secondary legislation. Chapters three and four highlight, in particular, the protection of certain core values, namely human life and health (and the corresponding human rights as affirmed in the ECHR), which are actually or potentially affected by the illicit conduct of corporations particularly in the three abovementioned sectors.

This field of choice stemmed from the idea of exploring—and possibly exploiting—intersections and potential synergies between the Directive 2012/29/EU and the existing body of EU legal tools in these three sectors, which, it must be said, currently focus on a different, preventive, risk-based approach, coupled with remedies based on compensation and reparation. This was an approach, we assumed, which could benefit from a comparison and coordination with the *ex post facto*, victim-centred approach of the new Victims Directive.

Such a focus, however, is also quite consistent with the main competences of the three institutions involved in the ‘Victims and Corporations’ project, namely the ‘Federico Stella’ Centre for Research on Criminal Justice and Policy of the Catholic University in Milan (Centro Studi ‘Federico Stella’ sulla Giustizia penale e la Politica criminale—CSGP), whose researchers have contributed to the coordination as well as to the accomplishment of this project; the Max Planck Institute for Foreign and International Criminal Law of Freiburg im Breisgau (Max-Planck-Institut für ausländisches und internationales Strafrecht—MPICC); and the Leuven Institute of Criminology, established within the University of Leuven Faculty of Law (LINC). Crucially, given the complexity of the issues arising from the implementation of the Victims Directive to corporate violence, these three research institutions were able to integrate their interdisciplinary expertise on a wide range of issues pertaining to white-collar and corporate crimes: corporate liability and compliance, EU law in general and EU criminal law, international and comparative criminal law, criminal procedure, victimology, restorative justice, management of industrial and technological risks, causes and effects of

criminal negligence, and the precautionary principle. Throughout the research, the partners kept clear sight of the need for an innovative and mainly organisational approach to criminal events arising within complex organisations.

But perhaps the main reason for concentrating our research on this kind of suffering from the wrongdoings of complex organisations, is that the victims have an urgent need—quoting from the Directive—to ‘receive appropriate information, support and protection’, and to be ‘able to participate in criminal proceedings’, as detailed from various perspectives in chapters one, two and seven. We were well aware of the need to advance knowledge and awareness about victims who find themselves, more often than not, thrown into the quandary of simply not being able—whether in fact, or not in a manner that is sufficiently timely—to perceive their own condition of being victims.

Using, and somewhat adjusting, a category developed by Miranda Fricker (2007) that is ‘innovative to the point of initiating a conceptual shift as it has traditionally been practiced’ (Code 2008), we could say that these victims suffer a kind of ‘epistemic injustice’. This epistemic injustice is constituted by the failure of victims to be recognised as victims, and the wider failure of the victims themselves to perceive the victimisation they have suffered (or even that they *could* suffer in a foreseeable future) in a prompt and appropriate manner.

Such a predicament stems from victims being confronted with at least three dire hindrances—we might even say ‘adversaries’—along the path they must tread to achieve recognition of their status as victims, and hence pursue the satisfaction of needs which such status entails: complexity (scientific, social, ethical, and organisational), time lag, and the power of corporations.

These adversaries are made even more formidable by the connections and alliances among them, which are bound—often intentionally—to blur responsibilities, as well as to impede the recognition of the causes of harms (Forti 2009). Indeed, such ‘alliances’ are in a sense constitutive of the very notion of victim which concerns us here, since they give stark expression to features which are present, albeit perhaps less vividly, in other cases of victimisation (including that stemming from violence between individuals). These features can all too easily be bypassed or brushed aside, when onlookers are distracted by the spectacle of overt violence or other shocking features of the event.

Indeed, these three influential factors—complexity, time lag, and corporate power—are so intertwined that they come to form a kind of cybernetic system: the power of corporations is able to enhance and deepen the natural impairments, arising from the passing of time

(Centonze and Manacorda 2017) and overweening (scientific, etc) complexity, which degrade the ability of people (and thus witnesses, prosecutors, judges) to remember past facts. Moreover, such a condition of oblivion or confusion becomes an ideal medium in which organised or organisational power can flourish and assert its dominance. If ‘we are often ignorant about what might happen, but also even about “the area of possible outcomes”’ (Innerarity 2012: 6), it is easy for organisations possessing only a little more knowledge than the general public to exploit this advantage so as to avoid responsibility.

As Costas and Grey have recently observed in an extended meditation on the subject, secrecy ‘is about the drawing of boundaries—boundaries around knowledge, yes, but also boundaries between knowers’. Moreover, the fact that ‘secrets are held by some people and not others implies that secrecy is both about concealment from some and sharing with others’; thus, ‘secrecy does not just occur within organizations, but in some important ways it can make organizations’ (Costas and Grey 2016: ep 233).

We could even say that the epistemic injustice or impairment suffered by victims of corporate malfeasance arises before any practical management of situational knowledge in the place where the harm has taken place, and stems rather from the sheer epistemic architecture of the organisations bringing about the harm.

Secrecy entails, on the one hand, keeping knowledge from people—those outside an organization, perhaps, or from particular groups within an organization—and, on the other hand, sharing knowledge within an organization or among particular groups therein. Thus we can think of organization itself as having a kind of ‘epistemic’ architecture in which boundaries between the inside and outside of an organization, or subsections of an organization, are constructed. We can envisage this as epistemic compartmentalization, metaphorically constructing external or internal walls—and not always necessarily metaphorically because, in some cases, the possession of secrets may itself be marked by a physical architecture (e.g., access to laboratories). At the same time we can think of organizations as having an epistemic cabling, rather like the wiring of a building, through which secret knowledge flows, when people for various reasons and in various ways share secrets. Again one can think of this literally—for example, in terms of differential access to, say, networked databases of confidential information—as well as metaphorically, as when informal networks to share confidential organizational gossip are constituted. Thus we are not talking here about knowledge-sharing in the normal and generic sense of the word, but about the sharing of, specifically, secret knowledge. These senses of a hidden architecture are intended to suggest that although organizations are in all

kinds of ways creators of secrets—generating, for example, trade secrets or utilizing confidential discussions as part of politicking—they are also in some way created by secrecy. (Costas and Grey 2016: ep 266)

And as Chomsky has recently remarked (2017: ep 89) ‘privileged and powerful sectors have never liked democracy and for very good reasons. Democracy puts power into the hands of the general population and takes it away from the privileged and the powerful. It’s a principle of concentration of wealth and power’; and, he adds, ‘concentration of wealth yields concentration of power’.

This is a setting that principled lawyers, scholars, or practitioners cannot allow themselves to ignore; they will therefore feel compelled, within a discourse centred on victims, to locate where the real source of victimisation lies. It is certainly true that ‘the wealthy always did have an inordinate amount of control over policy’ and that ‘they make sure that their own interests are very well cared for, however “grievous” the impact on the people’; and Chomsky observes that today it is the financial institutions and multinational corporations that play the role of those that Adam Smith called the ‘masters of mankind’, who stick to the ‘vile maxim’: ‘all for ourselves and nothing for anyone else’ (Chomsky 2017: ep 98).

We must also be aware, as discussed by Sutherland, that white-collar workers have a huge cultural influence on societies:

The rationalistic, amoral, and nonsentimental behavior of the corporation was aimed in earlier days at technological efficiency; in later days more than previously it has been aimed at the manipulation of people by advertising, salesmanship, propaganda, and lobbies. With this recent development the corporation has developed a truly Machiavellian ideology and policy. It has reached the conclusion that practically anything is possible if resources, ingenuity, and strenuous effort are used. It has appropriated the physical and biological sciences and applied them to its objectives of technological efficiency and in the process has made significant contributions to those sciences. Similarly, it has appropriated the social and psychological sciences and applied them to the objective of manipulating people. (Sutherland 1983: 236)

Confronted by corporations, which can be deemed not only legally (Glaasbeek 2007) but also epistemically and culturally created ‘sites of irresponsibility’, even the best-organised victims are definitely the underdogs.

The victims of corporate crimes are seldom in a position to fight against the management of the corporation. Consumers are scattered, unor-

ganized, lacking in objective information as to qualities of commodities, and no one consumer suffers a loss in a particular transaction which would justify him in taking individual action. Stockholders seldom know the complex procedures of the corporations which they own, cannot attend annual meetings, and receive little information regarding the policies or the financial status of the corporation. Even if stockholders suspect illegal behavior by the management, they are scattered, unorganized, and frequently cannot even secure access to the names of other stockholders. In their conflicts with labor, the corporations have the advantage of a friendly press and of news commentators whose salaries are paid by business corporations, so that their unfair labor practices can be learned generally only by consulting official reports. (Sutherland 1983: 237)

In spite of some advancements in the empowerment of the victims of corporations since the days when Sutherland described their lot, the situation they still confront, before as well as after having perceived the harm they have suffered, remains blighted by a darkness which verges on outright opacity. And this disadvantage is particularly agonizing in the context of what has been called our current ‘knowledge society’ (Innerarity 2012). Knowledge in such a society more and more comes to resemble a commodity, or indeed an essential economic resource: thus any unequal distribution thereof impairs severely human rights (suffice to consider how deeply the so-called digital divide can hinder access to fundamental services and human development resources). Lack or scarcity of knowledge vitiates the possibility of awareness which allows access to the procedural rights granted to victims of crime (see chapters one and two), where the latter make up the protection mechanisms provided by European Convention on Human Rights and EU law (as considered in chapter four). If a victim is deprived of relevant knowledge, their ability to participate in criminal proceedings is impaired at source. Even if the right to be heard (Directive 2012/29/EU, art 10) is fully guaranteed to them, and even if according to the Victims Directive they are ‘permitted to make statements or explanations in writing’, there is little meaningful they can say to judges and prosecutors in order to receive adequate recognition and respectful treatment from wider society.

2. Salience of the Victim and Prevention of Corporate Violence

In view of the preceding considerations, we can easily grasp how daunting is the challenge facing any attempt to comply in a substantive way with the need for—and right to—protection of these rather special

victims. Specifically, the challenge pertains to meeting the requirements of art 22 of Directive 2012/29/EU, which affirms the duty of Member States to ‘ensure that victims receive a timely and individual assessment’ aimed at identifying such specific needs, as well as at determining ‘whether and to what extent they would benefit from special measures in the course of criminal proceedings’ provided for under arts 23 and 24 (see chapters two and six).

This is a challenge which, for policy-makers as well as legal and social practitioners, entails first and foremost that they be equipped with adequate knowledge of the issues relevant to the predicament of victims, in order to make their decisions properly enforceable and, hence, speed their implementation. We could even say that all legal subjects today must take on the vantage point of victims as an essential prerequisite for their normative decisions.

Indeed, what has been said about ‘paths of application’ in psychology, namely the significance of the interlacement between a phenomenon (the social field) and expert knowledge (a specific science) (Bosio 2012), could also be deemed relevant to law, in so far as we consider the law an ‘expert agent’ (actually an institutional agent) facing demands for intervention in the social field—where the latter plays the role of receptor of the knowledge as well as of the aims of law, and is where such intervention is expected to take effect.

The heightened awareness (van Bavel et al 2013: 3; Holden 2016) that ‘policy-making can greatly benefit from a better understanding of people’s behavior’ and that ‘well-designed behavioural studies can offer useful insights to policy-makers by generating the evidence required to improve policies’, is relevant also in the field of criminal justice (and for all agents involved therein, namely lawyers, public prosecutors, judges, police, social practitioners, lawmakers). In such a field this awareness highlights the need to take into account not only criminological knowledge in general, but also specialized insights into the most relevant features of the phenomena with which criminal law (and related legal regulation) has to deal. We could thus say that here the ‘paths of application’ should focus on what is most representative, namely on what is really at issue in social matters—first and foremost, the imbalances in power relationships among the people (and organisations) embroiled in the criminal case.

As suggested some years ago, when we analyse corporate crime, and especially corporate violence, one area ‘worth considerably more research is the study of corporate cultures and decision-making processes from the viewpoints of those involved in them’ (Yeager 2007: 39). This is an area which promises a huge ‘potential payoff to

knowledge’, and which, as regards the victims of corporate violence, seems one of the best ways to check (or regulate) the momentous decisions of the most powerful actors on the criminal stage, namely the corporations.

As recently discussed, such a viewpoint cannot help evoking Adam Smith’s well-known example of the earthquake in China (and the reaction of people living far from China on hearing news of the disaster), or the dilemma posed in the ‘trolley scenario’: a railway car is running out of control and heading toward five people making repairs to the tracks; you have the choice of flipping the rail switch and diverting the trolley onto another track where it will kill only one worker rather than five. These two examples contrast with the ‘patient killing’ and ‘pushing a man over a rail’ scenarios, which involve a more intimate act of violence. In this regard, Soltes comments as follows:

Although violence has occurred throughout human history, evidence also suggests that it is not something we’re especially keen on doing. [...] Until quite recently in our history, it was difficult to cause direct harm to another person unless that individual was physically close to us. Harm was not only physical but intimate. As the ability to communicate and influence others from greater distances became possible, however, new and different ways of inflicting harm emerged as well. Notably, these innovations permitted the perpetration of newfangled kinds of harm against individuals—namely, economic harms, which are less physical and more abstract. Economic harms fundamentally differ from other acts in that they do not trigger gut feelings of actually doing harm, as was the case with intimate, physical harm. Yet, they injure others—albeit economically rather than physically—all the same. (Soltes 2016: ep 2031)

Corporate executives are not exempt from the popular maxim that ‘out of sight’ is ‘out of mind’. Moreover, while most such executives seem to favour cost–benefit calculations in their decision-making, according to recent experiences, few make much effort to deliberate on the consequences of their actions.

They seem to have reached their decisions to commit crimes with little thought or reflection. In many cases, it was difficult to say that they had ever really ‘decided’ to commit a crime at all. I struggled to understand why they didn’t anticipate the adverse and often extraordinary consequences of their decisions. Their failure to see the personal and professional consequences of their choices seemed deeply myopic and inconsistent with the very traits that made their prior success possible. [...] They put little effort into these decisions because they never deeply

felt that the decisions were actually harmful to themselves or others. Because they didn't perceive this harm, they had little reason to pause and reconsider their course of action. *It wasn't that these executives recognized that other people were going to be harmed and simply didn't care.* Rather, they never even stopped to consider that their actions would harm, even devastate, real people. It may seem hard to believe that an intelligent executive could fail to see the harm created by fraud, embezzlement, or price-fixing. To victims, the negative ramifications of such crimes are readily apparent. The perpetrator sees the victim, physically touches his property, and witnesses his immediate reaction after being robbed. But manipulative corporate conduct lacks all these sensations associated with theft. *Executives never need to get close—physically or psychologically—to their victims. Instead, the victims of financial crimes often remain distant and amorphous.* The distance between individuals in modern business dealings creates a problem for managers and executives. The human ability to sense the potential for harm is significantly affected by physical and psychological proximity. [...] Proximity deeply affects our instinctive ability to sense and react to harm. As distance grows, our ability to empathize with others shrinks. In business, where many transactions occur at 'arm's length' among unrelated parties, there is often no natural tendency to empathize with individuals on the other side of a transaction, let alone those derivatively affected second- or third-hand. The nature of modern commerce has made it perilously easy to wander into the penumbra—that 'gray zone' between right and wrong. (Soltes 2016: ep 175; emphasis added)

It is not only in committing financial crimes that executives find themselves wandering 'into the penumbra', the 'gray zone between right and wrong'. Also gray (perhaps rather less gray and more shifted toward black) is the vast territory in which the risk of committing corporate crimes and thus doing physical harm to other people can arise. In fact, on the basis of various studies and associated empirical evidence, questions have been asked about whether there is any association at all between sophisticated moral judgment and de facto ethical behaviour.

The ability to behave morally isn't necessarily as ingrained in a person's character as researchers once thought. As further support, researchers asked students at the Princeton Theological Seminary to give a short talk on the biblical parable of the Good Samaritan. The parable describes several individuals hurrying past an injured person, before one Samaritan finally stops to take care of the despondent man—an act that Jesus commends. Seminarians were asked to deliver a talk on the parable in an adjacent building, on whose path the researchers had positioned a groaning 'victim' slumped over in the doorway. The seminarians were precisely the kind of individuals who espoused that they would stop to help. Under time pressure, however,

many of the seminarians ignored the victim or were not inclined to offer aid. *In several instances, they even literally stepped over the victim as they rushed to give their talk on the parable of the Good Samaritan.* Seminarians were so engaged with delivering their speech that they failed to even recognize the moral dilemma directly in front of them. Helping the victim required not only believing that it is one's abstract duty to help but also recognizing the problem in the first place. This experiment, along with others like it, helped psychologists see that moral decision making is actually far more complicated than they initially envisioned. People have to successfully complete a whole series of steps—becoming aware of a problem, forming a judgment, establishing intent, and engaging in moral behavior—to behave ethically. Those prone to succeed at one step might find themselves overlooking at others, and failing at any one step leads to failure at the end. (Soltes 2016: ep 1494; emphasis added)

The ability to *see* the possible victims of one's own actions *in advance* seems paramount in prodding corporate bosses into the 'successful completion' of these steps and thus preventing harm and organisational crime. And this ability can and must be cultivated and fostered while also paying due attention to the victim *after* a crime has been committed and—one would hope—legally ascertained. This could bring into effect a kind of victim 'salience' which should retrospectively help people to consider the personal, human repercussions of their choices and deeds exactly when they are beginning to devise them. The more vividly such victims are fixed in the mind, the more we may hope they will be enshrined in the heart.

Thus a central pillar of our research has been the (written but especially visual) collection of narratives and testimony of victims of corporate violence; and these have been all the more edifying and moving, the less they were charged with denunciatory overtones, grievance, and thirst for vengeance, and the more they were simply presented as human stories. Their poignancy stems from the facts described, and they are meaningful in so far as they reveal the need for people to be heard and to receive assistance during their ordeal.

In order to be salient in the thoughts of potential offenders, victims must be made present in public perception not only as categories of victims (consumers, investors, workers, etc) but as individuals. In this respect, a crucial part of the Victims Directive is art 22 which deals with 'individual assessment of victims to identify specific protection needs', and proposes that account be taken of (a) the personal characteristics of the victim, (b) the type or nature of the crime, and (c) the circumstances of the crime.

Such 'individual assessment' is actually one of the most

challenging novelties of the Directive (as analysed in chapters one, two, and six), as it represents a change in the approach adopted by the previous Framework Decision 2001/220 JHA, where the notion of ‘particular vulnerability’ (art 2(2)) referred to macro-categories of victims determined by the type of crime or subjective characteristics (and thus risked leaving without protection victims who fail to fall under such categories). Being aimed at protection from secondary and repeat victimisation, intimidation, and retaliation, such individual assessment requires the building of an appropriate methodology as well as specialised skills and frameworks.

Transposed to the field of corporate violence, the requirement stated in art 22 of the Victims Directive, that ‘particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime’ and also to ‘victims whose relationship to and dependence on the offender make them particularly vulnerable’, calls for the mobilisation of a great deal of criminological knowledge and experience.

The harm caused by corporations is often considerable in intensity, duration, and extension, and people suffering thereby are bound to experience secondary victimisation (the negative consequences stemming from the way in which eg law enforcement agencies, primary groups, and the broader community deal with their case), as detailed in chapters six and seven. But it is also typical of these crimes that victims find themselves in a condition of ‘dependence’ on the offender (see chapter one). And this is the case not only when they are workers whose wages and well-being rely on the power and will of the entrepreneurs, managers, and business people in charge. Such dependence is also constituted, as remarked above, as epistemic dependence and disadvantage (Govier 2015: 97–100), due in part to the ‘architectural secrecy’ of organisations and the privileged position of white-collar criminals before the law (Sutherland 1983), but stemming first and foremost from the corporations’ unique knowledge of the often complex paths which led to the ‘final’ harm, including the specific ‘structure of risk’ as well as the kind of exposure to harm that their activities had engendered.

3. The Victimological Paradigm Shift

The retrospective gains in sensitivity toward the victim has the potential to provoke a far-reaching shift in perspectives, attitudes, and

deeds, thus materially affecting decisions within organisations; and we think the Victims Directive could contribute to making this happen.

We chose to explore the difficult field of corporate violence in part because we had a sense—a sense which is even stronger now, at the end of our research—that a renewed victimological view, extending beyond the traditional boundaries of the public discourse on victims, would be apt to effect a paradigm shift in criminal justice (and in justice *tout court*), in the well-known epistemological sense intended by Thomas Kuhn (1970).

The usual example of a paradigm shift, namely the replacement of the Ptolemaic cosmos by the Copernican one, is rather apt as a metaphor for our case, since here the victim is put at the centre of the criminal law perspective, replacing the ‘normal’ offender-centred paradigm which segregated the victim on the margins of criminal justice. And the metaphor seems yet more apt once we take due account of the impact which the Copernican revolution in astronomy then effected in the cultural and anthropological panorama of the time, and how these shifts emerged from a long and protracted crisis.

The awareness of anomaly had lasted so long and penetrated so deep that one can appropriately describe the fields affected by it as in a state of growing crisis. Because it demands large-scale paradigm destruction and major shifts in the problems and techniques of normal science, the emergence of new theories is generally preceded by a period of pronounced professional insecurity. As one might expect, that insecurity is generated by the persistent failure of the puzzles of normal science to come out as they should. Failure of existing rules is the prelude to a search for new ones. (Kuhn 1970: 67–68)

The ‘pronounced professional insecurity’ we are experiencing in criminal justice is evident to both the professional and popular eye, being intertwined with the crisis arising from a deep transformation of societies that is affecting public policies and the cultural meaning of crime and criminals. Thus has criminal justice been in the grip of dilated individual freedoms and relaxed social controls, of a massive increase in the popular demand for security amid fears of a loss of effectiveness, coupled with a crisis of State sovereignty and a squeeze on public resources and welfare (Garland 2001).

Among the several outcomes of the paradigm shift that might be effected by the development of victim-protection-oriented criminal justice, one might consist in the promotion of more opportunities for reflection and consideration of alternative viewpoints, as well as a more problematised approach among corporate decision-makers. The

latter might comprise a kind of cognitive revolution, enabling white-collars to become aware of their limits and thus encouraging their organisations to abstain from conducts which would have disgraceful impacts on communities.

As concluded in a really thought-provoking study on white-collar crime:

Appreciating our lack of invincibility—our inherent weakness and frailty—offers us the best chance of designing the appropriate mechanisms to help manage these limitations. If we learn to be more suspicious of gut feelings when placed in new or difficult situations, we can acknowledge the need to create more opportunities for reflection and to bring in viewpoints of others to question us. If we humbly recognize that we might not always even notice the choices that will lead us astray, we are more likely to develop ways to identify and control those decisions. But it's when we realize that our ability to err is much greater than we often think it is that we'll begin to take the necessary steps to change and improve. (Soltes 2016: ep 5843)

4. The Long Way, Mostly Ahead, to Real Victim Protection

If we needed clear proof of the need for a paradigm shift in the protection and assistance for victims of corporate violence, we might consider that at least two of the main legal documents providing for criminal penalties for infringements of environmental law—namely the Directive 2008/99/EC on the protection of the environment through criminal law (the ‘Environmental Crime Directive’) and the Directive 2009/123/EC on ship-source pollution and the introduction of penalties for infringements (amending Directive 2005/35/EC)—substantially neglect the status and rights of victims (as described in chapter three).

In fact, the Environmental Crime Directive targets unlawful conducts that cause or are likely to cause death or injury, thereby expressly punishing the endangering of or harm to human life and health. However, despite dealing directly with the impact of environmental criminal offences on individuals, not only does it refrain from defining the ‘victim’ (thus also neglecting the conditions of her/his vulnerability and any need for protection against secondary and repeat victimisation), but it refrains from providing any outline of the protected values to which individuals are entitled.

The study of the needs for protection on the part of the victims of corporate crimes, and especially of the obstacles to responding to victims’ expectations of the criminal justice system arising before,

during, and after criminal proceedings (as detailed in chapter seven), provides an insight into the condition of many other kinds of victims. As said above, the suffering experienced by victims of corporate violence is exacerbated by the fact that harms are made more serious and enduring by the imbalance of power and knowledge—we might say the imbalance in the power *of* knowledge—which they experience when confronting organisational behemoths and their well-equipped legal staff.

Being aware of these victims' increased and, we could say, epistemic needs for protection, it has been all the more astonishing to see how Italy has implemented the Directive 2012/29/EU into its domestic system through d lgs 15 December 2015 n 212. In fact it seems that a full set of fundamental safeguards has been completely left out: especially the Victims Directive's requirement of a right to access victim support services (art 8), the kind of assistance offered by the support services (art 9), and certain obligations included in the right to protection of victims with specific protection needs during criminal proceedings (art 23). In other words, irrespective of their importance to the European institutions, the Italian lawmakers have not implemented such safeguards, nor were they already provided for by the Italian justice system.

On account of this, d lgs 15 December 2015 n 212 is a 'missed opportunity', as already clearly stated in the Project's first findings report (Mancuso 2016: 46). It narrowed its scope to the integration of few, limited, procedural, and conventional amendments, falling far from the European demand for all-embracing and substantial protection of victims' individual needs in connection with criminal proceedings.

This can only partially be explained by reference to the peculiar features of the Italian criminal justice system and the limited role played therein by the victim—who is considered merely as a person involved in the criminal proceedings, with less powers and rights than the defendant and without the legal status of a party.

Regrettably, not enough attention has been paid to the implications for restorative justice (whose practical relevance in cases of corporate violence is discussed in chapter nine), or to the creation of adequate victims' support services (see chapter eight, including for references to different national legal frameworks). Italy has not yet established offices or structures specifically designed to provide support for victims' needs. During the examination of the draft proposal, the Parliamentary Justice Commission did propose the inclusion of a provision aimed at creating, within every court's premises, a 'help desk

for victims of crime’, directed by a magistrate in collaboration with social care services and victims’ associations. But the suggestion was not welcomed by the Italian Government because of its financial and bureaucratic impact.

The fact that d lgs 15 December 2015 n 212 has not effectively implemented the goals set by the Directive 2012/29/EU could trigger disputes against the Italian State, especially by non-resident victims who cannot rely on the minimum standards of protection offered by the Victims Directive or granted to them in their Member State of residence. The Italian situation constitutes just one example of the many differences in the implementation of the Victims Directive amongst Member States, albeit possibly the most apparent case of incomplete transposition amongst the countries examined by our Project (ie Italy, Germany, and Belgium). More generally, it can be observed that these differences also have strong implications for victims’ rights with respect to corporate violence offences with transnational features (see chapter two)—which possibly comprise the majority of corporate violence cases.

Thus we must conclude that the task of making victims’ rights effective—even when conceived in a legally binding way at EU level—remains a challenge. The existing legal framework of criminal justice poses obstacles to integrating the victim’s perspective, and new steps must be taken in order to advance along the course plotted by the Directive 2012/29/EU. All these steps—which are sketched here in a set of recommendations for national lawmakers and policymakers (see Annex)—must be conceived within a broader legal and cultural frame apt to take seriously the victimological ‘paradigm shift’ and to build the ‘paths of application’ most suitable to the social, cultural, economic, and personal conditions of each country.

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PART I

**THE LEGAL FRAMEWORK,
BETWEEN PRESENT CHALLENGES
AND FUTURE PERSPECTIVES**

CHAPTER I

VICTIMS OF CORPORATE VIOLENCE IN THE EUROPEAN UNION: CHALLENGES FOR CRIMINAL JUSTICE AND POTENTIALS FOR EUROPEAN POLICY

*by Claudia Mazzucato **

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* This chapter builds on, and develops, the findings presented in Mazzucato 2016: c II (s 1) and c IV. Davide Amato, PhD, Paola Cavanna, PhD, Marina Di Lello, PhD, and Biancamaria Spricigo, PhD, contributed to the initial bibliographical research behind the analysis presented in this chapter.

Official links (such as <http://eur-lex.europa.eu>) to the legal resources, summaries of the legislation, and case law quoted and mentioned in this chapter can be found in *European and International Selected Legal Resources and Case Law: Appendix to Mid-Term Report*, 2016 (updated 2017), available from the project website, www.victimsandcorporations.eu.

1. Victims of Crime in the European Union and the Directive 2012/29/EU

1.1. *Victims Matter: A Priority of the European Union*

‘Victims matter’: this apparently simple—yet not obvious, and indeed problematic and disputed—declaration stands at the very beginning of the 2011 European Commission Communication titled *Strengthening Victims Rights in the EU* (where it is explained why victims do matter).¹ This EC Communication contained a ‘legislative package’ (‘Victims Package’) of proposals ‘as a step towards putting victims *at the heart* of the EU criminal justice agenda’ (emphasis added). The Communication was immediately followed by the EU Council Resolution of 10 June 2011 concerning a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings (Budapest Road Map): the opening recital of the Council Resolution solemnly states that ‘[t]he active protection of victims of crime is a high priority for the European Union and its Member States’. The Budapest Road Map, in turn, has led to the approval of the Directive 2012/29/EU of the European Parliament and 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. Furthermore, the 2013 DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU stresses once again that ‘The rights, support, protection and participation of victims in criminal proceedings are a European Commission priority’.²

Victims are no more to be left ‘on the periphery of the domestic and international political agenda’ (de Casadevante Romani 2012: 3). Victims matter to the European Union.

The path that resulted in a comprehensive ‘horizontal package of measures’ for *all* victims is an interesting one.³ It shows the evolution

¹ European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, and the Committee of the Regions *Strengthening Victims’ Rights in the EU* (COM(2011) 274 final, 18 May 2011).

² European Commission, DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU of the European Parliament and 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, December 2013, p 3.

³ See again European Commission, DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 3.

of European law in a legally, politically, and socially ‘sensitive’ field; it displays a picture of the EU agenda and policies; and it offers a sort of ‘thermometer’ of the stage reached in the complex process of European integration and in the delicate harmonisation in criminal matters.

The origins of this quite long and progressive path date back to the entry into force of the Maastricht Treaty (1993) and the Amsterdam Treaty (1997), and culminate in the Lisbon Treaty, whose entry into force in 2009 overcame the intergovernmental ‘Third Pillar’, thus creating inside the EU (inside its ‘policies and internal actions’: part III of the Treaty on the Functioning of the European Union—now on TFEU) the ‘Area of freedom, security and justice’ (title V) within which ‘Judicial cooperation in criminal matters’ (chapter 4) has its place (Vervaele 2014). Here, in the ‘Judicial cooperation in criminal matters’, the ‘rights of victims of crime’ receive their most formal, and up to now final, recognition within Europe’s system of law, as a topic that, again, matters to the European Union. Art 82(2) of the TFEU is the primary source and the first legal basis for the European legislation on the rights of victims of crime (see, eg Allegrezza 2015: 4; Allegrezza 2012: 5; Bargis and Belluta: 2017; Mitsilegas 2015; Mitsilegas 2016: ep 6466; Savy 2013: 23).

The Charter of the Fundamental Rights of the European Union and the European Convention on Human Rights (ECHR) also provide ‘foundations’ for the rights of victims, as pointed out, for instance, in recital 66 of the Directive 2012/29/EU: ‘the right to dignity, life, physical and mental integrity, liberty and security, respect for private and family life, the right to property, the principle of non-discrimination, the principle of equality between women and men, the rights of the child, the elderly and persons with disabilities, and the right to a fair trial’ are among the fundamental rights recognised by the EU that may be violated, infringed, or otherwise come to be at stake when someone falls victim of a crime. This is why victims matter.

Alongside the development of this broad roadmap linking the above-mentioned treaties, the Charter, and the ECHR, several other steps towards the establishment of a legal set (or a legal *system*) of rights of victims in the EU have been taken (eg the 1998 Action Plan of the Council and the Commission on how to best implement the provisions of the Treaty of Amsterdam on an area of freedom, security, and justice; the 1999 Communication by the Commission titled *Crime Victims in the EU: Reflections on Standards and Action*; the 1999 Tampere Council Conclusions; the European Council’s 2005 Hague Programme). In addition to the aforementioned Council Framework

Decision 2001/220/JHA, to the 2011 Victims Package, and to the Budapest Road Map, the adoption of the Victims Directive was ‘prepared’ by the European Council’s Stockholm Programme entitled *An Open and Secure Europe Serving and Protecting Citizens* (2010/C 115/01), and its Action Plan (2010–2014).⁴

Through Basic Principles and various recommendations, soft law provisions by the United Nations and the Council of Europe have also influenced the EU legislators, who considered them when drafting normative instruments in favour of victims of crime *in general*.⁵

At the European Union level, this ‘horizontal’ system of protection of *all* victims of *all* crimes, culminating in the Directive 2012/29/EU, is further complemented by a series of other binding legal provisions, both in criminal and civil matters, that must be applied in close coordination with the implementation of the Victims Directive, within a comprehensive approach to victims’ protection and support (Savy 2013: 93). These are:

- Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims;
- Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order;
- Regulation (EU) n 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters.

The Court of Justice of the European Union (ECJ) and the European Court of Human Rights (ECtHR) case law is also of paramount importance in understanding the reach (and the limits) of victims support and protection, and of the role of victims’ rights in criminal proceedings in the EU (Gialuz 2015; Mitsilegas 2015: 329; Savy 2013: 39; Venturoli 2015: 120). In fact, in framing the Victims Directive the European lawmakers have taken into consideration the jurisprudence of the European courts. One example which is relevant for the scope of this project and research is the definition in the Directive of ‘victim’ as (only) ‘a natural person’ (art 2(1)(a) Dir), thus

⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, and the Committee of the Regions *Delivering an Area of Freedom, Security and Justice for Europe’s Citizens—Action Plan Implementing the Stockholm Programme* (COM(2010) 171 final, 24 April 2010).

⁵ See in this volume chapter four by Marc Engelhart, and chapter five, by Gabriele Della Morte.

confirming the exclusion of legal persons stated by the ECJ in *Dell'Orto* and *Eredics*.⁶

The replacement of the Third Pillar's Framework Decision 2001/220/JHA and the enrichment of its provisions thanks to the adoption of the 'post-Lisbon' and 'more supranational' Victims Directive (Mitsilegas 2015: 318, 326) have attracted, as a 'side effect', the whole set of judicial competences of the ECJ (and the correspondent possibilities to resort to the Court). This will probably further inspire the European jurisprudence on victims' rights. ECJ case law, in fact, has been very relevant for—and sometimes has truly instructed—European law, as with *Pupino*,⁷ but thus far it has centred (mainly by necessity) on cases solely concerning the interpretation and application of the 2001 Framework Decision. Furthermore, the very nature of a directive produces a more effective penetration of European law into national legal systems: this pervasiveness, in fact, is not limited to the control of complete transposition and actual fulfilment of obligations, but of course also includes the possibility of the direct application of the directive's self-executing provisions by national judges, who, by the way, are compelled to interpret domestic law in conformity with EU law (Allegrezza 2015: 5; Mitsilegas 2015: 333; Mitsilegas 2016: ep 6869; Pemberton and Groenhuijsen 2012).

A 1989 landmark decision of the ECJ had indeed anticipated the actions of the European legislature: the *Cowan* case⁸ framed victims' rights (and particularly the right to compensation) within the principle of non-discrimination on grounds of nationality and residence status, as a condition for freedom of movement in the EU. Still, today this issue remains one of the primary concerns of European institutions, as highlighted by its position in the opening article of the Directive 2012/29/EU (art 1(1)). Non-discrimination, incidentally, is strictly linked nowadays to the principle of 'mutual recognition of judgment and judicial decisions', and to the constant need to enhance 'approximation of the laws and regulations of the Member States' in order to ensure 'judicial cooperation in criminal matters', as stated by art 82 TFEU (Mitsilegas 2015: 315; Mitsilegas 2016: ep 6392). The prevention of discrimination in order to ensure freedom of movement, mutual trust as regards national criminal justice systems, and European citizens'

⁶ ECJ, Case C-467/05 *Dell'Orto* [2007]; ECJ, Case C-205/09 *Eredics – Sági* [2010].

⁷ ECJ, Case C-105/03 *Pupino* [2005].

⁸ ECJ, Case 186/87 *Cowan v Trésor public* [1989].

confidence in justice, are among the main reasons, together with humanitarian concerns and reasons of solidarity, why victims matter, and why their protection falls within the ‘policies and internal action’ of the EU, seen as an ‘area of freedom, security and justice’ for all. Yet doubts have been raised by scholars as to whether the Victims Directive actually ‘meets the legality criteria set out by art 82(2) TFEU’ (Mitsilegas 2015: 325; Mitsilegas 2016: ep 6594), which attribute to the EU competence to ‘establish minimum rules’, by means of directives, ‘to the extent necessary to facilitate mutual recognition of judgements and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension’. Others point out how post-Lisbon cooperation in criminal matters ‘has become, compared to art 2 of the Amsterdam TEU, an objective that is related to rights and duties of citizens, not only related to free movement of persons’ (Vervaele 2014: 38) or mutual recognition of judicial decisions.

1.2. A Priority within the Priority: Vulnerable Victims and Victims with ‘Specific Protection Needs’: Light and Shades

Vulnerable victims are a priority within the priority (Gialuz 2012: 60). The notion of vulnerable victims in international and European legal documents and tools is broad, depending either on the ‘subjective’ condition of the person, or the ‘objective’ nature of the crime, or a combination of both (Ippolito and Iglesias Sánchez 2015b).⁹ Vulnerability, though, is one of the main fields in which the 2012 Victims Directive represents a turning point in EU victims’ legislation.

Throughout international and European legal documents, the following are often cited as persons in need of specific protection (whether considered individually, or as ‘typical’, yet abstract, groups of persons), and therefore *expressly* deserving specific attention and tailored protective actions:

- children,
- women,
- the elderly,
- people with disabilities;

⁹ See also in this volume chapter six, by Arianna Visconti.

- victims of crimes occurred in a country of which they are not nationals or residents,
- victims of gender-based violence,
- victims of violence in close relationships and domestic violence,
- victims of sexual violence and other sexual offences,
- victims of trafficking in human beings,
- victims of terrorism,
- victims of organised crime,
- victims of crimes committed with a bias or discriminatory motive.

Interestingly, the United Nations, the Council of Europe, and the European Union have often devoted attention to these kinds of situation, due to common protection priorities (such as the primary consideration of the best interest of the child), or the need to combat certain transnational crimes (such as terrorism or trafficking in human beings), or due to an increased sensitivity towards specific forms of violence and criminal phenomena (such as gender-based violence, violence in close relationships, violence against women).

In various hard and soft legal documents, the United Nations, the Council of Europe, and the EU have taken into account other forms of victimisation, such as, respectively, victims of abuse of power and victims of torture, victims of genital mutilation (Stockholm Programme), and victims of road traffic accidents (Victims Package). Minorities who can be victims of hate crimes also receive special consideration by the international community and the EU (Ippolito and Iglesias Sánchez 2015b).¹⁰ Victims of international core crimes are the focus of increased attention, and the beneficiaries of a set of international provisions (as described in chapter five of this volume).¹¹

Through the years, some of the above-mentioned ‘specific

¹⁰ On racial discrimination, see Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. This Directive addresses, among others, the following issues relevant to the topics of this volume: (a) protection of natural persons against discrimination on grounds of racial or ethnic origin (recital 16); (b) adequate judicial protection against victimisation (recital 20); (c) concrete assistance for the victims (recital 24); (d) victimisation (art 9). See also Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

¹¹ de Casadevante Romani (2012: 39), while provocatively asserting that there are ‘almost as many concepts of victim as categories of victims’, lists the following ‘different international categories of victims’ according to international soft or conventional law: (a) victims of crime; (b) victims of abuse of power; (c) victims of gross violations of international human rights law; (d) victims of serious violations of

situations’¹² of *typically* ‘vulnerable’ victims in ‘areas of crime’ of particular concern to the EU, now falling under art 83(1) TFEU, have become the objective of ad hoc—‘vertical’—binding provisions and measures at the European Union level, which complement the Council of Europe Istanbul, Lanzarote, and Warsaw European Conventions.¹³ These EU legal instruments are:

- 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;
- 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;
- 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.

Directive 2011/36/EU is the first legislative initiative taken under art 83(1) TFEU (Vervaele 2014: 44). Both Directive 2011/36/EU on trafficking in human beings and Directive 2011/92/EU on sexual offences against children combine a threefold objective: prevention, repression, and protection. Therefore, protection of these particular victims—in terms of assistance, support, protection from secondary victimisation, and so on—comes together with prevention and, primarily, with the binding criminalisation on the part of Member States of the acts described in those directives. These two directives ‘go beyond’ the ‘classic content as foreseen under the Council’s model provisions’, including inter alia ‘many aspects of victim protection and victim rights’ (Vervaele 2014: 45). And in fact both directives’ preambles refer to art 82(2) *and* art 83(1) TFEU. This combination is quite unique in the panorama of the European legislation, where either

international humanitarian law; (e) victims of enforced disappearance; (f) victims of trafficking; (g) victims of terrorism.

¹² European Commission, DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 3.

¹³ Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS n 210), Istanbul 2011; Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS n 201), Lanzarote, 2007; Convention on the Prevention of Terrorism (CETS n 196), Warsaw, 2005.

criminalisation and repression of offences or victims' protection are usually set forth, as separate areas of intervention.

As stated in art 1, the recent Directive (EU) 2017/541 also establishes minimum rules concerning the criminalisation of offences related to terrorism, terrorist groups, and terrorist activities, 'as well as measures of protection of, and support and assistance to, victims of terrorism', in accordance with the ('horizontal') Victims Directive: yet Directive (EU) 2017/541 is framed as having regard 'in particular' to art 83(1) TFEU, a sign which places this Directive in the light of the EU crime policy 'in the areas of particularly serious crimes with a cross-border dimension', rather than in the light of 'the rights of victims of crime' following art 82(2)(c) TFEU.

As described by Stefano Manacorda and Irene Gasparini in chapter three of this volume, policies in fields such as environmental protection, while sometimes compelling the criminalisation and punishment of conducts causing death and/or injury to physical persons, do not contemplate victims and victims' rights as such. *Pour cause*, one might provisionally add.

The Victims Directive, on the other hand, has the sole purpose of protecting, supporting, and assisting victims of criminal offences and of ensuring they are entitled to certain procedural rights in criminal justice. The Directive 2012/29/EU Guidance Document clearly affirms that 'its object is *not* to criminalise certain acts or behaviours in the Member States'.¹⁴ This said, the above-mentioned European Commission's Communication presenting the 2011 Victims Package of proposals clearly states that the needs of crime victims are a 'central part of the justice system, alongside catching and punishing the offenders' (p 2)—a controversial statement, as Mitsilegas points out (2015: 335).

On the contrary, criminalisation, as the obligation of a Member State under the ECHR to effectively protect its citizens, is deeply embedded in the jurisprudence of the European Court of Human Rights (and not without debate) (Gialuz 2012: 29).¹⁵ In the Strasbourg Court's decisions, criminalisation comes in combination with another affirmed obligation of Member States: that of a thorough investigation, capable under due conditions of reaching the disclosure of criminal

¹⁴ See again European Commission, DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 7 (emphasis added).

¹⁵ See chapter four in this volume.

facts and the conviction and punishment of the offender found guilty (Gialuz 2015: 29; Allegranza 2012: 21).¹⁶ Conviction and punishment, though, are in no way among the rights of victims. Much thought is still needed on the issue of a State's obligation to investigate, which is echoed, for instance, in international and EU 'vertical' provisions regarding specific vulnerable groups of victims. For instance, according to art 9 of the Directive on trafficking in human beings, investigation and prosecution of such offences are 'not dependent on reporting or accusation by a victim', and 'criminal proceedings may continue even if the victim has withdrawn his or her consent'. Another example of similar provisions is offered by art 8 of the Framework Decision 2008/913/JHA on racism and xenophobia, with the motivation that victims of these crimes 'are often particularly vulnerable and reluctant to initiate legal proceedings' (recital 11) (Gialuz 2012: 68). Proactive enforcement may be a necessity in certain areas of crime, including in order to adequately protect victims of such crime. Yet proactive criminal enforcement may trap victims into the vicious cycle of secondary victimisation resulting from criminal proceedings, especially if during those proceedings the vulnerability of each individual victim to secondary victimisation is not carefully and accurately assessed and appropriate action taken.

There is another series of decisions of the European Court of Human Rights on a parallel, yet different, topic, which is of signal importance for our project: this is the ECtHR case law concerning the lack (or failure) of action on the part of national authorities to protect fundamental rights such as life, health, and private and family life, under arts 2 and 8 ECHR, in cases *inter alia* of exposure to polluted sites and industrial emissions, dangerous industrial activities, natural disasters, and so on. Interestingly, these judgments are not—or not entirely—focused on the lack of investigation, but more openly and directly focused on the State's positive obligation to protect individuals' rights via appropriate and effective measures that, in the given situation, would have prevented harm in the first place, and the lack of which resulted in an infringement of the said rights.¹⁷

Tracing the issue of 'vulnerability' throughout the European legislation is a fascinating task. The term 'vulnerability'/'vulnerable' appears quite early in the development of European law concerning victims' rights, and is present throughout its evolution: we find the

¹⁶ Eg, chapter four in this volume.

¹⁷ See chapter four in this volume.

word ‘vulnerability’ (and its various declinations) in legal instruments concerning both ‘general’ victims and ‘specific groups’ of victims, as identified above: from the ‘general’ Framework Decision 2001/220/JHA (arts 2, 8, 18), to the Stockholm Programme, to the ‘specific’ 2011/36/EU Directive on human trafficking (recitals 2, 8, 12, 22, 23; art 2) etc. The reference to the ‘particular vulnerability’ of (certain) victims appears expressly four times even in the Directive 2012/29/EU (recitals 38, 58; art 22(1)(3) Dir), a directive known for its overcoming of abstract categories in favour of the notion of the ‘individual assessment’ of the ‘specific protection needs’ of each victimised person (arts 22, 23) (Parizot 2015: 284).

In some ways, the term ‘vulnerability’ is even contradictory. First, ‘vulnerability can be considered as an attribute inherent to human nature’ (Ippolito and Iglesias Sánchez 2015a: 1): we are all vulnerable in many ways. Second, vulnerability is not exclusively a characteristics of victims of crime: as Ippolito and Iglesias Sánchez point out (2015a: 5), the conception of vulnerability concerns, individually or collectively, several groups of people: from asylum seekers to the elderly in nursing homes. This aspect emerges as significant for the scope of this project and research: there are many references to vulnerable populations or vulnerable subjects (pregnant women, unborn, infants, workers etc), for instance, in EU product safety law.¹⁸ Third, victims of crime are not only vulnerable, but are persons who have in the archaic usage already been ‘vulnerated’ (or violated). The idea of the ‘vulnerable victim’ is yet another ‘paradox’ (Gialuz 2012: 91)¹⁹ of the victim’s condition alongside other paradoxes, such as the need to be heard which provokes the risk of secondary victimisation that often stems from criminal proceedings; or the need to be protected not only from the offender, but also from the process of justice itself.

One of the core novelties of the 2012 Victims Directive is precisely that it (partly) overcomes abstract ‘macro’ categories of vulnerable subjects (the elderly, women, etc) in favour of the key idea that *every* victim may be ‘vulnerable’, even if they do not belong to (objective or subjective) vulnerable ‘groups’. The Directive therefore focuses on an individualised and personalised comprehensive approach in which the individual ‘protection needs’ must be singularly assessed

¹⁸ See chapter three in this volume.

¹⁹ Stitt and Giacomassi (1993: 71) also refer to the ‘paradox of victimization’ in relation to victims of corporate harms.

and taken into account (FRA 2014: 47, 77).²⁰ This assessment must guide competent authorities (police and judicial authorities) and victim support services in dealing with victims *case by case*, and in offering them the most adequate and tailored protection, assistance, and support (Rafaraci 2015: 221).

Arts 22 and 23 of the 2012 Directive open a whole new space for reflection and research. The implication of the individual assessment of (each) victim's protection needs is, in fact, still largely unexplored by both scholars and practitioners.²¹ The effectiveness of this approach requires significant competence, sensitivity, attention, and care on the part of the police, the judiciary, and victim support organisations. Sufficient time will therefore have to be spent by practitioners with every single victim, in order to carefully listen to (and understand) their personal narratives. Only tailored, active listening to their story and deposition—including what remains untold or unspeakable—will reveal the actual needs for protection of that very person. These are important aspects of the victim's right 'to be recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner' (art 1(1)), 'to be understood' (art 3), and 'to be heard' (art 10).

We may wonder (or indeed doubt) whether the criminal justice system and the victim support services are sufficiently equipped with the aforementioned precious, yet scarce, resources of time, attention, etc.²² A real fulfilment of the Victims Directive's provisions, though, depends on the individual assessment being taken seriously by national legislators and competent authorities (see, eg Pemberton and

²⁰ See chapter six in this volume.

²¹ On this topic, among reports and publications stemming from previous EU co-funded projects, see, *ex multis*, eg: *IVOR Report* (Biffi et al 2016); Victims Support Europe reports and manuals (www.victimsupport.eu); *Good Practices for Protecting Victims Inside and Outside the Criminal Process*, research project coordinated by the University of Milano (Lupária 2015) (www.protectingvictims.eu, last accessed 15 January 2018); Centre for European Constitutional Law & Institute for Advanced Legal Studies (*sine dato*), *Protecting Victims' Rights in the EU: The Theory and Practice of Diversity of Treatment During the Criminal Trial: Comparative Report and Policy Recommendations* (www.victimprotection.eu, last accessed on 15 December 2016); *EVVI Guide: EVvaluation of VICTIMS*, 2015 (available at <http://www.justice.gouv.fr/aide-aux-victimes-10044/un-guide-pour-levaluation-des-victimes-28155.html>, last accessed on 15 January 2018). On the assessment of specific groups of victims' needs, see, eg the INASC project *Make It Happen: European Toolkit to Improve Needs Assessment and Victims Support in Domestic Violence Related Criminal Proceedings* (http://www.inasc.org/pdf/INASC-international-Brochure-EU-Make_it_happen.pdf, last accessed 15 January 2018).

²² The topic of victim support is crucial: see chapter eight in this volume.

Groenhuijsen 2012; Aertsen 2016; Victims and Corporations 2017). The diffuse lack of awareness and of specialised training must still be rectified, especially in those EU Member States where victims' rights do not matter (yet) as much as they do for the European Union itself.

Awareness-raising campaigns, education, research, and exchange of information are in fact among the indications given by the 2012 Directive (recital 62 and art 26). Training of practitioners is another important part of the Victims Directive provisions (art 25 and recital 61), particularly since the EU norms underline the necessity of appropriate training to enable all the relevant practitioners (police officers, court staff, prosecutors, judges, public services) 'to recognise victims and to treat them in a respectful, professional and non-discriminatory manner' (art 25(5) Dir). Timely recognition of victims—and moreover of victims with specific needs—is both a duty and a mission that the Directive puts in the hands of Member States and of national authorities and professionals. Recognition of victims is indeed crucial, and it is in fact a condition to ensure victims' effective access to support, protection, and to the exercise of their rights.

This said, new problems arise. Issues concerning victims' rights are in fact invariably 'complex, multifaceted and controversial' (Bottoms and Roberts 2010: xx). The individual assessment of protection needs—one of the main highlights of the Directive 2012/29/EU—brings about what has been stigmatised as an 'individualisation of security', involving a 'potential reconfiguration of the relationship between the individual and the State', and having 'profound justice implications', especially in regards to the defendants (Mitsilegas 2015: 334; Mitsilegas 2016: ep 6791; see also Tonry 2010). Moreover, according to this analysis, individualising security fosters a possible expansion of State power, which requires the most careful scrutiny, especially in times when freedom is in constant tension with the need for security (Mitsilegas 2015: 334; Tonry 2010). The issues raised by these critical voices are relevant and deserve attention, also in light of another significant—yet again complex and multifaceted—aspect of the Victims Directive: that is, its definition of crime as 'a wrong against society as well as a violation of the individual rights of the victims' (recital 9). This definition opens another set of philosophical, juridical, and political questions with which criminal law scholars have been engaged for centuries.

1.3. A Comprehensive and Multi-Level System

Much has been written about the contents of the Victims Directive and its enrichment of Framework Decision 2001/220/JHA, which it replaces. Instead of focusing on a description of the individual provisions,²³ it is preferable here to briefly concentrate on a more general view of the changes in policies, culture, and practices that the adoption of the Directive triggers in addressing victims' rights.

According to Mitsilegas (2015: 320; 2016: ep 6491), the Directive 2012/29/EU 'introduces a multi-level system of protection of the victim', while constituting 'an attempt to establish minimum standards rules on the rights of victims in face of the considerable diversity in national criminal justice system as regards the position and rights of the victim'. The Directive in fact builds a 'comprehensive'²⁴ system, which takes into account the multiple needs of the victims (corresponding to their multiple rights and interests), such as:

- recognition,
- recognition of vulnerability and/or of specific protection needs,
- respect,
- information,
- support,
- protection,
- access to justice and participation in criminal proceedings,
- access to compensation and restoration.

Within this system, which has already achieved considerable articulation through the work of the various legal bodies, two major axes interestingly intersect. On the one hand, there is a constant call to tailor and target each intervention to the *individual* victim's condition and needs, as mentioned above. On the other, the implementation of the Directive 2012/29/EU requires looking at 'the wider picture': that is, to combine 'legislative, administrative and practical measures', as stated in the Guidance Document,²⁵ and to coordinate the 'horizontal' system of rights attributed by the Victims Directive with the whole European set of legal instruments concerning victims of crime, such as Directives 2004/80/EC (compensation) or 2011/99/EU (European protection order in criminal matters), but also, for instance, Regulation

²³ Addressed in particular by Enrico Mancuso, chapter two in this volume.

²⁴ European Commission, DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 4.

²⁵ European Commission, DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 4.

606/2013 (mutual recognition of protection measures in civil matters). In addition, the Commission's transposition and implementation Guidance Document calls resoundingly for a coordination among 'all stakeholders':²⁶ from national legislators (in the exercise of their discretion when transposing the Directive) to criminal justice authorities in day-to-day activities, 'including the police, judicial authorities, relevant administrative bodies (such as legal aid administration, probation and mediation service) and victims' support providers' ending with NGOs and civil society.²⁷ The Victims Directive multi-level system has to be implemented within a wider network of subjects, legal tools, and actions, at international, European, and national levels.

1.4. Protection: The Bridge Between 'Support' and 'Justice'

Following art 8 of the Directive 2012/29/EU, one of the primary rights of victims is that of being able to access confidential victim support services, and if necessary specialist support (Gialuz 2012: 73). These services are charged with 'acting in the interests of victims' (art 8(1)).²⁸

For a victim, the right to access support services is of extreme practical importance; nevertheless, this right is widely neglected by many of the EU Member States. Interestingly, access to victim support is entirely parallel to and independent from criminal justice, having to be ensured 'before, during and for an appropriate time after criminal proceedings', irrespective of whether the victim has made a formal complaint (arts 8(1), 8(5) Dir). This significant right of the victim does not create tensions vis à vis the rights and interests of the suspects, the accused persons, and the offenders. As outlined by Lupária (2012: 39) with reference to the US *Parallel Justice Project* (Herman 2010),²⁹ the idea of 'parallel obligations' towards victims and offenders is

²⁶ Ibid p 3.

²⁷ Ibid pp 33, 49.

²⁸ See chapter eight in this volume.

²⁹ Following the core idea that 'Justice not only requires a fair and appropriate response to people who commit crimes; it also requires helping victims of crime rebuild their lives', the Parallel Justice Project aims at implementing a 'new framework for responding to crime—two separate, parallel paths to justice—one for victims and one for offenders. [...] [T]here would always be a separate set of responses for victims of the crime. [...] These responses would not depend on whether the offender is ever identified or convicted. In all cases, the harm experienced by victims of crime would

promising, since it manages to separate the focus on the needs of actual victims from (punitive) criminal justice. Bottoms and Roberts (2010: xx) note how ‘the victims’ right movement cannot be seen as a monolithic enterprise [...], exercis[ing] a unidimensional influence on criminal justice policy-making’ in a punitive direction: there is in fact a perspective that primarily ‘seeks to ensure that victims [...] receive their service rights’. There is a lot that can (and must) be done in favour of victims *outside* criminal justice, and *independently* from it.

In the European ‘horizontal’ system of protection of each and every victim, as comprehensively outlined by both EU law and the ECtHR-ECJ case law, the relationship between victims and ‘justice’ is multi-faceted, and not limited to criminal justice. It comprises, in fact, a wide range of profiles, which correspond to the equally widely ranging rights or interests of the victim. They can be summarised as follows:

- access to information, including access to simple and accessible communication, to translation and interpretation (arts 3 ff of the Directive 2012/29/EU);
- an articulated series of rights set out by the Directive 2012/29/EU in relation to victims’ ‘interaction’ with competent authorities, inside or/and outside criminal justice;
- an articulated series of rights attributed by the Directive 2012/29/EU in relation to victims’ participation in criminal proceedings (chapter 4 of the Directive);
- access to: (a) criminal, administrative, or civil measures of protection which include protection orders in criminal and civil matters; (b) measures of protection tailored on an individualised assessment to identify specific protection needs; and (c) special measures in case of particular vulnerability (arts 18 ff of the Directive 2012/29/EU; Directive 2011/99/EU, Regulation (EU) 606/2013). Protection of victims further includes measures (diverse in nature) that the State has to take in order to safeguard the rights granted under the ECHR (ECtHR case law);
- the right to compensation from the offender, which includes the right to a decision on this issue in the course of criminal proceedings (art 16); the right to compensation from a Member State’s authority in case of violent intentional crimes having a cross-border dimension (Directive 2004/80/EC);
- a set of rights and interests related to situations having a cross-

be acknowledged and addressed separately and apart from the criminal justice process’: see www.paralleljustice.org (last accessed on 25 January 2018).

border dimension which might affect free movement and non-discrimination on grounds of residence status (Directive 2012/29/EU; Directive 2011/99/EU; Directive 2004/80/CE etc);

- an interest in investigating on the part of the State, corresponding to its positive obligation to protect individual rights under ECHR (ECtHR case law).

From the list above it appears that the issue of protection is ideally located between service rights and procedural rights, so as to seal those two aspects of the European targeted system in favour of victims. Victim protection seems to be two-sided: it has something in common with victim support, because of its forward-looking aim to sustain the victim and to avoid further negative consequences, such as repeat and secondary victimisation. But it also has something in common with access to justice in the broad sense, since protection measures are made available by resorting to the ‘competent authorities’ (be they criminal, administrative, or civil), and especially to the judiciary because of these measures’ actual or potential negative effect on other people’s fundamental liberties and freedoms. In addition, some of the protection measures envisaged by the Victims Directive take place inside criminal justice, and during criminal investigations or criminal proceedings. Finally, protection measures are concerned in many ways with the position of the victims in the relevant criminal proceeding. It is not by chance, perhaps, that ‘one of the major achievements’³⁰ of the Victims Directive concerns precisely the ‘individual assessment of victims’ in order to identify their ‘specific protection needs’ (art 22): it is in this ground-breaking provision that all the levels and dimensions of the protection of victims seem to be concentrated.

1.5. Suspects, Accused Persons, and Offenders (Must) Matter Too

The European Union is clearly victim-sensitive. One may argue that the European Union nowadays is also victim-*centred*. But is this happening at the expense of the suspect, the accused person, or of the convicted offender?

The topic is thorny and contested. Attention to victims because of their suffering and harm is due for many noble reasons (including the freedom of movement without discrimination throughout the EU),

³⁰ European Commission, DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 44.

reasons that the European Union has decided to put ‘at the heart of its criminal justice agenda’. Up to now, protection and respectful treatment—*not* repression *per se*—have expressly been the core objectives of the EU in making victims matter. Nevertheless, putting the victim at the centre of criminal justice and of criminal policies may challenge fundamental principles, guarantees, and safeguards (Allegranza 2012: 8, 26; Mitsilegas 2015: 313; Mitsilegas 2016: ep 6786; Tonry 2010; Venturoli 2015: 117). This challenge has many pitfalls, and it therefore requires constant attention and considerable wisdom on the part of policymakers, European and national legislators, Justices in Strasbourg and Luxembourg, national judges and prosecutors, and enforcement agencies in general throughout the Union.

The ‘victim paradigm’, in fact, may everywhere steer criminal justice towards enemy criminal law, penal populism, and excessive severity in punishments (Garland 2001: 11, 103). It may distort the guarantee to a fair trial and other fundamental procedural and penal guarantees in favour of the *victims of crime* instead of the potential *victims of justice*, as we may call them (Dubber 2002; Spangher 2017; Stella 2003). According to some analyses, excessive attention to the rights of victims may transform the culture of human rights into a ‘culture of complaint’ (Huges 1993), and at the extreme may run the risk of transforming vulnerable, defenceless, victims of crime into the ‘heroes of our times’ (Giglioli 2014), the ‘étoiles de la scène pénale’ (Wyvekens 1999, as quoted by Gialuz 2015: 21), entitled to political power and to some sort of celebrity status (Eliacheff and Soulez Larivière 2007). Of course, populist victimism tends to ‘use’ victims for purposes other than their true protection and the respect for their dignity.

The formal recognition of and respect for the rights of the suspect, the accused, and the offender is therefore of utmost importance. European Union legal instruments and other documents, and the jurisprudence by both the European Court of Human Rights and the Court of Justice of the European Union, lay emphasis on the need to respect both the rights and interests of the victims and the rights, interests, and guarantees of the accused person and the offender. This must in fact be a permanent concern, since only a system capable of ensuring the protection of *both* those who harmed and those who were harmed, regardless of nationality and residence status, is a true, non-discriminatory, justice system (Eusebi 2013).

Yet the rights of victims and the rights of defendants do (sometimes) conflict.

Due to the enormous diversity in criminal justice systems in

different States, and especially as regards their criminal procedures, national legislators still have great discretion in framing the turning point at which the rights and safeguards of the accused overcome the rights of protection and participation in the criminal proceedings of the victims (Allegrezza 2015: 6; Lupária 2012; Mitsilegas 2015: 330). And—even more thornily—vice versa.

The European Court of Human Rights and the ECJ also greatly contribute in designing the ‘impact’ which victims will have in criminal trials and setting the limits to their role, and consequently in fixing the actual balance of the scale. How to conduct hearings involving victims in the course of criminal trials, protection of vulnerable ‘categories’ of victims, and the need to shelter victims from secondary victimisation are some of the frequently disputed matters. The issue of the balance between victims’ rights and the rights and safeguards of the suspected or accused is especially present in the extensive Court of Human Rights case law,³¹ whereas the Luxembourg Court primarily devoted itself to defining the exact frame of the notion of ‘victim’ and to interpreting the scope of the (then) Framework Decision 2001/220/JHA, mainly as far as victims’ testimony and the protection of vulnerable persons are concerned.

According to Tonry (2010), the very idea of ‘balancing’—or ‘re-balancing’—criminal justice ‘in favour of the victim’ must be contested, if (or when, or because) it comes along with punitive victims’ movements that manage to shift policies towards repression. On the contrary, as Tonry further argues, ‘few will disagree that victims should be dealt with sympathetically and supportively. That implies nothing, however, about treating defendants and offenders badly’ (Tonry 2010: 76). Not to mention the fact that offenders, and especially imprisoned offenders, can immediately become ‘vulnerable’ subjects—and even proper vulnerable *victims of crime*—if improper forms of authority or unjustified rights restrictions are imposed on them (the ECtHR case law is clear on this topic).

Arts 5, 6, and 7 of the European Convention of Human Rights and arts 47–50 of the European Charter of Fundamental Rights comprise the rights and safeguards of defendants. Besides legal tools to protect victims, the European Union has increasingly set (minimum) binding standards ‘to ensure that the basic rights of suspects and accused persons are protected sufficiently’³² (although the balance in the scale

³¹ See chapter four in this volume.

³² European Commission webpage affirming the EU commitment to the ‘rights

of European priorities when it comes to rights of victims and rights of defendants is still a matter of scholarly dispute). In the period 2010–13, three directives have been adopted with regards to procedural rights in criminal proceedings in favour of the suspects and the accused persons (right to interpretation and translation; right to information; right of access to a lawyer) (FRA 2016; Mitsilegas 2016: ep 5487). Interestingly, in 2016 three more directives were devoted to the rights of the defendants, with the purposes, respectively, of ensuring the effectiveness of the right of access to a lawyer as provided for under the 2013 Directive, strengthening the presumption of innocence and other aspects of the fair trial, and establishing procedural safeguards for children in conflict with the law. This set of directives is worth mentioning in its entirety:

- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings;
- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings;
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty;
- Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings;
- Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings;
- Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

Returning to the Victims Directive provisions, recital 12 clearly states that the rights of victims set out by the EU binding instrument

of suspects and accused’: https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/criminal-justice/rights-suspects-and-accused_en (last accessed on 15 January 2018).

‘are without prejudice to the rights of the offender’: this is a necessary and due affirmation which requires some clarification.

The service rights of victims (advice, support, and assistance) do not pose problems per se with regards to the rights of defendants. These service rights, in fact, are in principle to be directed to the victim in accordance with a tailored and professional approach (as required by the Directive) and they do not (or should not) cause immediate limitations on the freedoms and rights of the accused person or the convicted offender, nor rebalance fair trial safeguards in favour of the victim.

The procedural rights of the victims, however, are (much) more controversial, since they expressly assign the victim a participatory ‘role in the relevant criminal proceeding’. This role challenges adversarial rules and the right to confrontation (and procedures thereafter); it may restrain the action of the defence council during interviews with victims and in witness hearings, especially in case of vulnerable people or people with special needs of protection from secondary victimisation (Mitsilegas 2016: ep 6512). Victims’ impact statements and other forms of participation in the proceedings may even influence decisions about conviction, punishment, and release of a person in custody. It is with special regards to procedural rights, though, that the Victims Directive has ‘hedged’ the European contours of victims’ interests, by conferring national legislators ample discretion (Allegrezza: 2015; Mitsilegas 2015: 333).

The right to protection and the adoption of protection measures or special measures resulting from the individual assessment of specific needs of the victim (chapter 4 of the Directive) raise further questions. Victims have the right to the protection of their dignity and to be protected from ‘secondary and repeat victimisation’, from ‘intimidation and retaliation’, and ‘against the risk of emotional or psychological harm’ (arts 18, 22). It is not in their rights to say how this protection should occur, although according to art 22(6) victims must be closely involved and their wishes should be taken into account, including their wish not to benefit from protective measures.³³ One may argue that the references to ‘measures’ (art

³³ The provisions of art 22(6) raise the question of whether a future shift will occur in ECJ jurisprudence from the precedent of Joined cases C-483/09 and C-1/10 *Gueye – Sanchez* [2011] (both cases resulting in the irrelevance of the victim’s will to be approached by the offender in the frame of a judicial decision confirming an ancillary penalty enjoining a domestic violence offender not to do so).

18) and ‘special measures’ of protection (arts 22, 23) mark the climax of the conflicting relationship between victims’ rights and defendants’ rights in the frame of Directive 2012/29/EU. These measures, in fact, might have a substantial impact on the defendant’s procedural rights and might significantly constrain his/her freedoms, as is the case with protection orders. And yet the rationale and the explicit protective (*not punitive*) purpose of these measures are actually grounds for legitimately balancing the two conflicting interests. References to ‘victims’ concerns and fears’ (recital 58), to ‘emotional and psychological harm’ (art 18), and to ‘wishes’ (art 22(6)), though, are indeed problematic: these aspects are too subjective to meet the robust criteria needed to ascertain the actual necessity of issuing protection measures that limit or restrict one or more of the defendant’s rights and freedoms. Recital 58 and arts 18 and 23 of the Victims Directive fix the insuperable limits of this balance of conflicting interests: ‘without prejudice to the rights of the defence and in accordance with rules of judicial discretion’. These safeguards accompany those already envisaged, for instance, by the Directive 2011/99/EU concerning the European protection order in favour of the ‘person causing the danger’ (recitals 17, 37, art 9, etc).

History records the conflictual relation between criminal justice and victims of crime: from private ‘eye for eye’ retributive justice at the hands of those who have been harmed, through the long period in which victims were ‘forgotten’, and thence to the recent period in which they are being ‘re-discovered’ (Forti 2000: 252). Both the ‘wrongful’ inclusion and the ‘wrongful’ exclusion of victims has deep consequences for the legitimacy of the criminal justice system, and the search for the proper and ‘right’ role of victims in criminal justice often poses ‘intractable dilemmas’ (Bottoms and Roberts 2010: xix).

Victims may be an ‘uncomfortable’ presence in criminal justice systems: their presence compels us to face suffering and vulnerability. Yet it is precisely victims’ ‘uncomfortable-ness’ that raises questions about criminal justice: its abstract technicalities; its incapability to give reasonable responses to crime; its brutality, often, towards actual persons (offenders, who may fall victims of an ‘unjust’ justice; innocents, who may fall victims of judicial miscarriages; victims of crime *stricto sensu*, who may encounter secondary victimisation). This questioning, though, offers in return a unique opportunity for criminal justice to change. It is in fact true that a *wise* victim-sensitive criminal justice system may have a ‘positive impact on individual victims and on society as a whole’, as stated by the European Commission in its 2011 Communication.

A possible ‘right’ direction of change may be borrowed from the South African Constitutional Court’s landmark decision invalidating capital punishment: ‘It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected’.³⁴ This is ‘the test of our commitment to a culture of rights’, as eloquently put in South African Justice Langa’s concurrent opinion in ‘dialogue’ with us. This is echoed in Michael Tonry’s words too: ‘treating offenders well, better, or sympathetically does no damage to victims. Victims have the same interests as other citizens in having a criminal justice system that is fair, efficient and humane’ (Tonry 2010: 76).

2. The Challenge of Implementing the Directive 2012/29/EU with Victims of Corporate Crime and Corporate Violence

2.1. Building Bridges

Borrowing some thoughts from the literature concerning the victims of international crimes, we too wonder whether victims of corporate violence have thus far ‘received “second class” treatment’ (de Casadevante Romani 2012: 4). And if indeed they have, we wonder if this is because of the complex forms of their victimisation and the many obstacles they encounter when accessing justice, or rather because of corporate violence being one of the ‘crimes of the powerful’ (Rothe and Kauzlarich 2016; Leonard 2015: 61).

Significant attention has recently been paid by the United Nations and the EU to the violations of human rights in business conduct in the framework of so-called ‘Business and Human Rights’,³⁵ whether those

³⁴ Constitutional Court of South Africa, *S v Makwanyane and Another* [1995] CCT/3/94 [88].

³⁵ See especially the UN (2011) *Guiding Principles on Business and Human Rights* (available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, last accessed on 25 January 2018) and the OECD (2011) *Guidelines for Multinational Enterprises* (OECD Publishing, available at <http://dx.doi.org/10.1787/9789264115415-en>, last accessed on 25 January 2018). The major legal sources related to Business and Human Rights are available in section (D) of the *European and International Selected Legal Resources and Case Law. Appendix to the Mid-Term Report*, at www.victimsandcorporations.eu (last accessed 15 January 2018).

violations be criminal offences *or not*. Business and Human Rights is an interesting field for policies and practices that are currently developing (including judiciary practices), and a far-reaching field for research especially with a focus on victims of corporate violence (Engelhart 2016; Engehart 2017).

However, victims of corporate crime and corporate violence as such are not—or at least not yet—formally recognised as belonging to a ‘vulnerable group’ in either international or European (soft or hard) legal sources, despite the studies now available about the specific character of corporate victimisation and the many cases occurring worldwide (Victims and Corporations 2017; Visconti 2017).³⁶ Nor are these victims cited among the examples of the ‘typically’ vulnerable, such as the elderly, the victims of gender-based violence or of organised crime, and other categories.

Although every victim ostensibly matters to the European Union, victims of corporate violence per se seem entirely absent in its official documents regarding victims and victims’ rights. The Stockholm Programme, for example, is rich in references to victims of crime and to several vulnerable groups, and it also makes direct reference to *economic crime*, mainly understood as financial crime—but not to the victims of it. Similarly, the European Internal Security Strategy (ISS)³⁷ refers to economic crime as one of the ‘main crime-related risks and threats facing Europe today’, but when it come to victims, corporate victims are not expressly highlighted. Among the European principles and values that inspired its drafting, the ISS recalls the ‘protection of all citizens, especially the most vulnerable, with the *focus on victims of crimes*’ (emphasis added): yet it is other groups of victims who are referred to explicitly (ie ‘victims of crimes such as trafficking in human beings or gender violence, including victims of terrorism who also need special attention, support and social recognition’), even though corporate violence seems to fit perfectly within the majority of the ‘main challenges for the internal security of the EU’ listed in the ISS. The list, in fact, comprises the following: ‘economic crime’, which is included in the

³⁶ See chapter six in this volume.

³⁷ European Council, *Internal Security Strategy for the European Union: Towards a European Security Model* (Doc 7120/10 CO EUR-PREP 8 JAI 182, March 2010); European Commission, Communication from the Commission to the European Parliament and the Council *The EU Internal Security Strategy in Action: Five Steps Towards a More Secure Europe* (COM(2010) 673 final of 22.11.2010).

item dedicated to ‘serious crime’; ‘cross border crime’; ‘violence itself’; and ‘man-made disasters’. While reaffirming the validity of the ISS objectives, the 2015 *European Agenda on Security* sets out three priorities: terrorism, organised crime, and cybercrime. Interestingly, the *Agenda* underlines the ‘huge human, social and economic costs’ caused by ‘crimes such as trafficking in human beings, trade in firearms, drug smuggling, and *financial, economic and environmental crime*’ (emphasis added), which are ‘clearly *interlinked* and cross-border threats’ (emphasis added) with a ‘multi-faceted and international dimension’ requiring ‘an effective and coordinated response at the EU level’.³⁸ Moreover, connections between corporate violence and typical areas of crime of EU concern may clearly exist, as is the case, for instance, for corporations involved in human trafficking within the broader context of labour exploitation (see, eg in US literature, Rothe and Kauzlarich 2016: 91).³⁹ Still, when it come to victims, corporate victims are again not expressly highlighted. It truly seems that corporate violence is ‘silent’ and ‘invisible’, and that this situation is perpetuated by the many misconceptions about it which are still prevalent (Leonard 2016: 62).

There is of course a significant EU commitment in areas such as corporate governance and sustainability,⁴⁰ disclosure of non-financial

³⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions *The European Agenda on Security* (Strasbourg, 28.4.2015 COM(2015) 185 final) pp 2, 12–13.

³⁹ See also, eg, the South African cases of victims’ claims against international companies and foreign banks accused of having financed, ‘backed, and profited from the crime of apartheid’: Kesslerling 2017, 38–39. Kesslerling stresses how complex the situation is for victims ‘when it comes to the obligations of nonstate actors, who do not have the state’s duty to protect its citizens from harm, so that breaches of human rights committed by them are often difficult to prove. Also, the justiciability of corporate human rights breaches is more complicated and much less tested in courts, most of all when it comes to companies’ “mere” aiding and abetting of human rights violations committed by the state. Applicants need to prove a causal connection between the companies’ actions or omissions and the injuries’ (p 39).

⁴⁰ See, eg, the overview presented in the European Commission’s webpage dedicated to ‘Company Law and Corporate Governance’: https://ec.europa.eu/info/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_en (last accessed 25 January 2018). See in particular the *2012 Action Plan: European Company Law and Corporate Governance—A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies* (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM/2012/0740 final).

information,⁴¹ consumer protection,⁴² and others. Additionally, there are many important legal instruments in the fields, for instance, of product safety and of environmental protection, as further described by Stefano Manacorda and Irene Gasparini in chapter three of this volume. But there appears to be no connection—or no explicit connection—between the European law of victims and European legal instruments in the aforementioned corporate-sensitive areas. Briefly, there seems to be some sort of gap between the system of rights set out for victims in the European Union and those in other sectors of EU legal intervention, which are significantly oriented towards risk assessment, crime prevention, and criminalisation, but apparently not addressed to victims' direct protection. Those sectorial European laws appear focused more on *potential* victims than *actual* victims. Hence, up to now the protection of actual victims of corporate crime and corporate violence is addressed only by the Directive 2012/29/EU, and only because this Directive 'horizontally' concerns victims of crime *in general*.

A normative 'dialogue', we believe, is needed not only between European Courts, but perhaps also among European legal sources too.

⁴¹ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. The Directive is of utmost importance for the topics of this research. In fact, the Directive 2014/95/EU, as summarised in the Eur-lex portal, 'requires certain large companies to disclose relevant non-financial information to provide investors and other stakeholders with a more complete picture of their development, performance, and position and of the impact of their activity. [...] Such companies are required to give a review of policies, principal risks and outcomes, including on: environmental matters; social and employees aspects; respect for human rights; anti-corruption and bribery issues; diversity on boards of directors. [...] If companies do not have a policy on one of these areas, the non-financial statement should explain why not. [...] Companies are given the freedom to disclose this information in the way they find useful or in a separate report. In preparing their statements, companies may use national, European or international guidelines such as the UN Global Compact. The European Commission will produce non-binding guidelines on how to report non-financial information by December 2016' (available at <http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32014L0095>, last accessed on 25 January 2018). Disclosure of non-financial information is extremely relevant in the frame of both the prevention of victimisation and the protection of actual, potential, and future victims of corporate violence: for the purposes of this particular research, see especially Caputo 2017.

⁴² For a brief overview of actions and legal tools in the EU see, eg, the European Commission webpage on 'Consumers' protection' (consumers' safety; consumers' rights and law): https://ec.europa.eu/info/strategy/consumers/consumer-protection_en (last accessed on 25 January 2018).

It will be worth exploring ways to bridge the ‘horizontal’, general, EU provisions (and their national transpositions) concerning victims’ rights, and the ‘vertical’ EU provisions (and their national transpositions) regarding consumer protection, product safety, environmental protection, disclosure of non-financial information, etc. The interaction between existing EU legal instruments appears to be important in terms of the effective protection of actual victims throughout the European Union. These legal ‘bridges’ and the normative ‘dialogue’ among European legal sources (and their national transpositions) fit into the comprehensive approach to victims’ protection that is at the heart of the Directive 2012/29/EU, and may contribute to better implementing it. Moreover, creating legal synergies may even help in overcoming other types of gaps that greatly affect the successful protection of corporate victims, such as the immense problem of scientific uncertainty (for instance uncertainty about the harmful or hazardous nature of a given chemical substance). Finally, legal interconnections among the diverse relevant European instruments and their national transpositions may help in the process of harmonisation and trust-building within EU judicial cooperation in criminal matters.

In building those bridges, a few warnings are necessary. The ‘fundamental’ and constitutional stability—and righteousness, dare we say—of those legal connections rests on the firm commitment by those in charge of implementing the law to taking the rights and the interests of *all* the subjects involved seriously. In particular, the commitment to take victims’ rights and victims’ protection needs in due consideration must come together with an equal, or fair, consideration for the rights and the interests of the counterparts, and especially of corporate individual suspects, accused persons and offenders.

We know only too well how hard this task is to accomplish. The research literature has taught us that corporate violence is a dense jungle of problems and, sometimes, an inextricable enigma. Caution and wisdom are required when exploring this field and offering proposals.

The dilemmas about how to respond to corporate violence, in order to better protect its victims (see section 2.3.4), do not seem to find answers in ‘conventional’ (ie, punitive) forms of (criminal) justice: this is one of the first findings from this project.⁴³ The relevant cases of corporate victimisation, which we made the objects of our

⁴³ See in this volume the Annex ‘Policy Recommendations for National Lawmakers and Policymakers’.

theoretical and empirical research, offer some examples in this respect (Giavazzi 2016a; Visconti 2017).⁴⁴ Punishment-oriented criminal proceedings and corporate criminal-liability-related proceedings often appear ineffective in ascertaining offences, holding corporations and corporate offenders responsible, and preventing further negative consequences for citizens and communities as a whole, and they also end up being costly in terms of secondary victimisation. Out-of-court settlements and non-prosecution agreements, where admissible within national legal systems, present other problems and difficulties, and may also cause secondary victimisation or entail a lack of recognition of the victims of corporate violence, with indirect adverse consequences on victims' access to support and welfare/medical services. In all likelihood, in order to implement the Victims Directive in the field of corporate violence a new strategy has to be developed: provisionally, in fact, it seems that 'responsive regulation' (Ayres and Braithwaite 1992; Braithwaite 2002)—which is compliance focused—and similar forms of preventive/restorative dynamism in justice systems (Braithwaite 2016; Nieto Martín 2016) offer responses that are worth deeper investigation and perhaps also worth experimenting with in the European Union.

2.2. Revealing the Common Features of Corporate Violence to Better Assess/Address these Victims' Special Needs

The Directive 2012/29/EU requires a personalised and tailored approach to each individual victim by assessing their individual protection needs, and taking the consequent protective countermeasures. In some ways, as often repeated, the Victims Directive partly abandons abstract categories of vulnerability in favour of an actual, concrete, analysis of the individual person's exposure to risks of repeat victimisation, retaliation, and secondary victimisation. From burglary to sexual assault, from financial fraud to manslaughter, from pickpocketing to domestic violence: every victim falling into the definition of art 2 of the Directive deserves, and must receive, the proper consideration together with an individualised assessment of his/her 'special protection needs' as provided by art 22. If this task is properly and fully accomplished, then one may argue that there is no real

⁴⁴ See chapter seven in this volume.

necessity to focus on *another category*—or group—of victims (ie corporate victims).

When scrutinised further, though, the system of support/protection/rights of victims resulting from European law combines the consideration of three relevant elements, identifiable as the following: needs that are *common* to *all* victims of crime; needs that are *specific* to *some groups* of victims; *special* needs that are specific to the *individual* victim. Looking at the EU legal context, in fact, the system set out by the European legislation now comprises:

- a set of common minimum standards established by the Directive 2012/29/UE;
- the obligation by Member States to ensure ‘a timely and individual assessment’ of (personal) ‘specific protection needs’, as envisaged by art 22(1) of the Victims Directive;
- a series of ‘satellite Directives’ concerning ‘specific situations’ of vulnerability or of victimisation (trafficking in human beings, sexual offences against children, terrorism).⁴⁵

According to art 22(2) of the Victims Directive in particular, the *individual* assessment of specific protection needs is to be carried out by taking into account ‘the *type* and *nature* of the crime’ (lett (b)) (emphasis added), alongside the *unique* ‘personal characteristics of the victim’ (lett (a)) and the ‘circumstances of the crime’ (lett (c)). Hence, the Directive’s step towards an actual case-by-case assessment of protection needs does not exclude the importance of learning from the phenomenology of corporate victimisation(s), in order to focus on relevant *common* features (‘type and nature’) which are *specific* to the sectors of corporate crime and corporate violence, therefore enhancing the correct implementation of the Directive in those particular fields in favour of the individual corporate victim.

Knowledge of the criminological and victimological features of corporate crime and corporate violence⁴⁶ at least enables policymakers and practitioners to rely on epistemological ‘hints’ drawn from experience. By building on these broad characteristics—we may call them ‘schemes’—of corporate victimisation, the personal condition and the individual needs of the actual victim may be more easily identified and better assessed. In addition to needs that are ‘common to all categories of victims’, in fact, there are needs ‘specifically connected to some particular categories of victims’ (de Casadevante

⁴⁵ See section 1 of this chapter.

⁴⁶ Addressed in particular by Arianna Visconti, chapter six in this volume.

Romani 2012: 7). Knowledge of common features of corporate victimisation is therefore helpful to put the ‘general’ Victims Directive into practice in this ‘particular’ field.

2.3. A Closer Look at the Directive 2012/29/EU through the Lens of Corporate Violence Victimisation

In section 1, a brief overview of the provisions of the Directive 2012/29/EU was provided. Our lenses in examining the Directive now change: our interest is now focused on its implementation in the specific field of corporate crime and corporate violence. In brief, we now read through the Victims Directive again, bearing in mind the criminological and victimological features of corporate crime and corporate violence and the needs of corporate victims.⁴⁷ We briefly point out (only) those provisions of the Victims Directive that most directly pertain to the scope of our research, and we will select only a few major aspects of the many issues emerging from the perspective of implementing the Directive 2012/29/EU in cases of corporate (violence) victimisation.

This analysis stems from the project’s findings,⁴⁸ which await further validation and/or enrichment. Several of the topics treated here lead to more questions and problems than answers and solutions. Hard as it may be, these problems and open issues do not and must not prevent us from trying to implement the Victims Directive in the ground-breaking and far-reaching field of corporate violent crimes—and doing so immediately. Of course, in all this we must constantly seek to maintain a sound respect for both the rights of corporate victims *and* the rights of the defendants, whether these be corporate legal entities or individual persons who have acted in the interest of the corporation concerned.

⁴⁷ See chapter six in this volume.

⁴⁸ Our analysis is based on the following: (a) European Commission DG Justice Guidance Document; (b) desk research about corporate victimisation (see references); (c) findings from the interviews and focus groups carried out in the frame of the project’s empirical research (Victims and Corporations 2017; Visconti 2017); (d) findings from the study of some ‘leading cases’ (Giavazzi 2016a; Giavazzi 2016b; see also chapter seven in this volume).

2.3.1. *The Scope of the Victims Directive*

As stated in recital 13, the Victims Directive (only)

applies in relation to criminal offences committed in the Union and to criminal proceedings that take place in the Union. It confers rights on victims of extra-territorial offences only in relation to criminal proceedings that take place in the Union.

For the Directive to be applied, and therefore for a person claiming to be a ‘victim’ to see it implemented in his/her situation, it is necessary first for the act committed to be a *criminal offence* envisaged by the *national law*. From the very beginning of the criminological analysis on white-collar crime, one of the major problems with these crimes is precisely their equivocal status as ‘crimes’—ie criminal offences—in the strict legal meaning of the term (Sutherland 1949). The topic is extensively discussed in the criminological literature: it will suffice here to recall that, despite their harmful consequences on physical persons, conducts related to the notion of corporate violence may *not* always be considered criminal offences by national laws, which *excludes* the applicability of the Directive. Not all types of breach of law by a corporation is a ‘*proscribed breach of the criminal law*’ (Hall 2013: 58). This is especially true in certain economic sectors that are regulated more by civil or administrative provisions than by criminal law. In the context of Business and Human Rights, however, international legal documents refer to the broader notion of ‘violations of human rights’. The United Nations has coined the term ‘victim of abuse of power’⁴⁹ to refer to persons who have suffered the consequences of ‘acts or omissions that do not constitute violation of national criminal law but of internationally recognized norms relating to human rights’ (point 18) (de Casadevante Romani: 43). In both cases, these victims of human rights violations are not included in the system set out by the Directive 2012/29/EU, unless those violations are actually criminal offences under national law.

As stated by Matthew Hall with specific regards to environmental victims, ‘That the Directive should exclude victims in this way is somewhat puzzling, given the pedigree of this instrument’ (Hall 2013: 59).

⁴⁹ UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985): see chapter five in this volume.

A second condition for the Directive to find application is that the criminal offences must be committed in the EU *or* that criminal proceedings take place in the European Union, irrespective of the nationality or residence status of the potential victims. Art 1(2) and recitals 9 and 10, in fact, affirm that the rights set out in the Directive do not depend on the victim's residence status, citizenship, or nationality, and furthermore stress that these latter are not to be made conditions for benefiting from the rights attributed by the Directive.

It is unnecessary to reiterate how huge and complex the cross-border dimension of corporate crime may be, especially in cases of multinational corporations or of enterprises that rely on international and transnational supply chains, or of firms that sell their products all over the EU. It can also be complex to determine *where* a certain corporate offence has taken place and which, consequently, is the applicable legal system and country where the criminal proceeding has to take place.

2.3.2. *The Notion of 'Victim' and Their Recognition*

Provided there actually *is* a national law establishing a criminal offence, the path of corporate violence victims towards accessing support, protection, and justice is still long and difficult.

This topic is replete with dense philosophical, juridical, and practical implications, and here we can sketch only a few aspects. *Who* are corporate victims, according to the Directive 2012/29/EU? When do they become victims? Who is actually entitled to access the system of rights set forth by the Directive? From when? And on the basis of which conditions?

Some of these questions find answers in both the Directive's provisions and the ECJ case law (Gialuz 2015: 22; Mitsilegas 2015: 320; Venturoli 2015: 99; Savy 2013: 11). Others do not.

The definition of victim stands in art 2(1) of the Directive, which has enriched the Framework Decision 2001/220/JHA on this topic. Art 2(1) provides quite a clear definition, although advocates of victims rights criticise it as being too narrow, as do advocates of corporate victims, although even more vociferously (Hall 2013: 58). The UN 1985 *Basic Principles* provide, for instance, a wider notion which includes 'persons' who 'individually or *collectively*' (emphasis added) have suffered harm resulting from a criminal offence.⁵⁰ Although

⁵⁰ See also chapter five in this volume.

crime victims are of course sheltered by the protection system designed by the Directive 2012/29/EU as a community of *individuals*, underlining the collective dimension of certain forms of corporate violence can be important when assessing protection needs and implementing protection measures.

Under the Directive 2012/29/EU (and the former 2001 Framework Decision), ‘victims’ are only ‘natural persons’ (art 2(1)(a)). Ruling on the Third Pillar Victims’ Framework Decision, the Court of Justice of the European Union has in the past excluded that legal persons can fall under the notion of ‘victim of crime’.⁵¹ The reasons for this exclusion lie in the intimate bond that links the ‘victim’ to the (exclusively) *human* experience of suffering from a harm. In brief: corporations are not to be considered victims under the Directive 2012/29/EU; natural persons who are victims of illicit conducts carried out by corporations, however, are. Yet in *Giovanardi*⁵² the Court of Justice ruled that persons ‘harmed as a result of an administrative offence committed by a legal person [...] cannot be regarded [...] as the victims of a criminal act who are entitled to obtain a decision, in criminal proceedings, on compensation by that legal person’, because of the administrative nature, in that particular national legal system under scrutiny (Italy), of the liability of legal persons. Corporate legal bodies, on the other hand, may be included in the interpretation of the broader concept of ‘victim’ for the (different) purposes of the Directive 2004/80/EC (*Dell’Orto*).

The notion of ‘victim of crime’ poses other relevant questions that challenge juridical and judicial logic. Oddly, though, there is little analysis about the ‘relational’ nature of the concept of ‘victim of crime’. No crime, no victim. Yet *crime* is a strange entity: it depends on a criminal law envisaging it as an offence; it tries to remain hidden; it takes place in the moment it is committed, but it is declared so only following a conviction beyond any reasonable doubt. For a victim of crime to exist, there must have been a crime in the first place. But for a victim of crime a *full* recognition of his/her victimisation depends on the fact that the crime is not only *committed*, but is also *discovered* and the illicit facts *ascertained* in their criminal relevance. And this is the task of criminal justice.

Very interestingly and importantly, though, recital 19 of the Directive clearly states that ‘A person should be considered to be a

⁵¹ ECJ, Case C-205/09 *Eredics – Sápi* [2010]; ECJ, Case C-467/05 *Dell’Orto* [2007].

⁵² ECJ, Case C-79/11 *Giovanardi* [2012].

victim *regardless of whether an offender is identified, apprehended, prosecuted or convicted*' (emphasis added).

There seems therefore to be a sort of *presumption of victimisation*: to be entitled to information and support, and—to *some extent*—to be entitled to protection and to participation in criminal proceedings, it is sufficient that a (natural) person claims to be a victim. This sort of presumption perhaps counterbalances the presumption of innocence on the part of the defendant. Yet there also appears to be a duty of attention (and of care) on the part of the 'competent authorities' (ie police, prosecutors, judges, support services etc): according to recital 37, in fact, 'support should be available from the moment the competent authorities are *aware of the victim*' (emphasis added). Among the noblest provisions of the Directive 2012/29/EU are those dedicated to the *recognition* of victims. The Directive insists on the importance for the victim to be recognised: recital 9, art 1(2), and chapter 4 stress that victims of crime and their protection needs should be recognised.

These articles and recitals of the Victims Directive are highly relevant in respect to victims of corporate violence. Corporate violence, in fact, is hard to prosecute because of its criminological specificity, and because of many other 'technical' reasons that range from rules of evidence, to proof of causation, to time limitations, to the inner complexity which is related to the organisational and structural nature of a corporation (Leonard 2016: 71; Boggio 2012).

In addition, scientific uncertainty, scientific controversies, and controversial science cast a further shadow on the relationship that *victims* of corporate violence have with *crime* and *justice*. Frequently, what is at stake is the very recognition of a victim as a victim: Is this substance really toxic? Is *this* illness caused by *that* exposure to *this* substance? Within the confines of this shadow, victims of corporate violence may become, or remain, invisible: the harm they suffer may be manifest, but its illicit and criminal nature may on the contrary be *unknown*, or *unseen*.⁵³ It is worth pointing out that, following recital 19, recognition of the victim does *not*—and should not—require per se the activation of criminal justice, convictions, and punishments. Recognition as a victim *of crime*, though, is essential to accessing relevant information, victim support, and protection measures when needed.

⁵³ See the Introduction in this volume, and also Fricker 2007.

The awareness of competent authorities, as a part of the duty to recognise victims and so to offer support and address their needs, nonetheless raises the issue of reporting and proactive enforcement.

Victims of corporate violence may not realise they have been victimised. Since corporate crime occurs, by definition, during the *legitimate* activity of a corporation, it is often difficult—if not impossible—for an individual person to ‘uncover’ it, except when it is too late. In the case of corporate violence, delays in reporting criminal offences by the victims may depend on the common reasons recalled in recital 25 of the Victims Directive—ie fear of retaliation or stigmatisation—especially when the victim is the employee and the corporation the employer. But delays in reporting may also depend on more complex reasons, such as scientific uncertainty and/or long latency periods before the actual physical harm is manifest.

Protection from repeated or increased victimisation (see section 2.3.4) necessarily implies a proactive role by enforcement agencies: such is the case, for instance, for food frauds, selling of defective drugs or food, exposure to toxic substances, and exposure to polluted areas, where investigations and prosecutions are seldom dependent on the initiative of victims. Omissions in crime reporting on the part of public officials or any other subjects tasked with so reporting result in a factual lack of recognition of the corporate victims, and in a lack of their protection. At the same time, the reporting of administrative violations and/or of minor criminal offences is of signal importance in preventing small issues escalating into cases of corporate violence that result in harms to life, physical integrity, health, and safety. Investigative and judicial attention to ‘warning crimes’ (such as bribery in public procurement, corruption, money laundering, financial crimes, etc) is also of paramount relevance in addressing corporate violence at an early stage, and in avoiding more severe harms and consequences.⁵⁴

2.3.3. *The Right to Information*

Within the system designed by the Directive 2012/29/EU, the provision of information to victims is of the utmost importance. This

⁵⁴ These comments have been made the object of one of the ‘Policy Recommendations for National Lawmakers and Policymakers’ (see Annex in this volume).

right of the victim (and the correspondent duty of various authorities and services) is in fact central and strategic, being strictly connected, in the abstract provisions and in practice, to the access to support, justice, and protection (chapter 2 of the Directive, but in fact other provisions also envisage this right). Victims should be afforded the right to receive information from the ‘first contact’ with ‘any competent authority’. The content of the information to which the victim is entitled is ample and broadly covers nearly all the (other) rights attributed by the Directive. As stated in recital 26 (and again in recital 46 in relation to restorative justice) information is necessary for the victim to ‘make informed decisions’ and ‘an informed choice’.

The right to information is also crucial in the field of corporate victimisation, where it has specific aspects. Corporate victims, in fact, need not only the ‘procedural’ and/or ‘legal’ information necessary to ‘make informed decisions about their participation in proceedings’ or in restorative justice programmes (recitals 26, 46), but prior to this they also need access to the information necessary to ‘discover’ and/or become aware of their victimisation.⁵⁵ As mentioned above, these pieces of information are intimately interwoven with access to justice, and in fact they are truly a *condition* for access to justice: without this information, the actual possibility of filing a report, making a complaint, deciding whether or not to participate in a criminal proceedings, accepting or rejecting an out-of-court settlement, and so on, may be at stake.

This particular aspect of the right to information of corporate victims is unique, and is strictly linked to another of the main purposes of the Directive, that is the protection of victims from repeat victimisation (see section 2.3.4).

Yet, as often recalled in this publication, transparent and correct information may not be easy to access, because of the imbalance in the informative power of corporations, on the one hand, and because of scientific uncertainty or controversy (whether real or fabricated) on the other hand.

Corporate victims’ right to information intersects with other relevant areas where the ‘right to know’ is recognised and protected in the European Union: information to consumers (see, eg Directive 2001/95/EC), access to environmental information (Århus Convention and related Directives), disclosure of non-financial information

⁵⁵ See the Introduction in this volume.

(Directive 2014/95/EU), to name a few. By matching these different facets, we assign a stronger meaning to the right to information due to victims as individual persons, as citizens, and as consumers.

When implementing the Directive 2012/29/EU to cases of corporate violence, some adjustments to certain provisions are necessary. Such is the case, for instance, for the provisions of art 6(5) (and recital 32) regarding information about the release (or the escape) of the offender ‘at least in cases where there might be *a danger or an identified risk of harm to the victims*’ (emphasis added). The notion of ‘identified risk of harm’ is very different when dealing with a stalker, a violent partner, a serial thief, or a corporation carrying on activities resulting in criminal offenses to life, health, physical integrity, etc. More important than information about whether the corporate offender has been released (cases of their detention are infrequent) is the information about on-going, resumed, or new activities that may again expose actual or potential victims to the same or a novel risk of harm.

2.3.4. *The Right to Protection*

As has been mentioned (section 1.4), according to art 18 of the Directive 2012/29/EU, Member States must ensure that victims and their family members are protected from ‘secondary and repeat victimisation, from intimidation and from retaliation’, and that their physical integrity is safeguarded. Member States shall introduce the necessary ‘measures’ to fulfil this objective. National legal systems in the EU have generally adopted provisions in this regard that favour, once again, ‘typical’ vulnerable victims with special protection needs: yet these provisions (such as protection orders against family violence) are of little or no use in cases of corporate violence and there is a lack of specific and tailored measures aimed at avoiding repeat and future victimisation through corporate activities. The protection from repeat victimisation of actual corporate victims, and/or potential or future corporate victims—be they common citizens, consumers, workers, or inhabitants of polluted areas—seems to require ad hoc legal provisions regulating a set of tailored measures to be adopted under judiciary scrutiny and without prejudice to the rights of the suspect or accused (physical or legal) persons. Measures of this kind might be, for instance: the provisional stopping or reduction of production; the provisional closure of plants; the delivery of thorough information to consumers regarding the risks or toxicity of a product, and the way to

avoid or reduce such risks or harms; the obligation to provide medical assistance to the exposed population; the obligation to deepen the scientific knowledge regarding the risks of a certain substance and the obligation to publicly disclose the results, etc.

The capability of all the relevant public and private actors to detect risks, especially unknown ones, and recognise every warning sign coming either from epidemiological and scientific studies or the investigations of enforcement agencies and regulatory agencies, or coming from citizens and local communities, is crucial in implementing the necessary protection of corporate victims.

Due to the complexity and harmful nature of corporate violence, the protection of these—actual, potential, future—victims from the repeated risks or from new or unknown dangers calls for the implementation of an efficient network which proactively involves regulatory agencies, inspecting authorities, enforcement agencies, and the judiciary, together with the health system, the welfare state, etc, in collaboration with the scientific community, trade unions, corporations' representatives and associations, NGOs, victims' associations and other advocacy organisations. Only if these stakeholders are capable of exchanging the relevant information and working together (before and after a corporate violent crime is committed), can they effectively aid the quick identification and recognition of actual victims and potential or future victims, and consequently ensure their protection in a timely manner.⁵⁶

2.3.5. The Dependence on the Offender

Article 22(3) of the Victims Directive draws attention to the relationship between the victim and the offender 'in the context of the individual assessment' required to 'identify specific protection needs'. This relationship, in fact, can cause the victim to become particularly vulnerable when it entails a 'dependence on the offender'.

This provision is of the utmost importance for recognising corporate victims, and therefore correctly assessing their protection needs. Criminal breaches of health and safety regulations in the workplace, or of medical devices and drug safety regulations, almost

⁵⁶ The observations set forth in this section have become part of the 'Policy Recommendations for National Lawmakers and Policymakers' (see Annex in this volume).

invariably occur under various forms of dependence of the victim on the (corporate) offender. This can be an economic dependence, as is the case for workers, or an even more threatening technological or medical dependence on a device or a drug that could be life saving if properly produced.

There is another aspect of corporate violence that characterises the relationship between the victim and the corporate offender, giving the dependence of the former on the latter a particular nature which is perhaps similar to the dependence of victim on offender in cases of family violence or violence in close relationships: it is what we might call the *deceitful nature* of corporate violence.

During the empirical research conducted in the frame of the ‘Victims and Corporations’ project, participants in interviews and focus groups almost invariably reported a sort of tragic deception, indeed a form of delusion, linked to the ‘promise’ of a better life associated with the corporate activity or commercial product in question, and due, even more tragically, to the *initial* experience of an *actual* improvement of their life conditions (Giavazzi, Mazzucato, and Visconti 2017: 23). Hailed as examples of scientific progress, these advanced technological products, ‘wonder pills’, or the ‘new’ up-to-date factory which would have brought welfare and economic growth, instead, turn out to have an inner—and hidden—negative nature which causes *opposite* consequences. What should have brought about social and/or economic improvement, well-being, and better health conditions, progressively reveals its lethal or harmful nature. And by the time things became clear, it was already too late.

2.3.6. *Crime as a Violation of Individual Rights*

The Directive 2012/29/EU sees crime as a ‘wrong against society as well as a violation of the individual rights of victims’ (recital 9). As observed in section 1.1, recital 66 provides a list of some of the fundamental rights and principles recognised by the Charter of the European Union that become relevant for victims of crime: ‘right to dignity, life, physical and mental integrity, liberty and security, respect for private and family life, the right to property, the principle of non-discrimination, the principle of equality between women and men, the rights of the child, the elderly and persons with disabilities, and the right to a fair trial’.

Because of its complexity and the many fields where it takes place, in addition to the list of rights quoted in recital 66, corporate

violence may entail the violation or infringement of *other* fundamental rights and/or principles recognised by the Charter of Fundamental Rights of the European Union. The following are worth mentioning as particular examples:

- art 11, Freedom of expression and information: right to receive information;
- art 27, Workers' right to information and consultation;
- art 31, Fair and just working conditions: respect for health, safety, and dignity;
- art 34, Social security and social assistance: entitlement to social security benefits and social services providing protection in cases such as, among others, illness or industrial accidents;
- art 35, Health care: high level of human health protection;
- art 37, Environmental protection: high level of environment protection; principle of sustainable development;
- art 38, Consumer protection: high level of consumer protection.

The precautionary principle, as outlined by art 191 TFEU in relation to the protection of both the environment and human health, is also of paramount importance when dealing with corporate crimes in these fields, provided its use is consistent with fundamental safeguards related to criminal law.⁵⁷

3. Open Issues

In the previous sections, we reflected on how knowledge of common features of corporate victimisation may help in putting the Victims Directive *into practice*.

As for *theory*, a set of issues emerges which is by necessity provisional, although richly deserving of further sustained reflection and review, due to their complexity and multi-faceted implications:

- (a) A change of perspective is made possible by the search for interactions and synergies between the Victims Directive and the wider context of EU legislation in the fields for instance of environment protection, food and drug safety, and consumer protection.⁵⁸ On the one hand, this perspective enables a focus on

⁵⁷ Manacorda and Gasparini, chapter three in this volume, frame the correct limits and unique relevance of the precautionary principle in the domain of corporate violence.

⁵⁸ See in this volume chapter three, by Stefano Manacorda and Irene Gasparini, which is a necessary complement.

the possible extent of the *actual* mutual enrichment of EU legal resources; on the other, it would provide an interesting overview of possible lacks, or weaknesses, which await further legal developments.

- (b) Corporate violence manifests a very particular capacity to affect—and attract—nearly the whole set of European fundamental rights, values, and principles, challenging in a unique way the necessity *inter alia* ‘to strengthen the protection of fundamental rights in the light of [...] scientific and technological developments’, as described in the preamble of the Charter of Fundamental Rights. The ‘comprehensive’ negative nature of corporate violence may be seen as further evidence of the relevance of this topic for the European Union.
- (c) The priority assigned by the EU to the protection of victims of crime raises the question whether, *having regard to art 82(2) TFEU* and the scope of its provisions, there is a need to establish *ad hoc* minimum rules concerning the rights, support, and protection of victims of (specific) criminal offences comprised under the phenomenology of corporate violence—since these particular victims may have specific needs that require more targeted and integrated support than that granted by the Directive 2012/29/EU alone.
- (d) Another question raised by the research conducted for this project is whether the phenomena related to corporate violence, and their ensuing forms of victimisation, may fall under the provisions and scope of *art 83(1) TFEU*. That is, whether corporate violence has ‘developed’ as one of those ‘other areas of crime’ meeting the criteria set out in *art 83(1) TFEU*, and therefore should be seen as
 - being ‘particularly serious’, and
 - having a ‘cross-border dimension’,
 - ‘resulting from the *nature or impact of offenses* or from a special need to combat them on a common basis’ (emphasis added).

If this were the case, offences related to corporate violence could potentially become the object of a Council decision identifying corporate violence as an area of crime that meets the abovementioned criteria, and then of a new ‘vertical’ directive adopted having regard to *art 82(2) and art 83(1) TFEU*. This imaginary directive would be similar, in its nature and broad contents, to the existing directives concerning human trafficking and the sexual exploitation of children. It could therefore combine criminalisation of (certain) offences of corporate

violence—aiming at corporate criminal liability and crime prevention strategies (including corporate governance, corporate social responsibility, compliance programmes, etc)—with victim protection, within an integrated yet ‘specific’ ad hoc system. This system of course should be designed in close and careful coordination with already existing legal instruments in relevant fields (environment, food safety, product safety, safety in the workplace etc). Innovative responses to corporate violent offenses, including reparation measures and other types of redress and compensation, would have to be drafted, taking into account, on one hand, the particular features of corporate crimes and of corporate victimisation and, on the other, the promising experience of ‘responsive regulation’ and restorative justice (Ayres and Braithwaite 1992; Braithwaite 2002).⁵⁹ The role of Member States in preventing corporate violence and their obligations in setting up the proper measures to avoid victimisation and the violations of fundamental rights in the first place, and to protect victims from ongoing risks and repeat victimisation, could also be addressed. This issue still requires thorough analysis and further study in order to better address its exact legal basis. Yet, provisionally, a combined reading of the TFEU provisions may offer some hints towards a possible path in the harmonisation of the rights of victims of criminal offences falling under the criminological and victimological notion of corporate violence.

The political and social implications of these issues, and especially of the final questions we have raised, are great. The issues are thorny

⁵⁹ Restorative justice seems to offer a practical response capable, to some extent, of reconciling the corporation’s legitimate perspective and interests with the needs and rights of corporate victims. The trend towards restorative approaches may prove crucial for victims who need to be effectively protected from repeat or new victimisation, or relieved from their feelings of dissatisfaction: imagine, for example, the importance of remediation activities carried out voluntarily by a corporation at the end of a restorative justice programme that involves the victims and the community in the decision-making process. Restorative justice’s potential in cases of corporate crime and corporate violence is still largely unexplored, although some foreign experiences have proven to be extremely promising (eg, the US and Canadian experiences of restorative justice in the environmental field).

On this challenging topic, see in this volume chapter nine, by Ivo Aersten.

The various guidelines for professionals and corporations designed within this project (available online at www.victimsandcorporations.eu) generally devote a chapter to the implementation of restorative justice in cases of corporate violence.

and controversial. There are pros and cons. Fundamental rights of European citizens and the interests of corporations in the EU are involved. The constitutional and European legal basis for such actions need to be carefully assessed. We leave these very delicate questions open, awaiting the further discussion which will hopefully be stimulated by the findings stemming from the empirical research and other outputs connected to this project.

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CHAPTER II

THE ROLE OF VICTIMS OF CORPORATE VIOLENCE WITHIN CRIMINAL PROCEEDINGS: CURRENT STATUS AND FUTURE PERSPECTIVES *by Enrico Maria Mancuso **

CONTENTS: 1. Victims of Corporate Violence and the Directive 2012/29/EU. – 2. The Right to Receive Information and Assistance. – 3. The Right to Interpretation and Translation. – 4. Corporate Violence Victims and Their Participation in Criminal Proceedings: The Right to Be Heard. – 4.1. Rights in the Event of a Decision Not to Prosecute. – 4.2. The Right to Seek Compensation. – 4.3. The Participatory Rights of Cross-Border Victims. – 5. The Right to Protection. – 5.1. The Specific Protection Needs of Corporate Violence Victims.

1. Victims of Corporate Violence and the Directive 2012/29/EU

The Directive 2012/29/EU aims to establish minimum standards on the rights, support, and protection of victims of crime, regardless of their nationality and the place in which the crime was committed, additionally with a view to consolidating victims' procedural rights.

Moreover, in establishing the right of victims to protection, the Directive pays special attention to victims of specific crimes, including terrorism, organised crime, human trafficking, violence in a close relationship, sexual violence, exploitation, or hate crimes (art 22).¹

The framework is completed by directives specifically addressing distinct categories of victims, such as the Directive 2011/36/EU on trafficking in human beings and the Directive 2011/92/EU on combating sexual abuse and child sexual exploitation, as well as the recent Directive (EU) 2017/541 on combating terrorism.

* Bartolomeo Romanelli, PhD student, contributed to the bibliographical research.

¹ See chapter one in this volume.

In this domain, there is no specific provision aimed at addressing the victims of financial crimes, which the European legislature appears to have forgotten in its attempt at harmonisation (Allegrezza 2012: 14).²

In outlining the procedural rights for victims of corporate violence, a dual-level analysis appears necessary. On the one hand, it is necessary to acknowledge the procedural rights granted to all victims of crime. In this regard, one must bear in mind the discretionary margins attributed to national legislatures in implementing the Directive, which, in line with the approach taken by the former Framework Decision 2001/220 JHA (art 9),³ did not grant victims legal status as a party to criminal proceedings (recital 20).

On the other hand, the provisions of the Directive put into place to protect victims ‘with specific protection needs’ require analysis in order to confirm whether victims of corporate violence actually fall under this group.

2. The Right to Receive Information and Assistance

Pursuant to art 3, in terms of the victims’ basic right to understand and be understood, the Directive sets out the information to be provided to the victim by the competent authorities upon the first contact with the latter (art 4).

The obligation to inform must be fulfilled prior to the victim filing a formal complaint. This means that the investigating authority must engage with a proactive approach: specifically, upon notification of a crime, it must proceed to identify the potential victims.⁴

This obligation could be particularly cumbersome regarding corporate violence crimes, which more often than not consist in widespread offences: this is the case for environmental disasters that affect whole communities, or crimes committed in the healthcare and

² See chapters one and three in this volume.

³ Council Framework Decision 2001/220 JHA, of 15 March 2001, on the standings of victims in criminal proceedings, at www.eur-lex.europa.eu, last accessed on 17 July 2017.

⁴ European Commission, DG Justice Guidance Document related to the transposition and implementation of the 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, at www.e-justice.europa.eu, p 14, last accessed on 17 July 2017.

food sectors in which whole consumer categories can appear to be potential victims.⁵ In such cases, the investigating authority may well refer back to any formal complaint already on the record, in order to identify any other individual in the same situation.

In providing the required information, the competent authority must adopt a personalised approach (Bargis and Belluta 2017: 29), taking into account both the victims' specific needs and the nature of the crime (art 4, para 2).

It is therefore necessary to tailor this information to the specific needs of corporate violence victims. Cases of corporate violence often share characteristics that are particularly complex from a scientific and legal standpoint (take, for instance, the assessment of damages concerning environmental crimes): for this reason, precise, detailed, and comprehensible information concerning the available judicial and extrajudicial remedies available and their likelihood of success must be provided (Visconti 2017: 47).⁶

The means for providing information must also be adapted according to the nature of the crime: due to the widespread damage inflicted by corporate violence crimes, online publications may be used in order to reach the maximum possible number of victims.

Further information must be provided during proceedings where necessary or appropriate: as determined by the European Commission, the updating of information must not be confused with the discovery obligation regarding the criminal investigation, which continues to be regulated by national legislation.⁷

Falling under the required information is 'the type of support they can obtain and from whom, including, where relevant, information about access to medical support, any specialist support, including psychological support, and alternative accommodation' (art 4, para 1, lett a).

The European legislature hence requires the investigating authority to channel the victim through support services (Bargis and Belluta 2017: 30). This is based on the knowledge that those services, in addition to aiming to achieve social solidarity, can incentivise the victim to collaborate with the State authorities and therefore increase their desire to report the crime immediately (Sechi 2017: 1246).⁸

⁵ See chapter six in this volume.

⁶ See chapter seven in this volume.

⁷ DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 15.

⁸ See chapter eight in this volume.

This information is also necessary in criminal proceedings against corporate violence. One can think of cases in which victims have suffered damage to health as a result of a crime, including suffering from potentially stigmatised illnesses (for example contracted from blood transfusions); or even of cases in which victims must abandon their place of work or residence as a consequence of contamination by toxic substances (Visconti 2017: 39).

The provision set out in art 4 (para 1, lett a) must therefore be understood in the context of arts 8 and 9 on the access of victims to support services.

On this matter, the Directive distinguishes between general support services and specialist support services.

The former must provide information, advice, and support concerning the victims' rights and their role in criminal proceedings; emotional and psychological support; advice relating to the practical and financial issues arising from the crime; advice regarding the risk of repeat and secondary victimisation, intimidation, and retaliation (art 9, para 1).

Conversely, specialist support services are to provide shelter or temporary alternative accommodation to victims in need of a safe place due to the risk of repeat or secondary victimisation, as well as supporting victims with specific needs, including victims of sexual violence or violence in a close relationship (art 9, para 3).

Accordingly, when providing the information set out in art 4 (para 1, lett a), victims of corporate violence must be directed predominantly towards general support services. However, in some cases information concerning specialist support services may still be necessary, such as in the abovementioned case of environmental pollution, in which the victims find themselves compelled to abandon their place of residence.

The obligation to inform victims is provided for in art 6 of the Directive, titled 'Right to receive information about their case'. The extent of the information provided to them, however, is widely left to the discretion of the national legislature when transposing the Directive into national law.

The European legislature confers on victims, irrespective of their role in national criminal justice systems, the right to obtain, upon request, information about any decision not to prosecute the offender, as well as the date and place of the trial and the nature of the charges against the offender (art 6, para 1). Conversely, the information provided for in art 6, para 2 is adapted according to the victims' role in national criminal justice systems: that is, the right to be informed about

the possibility of receiving a copy of the final judgment, as well as the right to be informed about the state of the criminal proceedings.

Of particular interest is the provision set out in art 6, para 5 of the Directive, according to which:

Member States shall ensure that victims are offered the opportunity to be notified, without unnecessary delay, when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention. Furthermore, Member States shall ensure that victims are informed of any relevant measures issued for their protection in case of release or escape of the offender.

Pursuant to art 6, para 6, Member States must ensure that such information is provided to victims, upon the latter so requesting, ‘at least in cases where there is a danger or an identified risk of harm to them, unless there is an identified risk of harm to the offender which would result from the notification’. The scope of an identified risk of harm is defined in recital 32, according to which:

The reference to ‘identified risk of harm to the victims’ should cover such factors as the nature and severity of the crime and the risk of retaliation. Therefore, it should not be applied to those situations where minor offences were committed and thus where there is only a slight risk of harm to the victim.

The Directive thus adopts a characteristic approach which does not limit itself solely to the type of crime, but values above all the personal situation of victims, from which the true risk of retaliation can be determined. In this light, notification of the offender’s escape or release could also prove necessary in corporate violence proceedings where victims, having filed a complaint, could be exposed to the risk of retaliation.

In the framework of the Directive, this notification does not seem to involve victims in any release procedures or in reviewing restrictive precautionary measures; nor does it grant the right to appeal a decision to release the offender. Nevertheless, the Directive leaves the implementation of the minimum procedural standards to the Member States, which, at their discretion, may establish these rights.⁹

⁹ DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 19.

3. The Right to Interpretation and Translation

The Directive 2012/29/EU—in line with the provisions under the defendant established by the Directive 2010/64/EU—dedicates ample space to providing victims with linguistic assistance, which is seen as a prerequisite for effective participation in criminal proceedings (Lupária 2014: 99).

This topic is particularly important for transnational victims—that is, victims of crimes taking place in a State that is different to the State for which they hold citizenship. Community law began paying attention to these victims some time ago,¹⁰ on the assumption that effective protection for them hinges on principles of non-discrimination and free movement of people (Venturoli 2015: 121).

In relation to this point, one should bear in mind that certain corporate violence cases might harm individuals who hold citizenship in a different State to where the trial takes place. This refers not only to victimisation cases where the free movement of people is a factor, but also to cases of environmental disasters, which are potentially capable of spreading harmful effects that go beyond the boundaries of the State in which they occurred.

The protection of victims who do not understand or speak the language of the competent authority is guaranteed right from the beginning of the criminal proceedings. The Directive 2012/29/EU grants victims the right to file a complaint in a language that they understand or to receive the necessary linguistic assistance (art 5, para 2), as well as the right to receive a translation, free of charge, of written acknowledgement of their complaint (art 5, para 3). The linguistic assistance provided for in art 5, para 2 does not need to be supplied through an interpreter: the use of an individual capable of providing a translation is to be considered sufficient—for example, a friend or relative of the victim—even if this individual does not hold any interpretation qualification.¹¹

The right to interpretation and translation set out in art 7, in contrast, remains somewhat more formal, calling for an interpreter to provide assistance.

More specifically, it provides for assistance, free of charge, during

¹⁰ ECJ, Case C-186/87 *Ian William Cowan v Tesor Public* [1989]. See also Council Directive 2004/80/EC of 20 April 2004 relating to compensation to crime victims, in www.eur-lex.eu, last accessed on 17 July 2017.

¹¹ DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 17.

victim questioning or interviews, as well as when actively participating in hearings (art 7, para 1). Moreover, art 7, para 3 provides for the translation of all information essential for participating in the proceedings, free of charge, including at least any decision ending the criminal proceedings and, upon request, a summary of reasons. In any case, the right to interpretation varies according to the role of the victims within national criminal justice systems.

The need for linguistic assistance is assessed by the competent authorities (art 7, para 7). Therefore, contrary to what is set out in art 2, para 4 of the Directive 2010/64/EU, there exists no need for the Member States to put into place procedures and mechanisms to cover interpretation and translation needs.

The victims' ability to challenge a decision not to provide interpretation or translation is determined by procedural rules of national law.

Conversely—and contrary to that provided for the defendant under arts 2 and 3 of the Directive 2010/64/EU—victims may not file an appeal on grounds of the quality of the service provided.¹² This limitation, most likely inspired by the failure of numerous States to lend adequate linguistic assistance (Sechi 2017: 1244–45), negatively affects the effectiveness of the right to interpretation and translation (Bargis and Belluta 2017: 41).

The European legislature appears to be aware of the circumstance that in criminal proceedings concerning a large number of victims—as often occurs in cases of corporate violence—the complete protection of the right to interpretation and translation impacts the duration of the proceedings. With a view to finding an equilibrium between the protection of the victims' right and the duration of the trial, art 7, para 8 of the Directive specifies that '[i]nterpretation and translation and any consideration of a challenge of a decision not to provide interpretation or translation under this article shall not unreasonably prolong the criminal proceedings'.

As specified in recital 36, the use of a rare language by victims should not, in itself, be grounds to believe that interpretation or translation might unreasonably prolong the criminal proceedings. In addition to this clarification, finding an equilibrium between the right to interpretation and translation and the reasonable duration of the trial appears to be left essentially to the national legislature.

¹² DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 21.

4. Corporate Violence Victims and Their Participation in Criminal Proceedings: The Right to Be Heard

The third chapter of the Directive, dedicated to victims' participation in criminal proceedings, comprises: the right of victims to be heard (art 10); the right to request a review of a decision not to prosecute (art 11); the right to safeguards in the context of restorative justice services (art 12); the right to legal aid (art 13) and to reimbursement of expenses (art 14); the right to return of property (art 15); the right to a decision on compensation from the offender in the course of criminal proceedings (art 16); and the rights of victims resident in another Member State (art 17).

Moreover, analysis of the relevant provisions highlights the peculiar approach taken by the European legislature in the field in question when compared to topics concerning the right of victims to be informed: upon a comparative analysis with the latter, one notes a conscious self-restraint in the domain of participatory rights (Catalano 2015: 194).

Art 10, para 1 of the Directive asserts that 'Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence [...]'. Corporate violence crimes share certain features, including, for example, frequent scientific uncertainty concerning the assessment of damages, or the fact that the crime is the result of negligence or punished as a misdemeanour. Because of these features, victims often complain that they are denied such status, either by the corporation that committed the crime or by the general public (Visconti 2017: 37). In this context, victims of corporate violence view criminal proceedings as the only means by which to assert their truth, bring it into the public eye, and seek redress for the damages suffered. Thus, it is from here that the importance of granting the victims the possibility of making their voice heard during criminal proceedings stems.¹³

Furthermore, art 10, para 2 of the Directive leaves it to national law to determine the procedural rules under which victims can be heard in criminal proceedings and provide evidence. Hence, the need arises to establish whether the Directive imposes a minimum standard on national law regarding the victims' right to be heard during criminal proceedings.

In this respect, the previous Framework Decision 2001/220/JHA remains relevant.

¹³ See again chapter seven in this volume.

In the noteworthy case of *György Katz v István Roland Sós*,¹⁴ the Court of Justice differentiated the significance of art 3, para 1 of the Framework Decision from the identical content of current art 10, para 1. In this specific case, the provisions of the Framework Decision were invoked by the victim, the proponent of an action for a substitute private prosecution granted by the Hungarian legislature, to affirm the right to be heard as a witness during the trial. On this matter, the Court of Justice specified that:

the Framework Decision, while requiring Member States, first, to ensure that victims enjoy a high level of protection and have a real and appropriate role in their criminal legal system and, second, to recognise victims' rights and legitimate interests and ensure that they can be heard and supply evidence, leaves to the national authorities a large measure of discretion with regard to the specific means by which they implement those objectives.

However, in order not to deprive the first paragraph of Article 3 of the Framework Decision of much of its practical effect or to infringe the obligations stated in Article 2(1) of the Framework Decision, those provisions imply, in any event, that the victim is to be able to give testimony in the course of the criminal proceedings which can be taken into account as evidence.

Based on the above, a minimum standard for victims as a source of evidence can be affirmed: victims must be granted the right, and necessarily so, to personally make a statement of evidential value before the court, or even through alternative means of testimony (Catalano 2015: 188).

Moreover, recital 41 of the Directive, in part, seems to lower this minimum standard of protection, given that the right of victims to be heard is satisfied upon being permitted to provide a statement orally, or even in written form.

In any case, Member States are still entitled to develop the right of victims to be heard, such as, for example, in determining the right to request that their statements be recorded, or regulating victim impact statements (a statement relating to the impact the crime has had on a victim's life, which is taken into consideration during sentencing).¹⁵

Furthermore, it should be noted that this ability applies to the right

¹⁴ ECJ, Case C-404/07 *György Katz v István Roland Sós* [2008].

¹⁵ DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 29.

of victims to give evidence and have this taken into account. The Directive, however, does not refer to the victims' right to otherwise contribute to the reconstruction of facts by presenting evidence to the investigating authorities,¹⁶ or requesting to submit evidence (oral, technical, or documentary) to the court appointed for the hearing. The granting of these rights, inevitably connected to the role of victims within each Member State, remains at the latter's discretion.

4.1. Rights in the Event of a Decision Not to Prosecute

The European legislature—despite not recognising the right of victims to institute a private prosecution¹⁷—acknowledges their right to request the review of a decision not to prosecute (art 11).

This provision, innovative compared to the Framework Decision 2001/220 JHA, is connected to the informative rights set out under art 6, para 1, lett (a) of the Directive, according to which, upon request, the victim has the right to be informed of any decision not to prosecute.

Furthermore, the right under art 11 of the Directive appears to be set out in somewhat sheepish terms.

On the one hand, pursuant to recital 43, this right refers to the decisions adopted by law enforcement authorities, by prosecutors, or by the investigating judges, while it does not refer to those decisions handed down by the courts. This limitation appears hard to understand, since the alleged impartiality of the judge represents insufficient grounds on which to negate the right to a review (Bargis and Belluta 2017: 52).

On the other hand, procedural rules for reviews are not regulated (Sechi 2017: 1250), with the exception that the review must be carried out by a different person or authority to the one that made the original decision, unless the highest prosecuting authority is already concerned (art 11, para 4).

Above all, the right to request a review is reserved for victims holding a formal role in their national criminal justice system. The provision set out in art 11, para 2, being the only exception thereof, states the following:

Where, in accordance with national law, the role of the victim in the

¹⁶ See art 90, para 1 of the Italian Criminal Procedure Code.

¹⁷ ECJ, Case C-404/07 *György Katz v István Roland Sós* [2008].

relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

Moreover, it should be noted that the criteria to determine the severity of the crime appear to be, at best, blurred: not even the recommendations provided by the European Commission contribute towards defining their boundaries, according to which the concept of severity should be inferred from European legislation in criminal law and from the existing standards in international criminal justice.¹⁸

The breadth of this category seems to further justify the application of this right also to specific cases that are traceable to the notion of corporate violence, where more often than not the impact is upon the lives and health of victims. One can think, for instance, of atypical environmental disasters, contamination from infected blood-derivative drugs, or the commercialisation of teratogenic drugs.

In this light, it seems reasonable to grant victims the right to a review of a decision not to prosecute, in cases in which the victims' national criminal justice system assigns their role after a decision to prosecute.

4.2. The Right to Seek Compensation

As far as victims of corporate violence are concerned, art 16, on the right to a decision on compensation from the offender in the course of criminal proceedings, stands out from the other participatory rights considered in the Directive.¹⁹ Member States are granted the power to decide whether a decision on compensation is to be made in other legal proceedings, above all in civil proceedings. The Directive, therefore, does not impose civil prosecution mechanisms on criminal matters, which remain at the discretion of the Member States.

The provisions cover compensation from the offender and not the potential award of compensation from the State,²⁰ which is in fact

¹⁸ DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 30.

¹⁹ See in this volume chapter seven, by Stefania Giavazzi.

²⁰ DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 36.

regulated by the Directive 2004/80/EC, relating to compensation for victims of violent international crimes in cross-border situations. However, the Directive 2004/80/EC does not cover the entire spectrum of corporate violence crimes, despite referring to international offences.

In the Directive's overall design, the right to compensation is coupled with an adequate set of informative safeguards (Bargis and Belluta 2017: 43). More specifically, pursuant to art 4, para 1, lett (e), the investigating authority, upon first contact with victims, must inform them of how and under what conditions they may access compensation. Similar information is provided by victim support services, under art 9, para 1, lett (a).

Damages from corporate violence tend to be either physical, psychological, or financial. Significant physical damages can also include death and severe forms of illness, psychological damage, and emotional trauma, which can derive from a single traumatic event, for example a disaster, or from stress arising due to physical detriment or financial hardship. Finally, financial damages can consist of any sustained medical expenses, loss of work, deterioration in one's capacity to work, or the necessity to change residence (Visconti 2017: 26–27). The situation is often compounded by the financial dependence of the victim upon the corporation responsible for the crime.

In this scenario, particular attention must be paid to the impact of art 16, para 1, according to which compensation must be granted within a reasonable time: prompt compensation can in fact facilitate victim recovery.

Corporate violence victims often meet with difficulty in obtaining compensation from the corporation, just as much in non-judicial as in judicial proceedings, because of a disparity in resources and the degree of legal assistance between the victims and the company.

With a view to levelling the playing field, the Directive—in line with the provisions set out in art 9, para 2 of the Framework Decision 2001/220/JHA—requires the Member States to lay down measures to encourage the offender to provide adequate compensation to victims.

The somewhat vague concept of 'encouragement' is partially integrated from the recommendations provided by the European Commission: more specifically, Member States could infer that compensation is considered a favourable element for the offender, in sentencing, in obtaining judgment on merit, and in requesting early release.

In terms of corporate violence crimes, further encouragement

measures may be adopted specifically regarding the liability of legal persons for illegal activities: in this sense, Italian legislation is symbolic in that it excludes debarment sanctions²¹ and reduces the financial penalties²² to be borne by the corporation, following the provision of compensation and reparation for the crime's dangerous and damaging consequences.

Furthermore, the introduction of restorative justice proceedings, with respect to the safeguards adopted in art 12 of the Directive, may well encourage the offender to reach an agreement regarding compensation.

4.3. The Participatory Rights of Cross-Border Victims

As previously highlighted, the European legislature pays special attention to the status of cross-border victims, that is, victims who are resident in a Member State other than that where the criminal offence was committed, a situation common in corporate violence cases.

In general, pursuant to recital 10 of the Directive, the rights recognised therein may by no means be dependent upon the residency, citizenship, or nationality of victims.

More specific safeguards are adopted regarding the participation of cross-border victims in criminal proceedings. Recital 49, relating to the right to compensation, expressly establishes that cross-border victims may not be denied this right. Elsewhere, art 17 illustrates a range of safeguards that are intended as a prerequisite for the effective participation of cross-border victims in criminal proceedings.

The article provides for an obligation on the competent authorities to adopt measures to minimise the difficulties faced due to the cross-border victim status. In addition, it provides that victims may file a complaint in their Member State of residence, where they may not have been able—or, in the case of a serious offence, wanted—to file such a complaint in the Member State where the criminal offence was committed (art 17, para 2). The additional obligation to promptly transmit the complaint to the State in which the criminal offence was committed also falls on the Member State, according to the existing legal instruments of cross-border judicial co-operation, or even via a

²¹ Arts 17, 31 (para 2), 65, and 78 of d lgs 8 June 2001 n 231.

²² Art 12 of d lgs 231/2001.

less formal route.²³ This is so unless the Member State in which the complaint was filed has exercised the competence to institute the proceedings.

The Directive also provides for the gathering of evidence from cross-border victims immediately after the registration of a complaint. To guarantee, in every case, the right of the accused to confront the accuser (Bargis and Belluta 2017: 54), the European legislature calls upon the use of video- and teleconferencing, which are considered the appropriate means for taking a statement from the cross-border victim. Reference must be made, in this regard, to the Convention of 29 May 2000, relating to Mutual Assistance in Criminal Matters between the Member States of the European Union.²⁴

5. The Right to Protection

The right to protection appears central to the Directive, which, in chapter 4, makes a clear distinction between general protective measures, to be granted to all victims, and special measures for those victims with specific protection needs (Sechi 2017: 1252). As regards the general measures, art 18 states:

Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members.

The Directive provides for the protection of victims from repeat and secondary victimisation, as well as intimidation and retaliation, above all in the form of the right to avoid contact with the offender within the premises where the criminal proceedings are conducted, unless the criminal proceedings require such contact (art 19, para 1).

²³ DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, pp 38–39.

²⁴ Council Act of 29 May 2000 establishing in accordance with art 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of European Union, in www.eur-lex.europa.eu (last accessed on 3 October 2017).

For this purpose, Member States must ensure that new court premises have separate waiting areas for victims (art 19, para 2). The provision of separate waiting areas, limiting the amount of physical contact between the offender and the victim, is indeed sufficient in providing the latter with a sense of security. At the same time, this reduces the effects of secondary victimisation and the risk of repeat victimisation or intimidation in the run up to giving testimony.²⁵

The Directive, in line with the recommendations already provided by the European Court of Justice,²⁶ looks at taking a statement from all victims at an early stage, regardless of the type of offence, and exhibits a tendency to keep victim interviews to a minimum during investigations.

More specifically, under art 20 of the Directive:

Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations:

- (a) interviews of victims are conducted without unjustified delay after the complaint with regard to a criminal offence has been made to the competent authority;
- (b) the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;
- (c) victims may be accompanied by their legal representative and a person of their choice, unless a reasoned decision has been made to the contrary;
- (d) medical examinations are kept to a minimum and are carried out only where strictly necessary for the purposes of the criminal proceedings.

Finally, art 21 of the Directive imposes the adoption of suitable measures to protect the private lives of victims.

The European legislature thus demonstrates awareness that the public diffusion of information concerning the private lives of victims risks increasing exposure to secondary victimisation (Delvecchio 2017: 108–109; Iermano 2013: 146), notably in cases that gain media attention. This poses a risk from which victims of corporate violence are not immune: for instance, cases of environmental disasters or damages from healthcare covered by the media, from which prejudices

²⁵ DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, pp 40–41.

²⁶ ECJ, Case C-105/03 *Pupino* [2005].

can arise regarding the victims' most intimate spheres, particularly their health.

In the approach taken by the Directive, the protection of privacy must also be graded in relation to the precise needs of victims, and especially in relation to the results of the individual assessment carried out as to the existence of any specific protection needs (Savy 2013: 96).

Alongside the protection guaranteed to all victims of crime, the Directive imposes the obligation on Member States, as set out in art 25 of the Directive, to train judges, prosecutors, and lawyers so that, in coming into contact with victims, they can adopt an approach that respects victims' needs. Moreover, the training must be both general and specialised: it must concern particular types of victim, including those of corporate violence. Regarding the latter, the legal professionals involved must be trained to recognise general and specific protection needs, as well as to know how to effectively put into place the individual assessment described in art 22 of the Directive.

5.1. The Specific Protection Needs of Corporate Violence Victims

Art 22 of the Directive, titled 'Individual assessment of victims to identify specific protection needs', represents a change in the approach adopted by the previous framework decision 2001/220 JHA. Specifically, in the framework decision itself, the intention was to abandon the notion of 'particular vulnerability' (art 2, para 2), which referred to macro-categories of victims determined by the type of crime or subjective characteristics. Such an approach risked leaving victims unprotected who, despite failing to fall under a distinct category, still clearly had specific protection needs due to the particularity of the case (Petralia 2012: 41).

Conversely, the Directive provides for an assessment of all victims in order to identify any vulnerability (Venturoli 2015: 100).²⁷ Vulnerability must not be understood as an abstract category, but rather as a direct link (Gialuz 2012: 62; Sechi 2017: 18), regarding a risk—of secondary victimisation, of repeat victimisation, of intimidation or retaliation—which, from time to time, enters into play.

The assessment follows mixed criteria, both situational and personal: art 22, para 2 of the Directive invites the assessment to

²⁷ See also chapter one and chapter six in this volume.

consider the victims' personal characteristics, the type and nature of the crime, and its circumstances. These criteria are fluid, allowing adequate coverage of the varying vulnerability profiles of corporate violence victims.

Regarding personal characteristics, it must also be kept in mind that victims of corporate violence can find themselves in inferior or financially dependent positions compared to the corporation responsible for the crime, or find themselves suffering on account of the crime from severely debilitating illnesses. Regarding the type of crime, it has already been highlighted that corporate violence cases are capable of producing severe impacts on the lives and health of entire communities, with a potential risk of secondary or repeat victimisation. For instance, it is impossible for victims to abandon a place of residence contaminated by pollution or pathogens due to the crime.

Finally, as far as the circumstances of the crime are concerned, these often consist in a disproportion of resources in favour of the corporation, a cross-border nature, and widespread victimisation (Visconti 2017: 27).

The Directive takes care to provide indications which, since they only represent one exemplary condition of particular vulnerability (Bargis and Belluta 2017: 60), must be taken carefully into consideration when individually assessing the victim; more specifically, according to art 22, para 3:

In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.

This list clearly refers to offences that are consistently different to those of corporate violence. Having said that, some of the abovementioned circumstances could still arise in the context of corporate violence—for example, the prerequisites for 'considerable harm due to the severity of the crime' or of the 'relationship to and dependence on the offender', where this is essentially understood as financial dependency or dependency due to employment. Another example could be that mentioned above, of victims suffering from a

disability due to the marketing of pharmaceutical products with pathogenic effects.

The special protective measures are listed in art 23, paras 2 and 3 of the Directive, dealing with the investigation and hearing phases respectively.

Regarding the investigation phase, art 23, para 2 sets out that:

The following measures shall be available during criminal investigations to victims with specific protection needs identified in accordance with Article 22(1):

- (a) interviews with the victim being carried out in premises designed or adapted for that purpose;
- (b) interviews with the victim being carried out by or through professionals trained for that purpose;
- (c) all interviews with the victim being conducted by the same persons unless this is contrary to the good administration of justice;
- (d) all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.

The measures set out in letters (a), (b), and (c) seem to be aimed at reducing the risk of secondary victimisation, concerning the stress arising from interviews: their adoption, in corporate violence criminal proceedings, appears to stem from an appreciation for the vulnerabilities of the victim deriving from the crime.

Regarding the hearing phase, on the other hand, art 23, para 3 sets out that:

The following measures shall be available for victims with specific protection needs identified in accordance with Article 22(1) during court proceedings:

- (a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;
- (b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;
- (c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and
- (d) measures allowing a hearing to take place without the presence of the public.

The measures referred to in letters (a) and (b) appear to have the aim of preventing secondary victimisation by reducing the impact of

interviews and protecting against repeat victimisation, intimidation, and retaliation.

Conversely, the measures referred to in letters (c) and (d) make specific reference to the protection of the privacy of victims. In terms of corporate violence, the application of these measures can prove useful where the crime may have inflicted severe consequences on the victims' health, with a potential degree of stigmatisation. One example is the contraction of diseases from infected blood-derivative drugs, or the marketing of teratogenic drugs. In these cases, laying down restrictions on questions concerning the private lives of victims and conducting hearings behind closed doors can ensure that their needs are adequately met, with positive consequences in terms of preventing secondary victimisation.

It should also be noted that the Directive does not dictate the procedural means by which to assess the protection needs of victims: similarly, the selection procedure and the adoption procedure of special protective measures have not been provided for (Sechi 2017: 19; Simonato 2014: 110). Such procedures, therefore, continue to fall within the scope of the discretion of Member States in implementing the Directive.

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CHAPTER III

CORPORATE VICTIMS IN EUROPEAN UNION LAW: THE ‘SOUND OF SILENCE’

*by Stefano Manacorda and Irene Gasparini **

CONTENTS: 1. Introductory Remarks: Environment, Food, and Medical Devices as Fields of Analysis. – 2. The EU Legislation and the Missing Corporate Victim. – 3. Safeguarding Victims’ Fundamental Interests: The Protection of Human Life and Health. – 4. Framing Individuals’ and Legal Entities’ Liability for Corporate Misconduct. – 5. The Role of Criminal Law in Tackling Corporate Misconduct. – 6. The Risk-Based Approach and the Precautionary Principle. – 7. Concluding Remarks: The ‘Sound of Silence’.

1. Introductory Remarks: Environment, Food, and Medical Devices as Fields of Analysis

Directive 2012/29/EU (‘the Victims Directive’)¹ represents an unprecedented benchmark for the protection of rights of victims of crime at the EU level. It was drafted in order to establish minimum standards on victims’ rights across the European Union, in pursuance of the objectives of increasing the protection of vulnerable individuals within the criminal proceedings, and enhancing mutual trust among judicial organs. As to the first aspect, the provisions enshrined in the Directive aim at guaranteeing assistance, support, protection from repeated and secondary victimisation, information, and right to participation in criminal proceedings to individuals who have fallen

* Sections 1 and 5–7 were drafted by Stefano Manacorda, while sections 2–4 were drafted by Irene Gasparini.

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.

victim of a crime.² In particular, a number of provisions specifically address the protection needs of victims who are particularly ‘vulnerable’,³ therein including victims of specific offences such as ‘terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation and hate crime’, as well as disabled victims. As the Commission stressed in its 2011 Communication on strengthening victims’ rights, ‘without effective EU-wide application of a minimum level of rights for victims, mutual trust is not possible. [...] [T]he EU must ensure that victims benefit from a level playing field’.⁴

From a broader point of view, legal scholars have analysed in depth the concern of EU institutions for the status of the victim of crime, giving rise to a wide variety of positions (Lupária 2015). In general, while a certain number of commentators emphasise the need for a stronger consideration of individuals directly or indirectly affected by criminal offences, considering them too long neglected within the criminal justice system, others have raised sceptical concerns (Forti 2000; Venturoli 2015). Among the elements that this critical position has highlighted, the shift towards a victim-centred approach in criminal procedure and criminal law is worth mentioning, as it would threaten the traditional guarantees for the defendant and, more broadly, strengthen the retributive function of criminal sanctions (Hassemer 1990; Garland 2001; Tonry 2010).⁵ Although we are surely more sympathetic to the latter approach, this chapter will not directly address the complex issues of whether the EU should pay closer attention to the rights and needs of the victim in general.

On the contrary, the present analysis is specifically devoted to the position that the ‘corporate victim’—or the victim of corporate violations—currently holds within the EU legislation. In particular, the research proves particularly relevant in relation to three sectors that in

² See European Commission, DG Justice Guidance Document related to the transposition and implementation of 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, 2013 (online at http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf, last accessed on 29 October 2017). See also chapters one and two in this volume.

³ Art 22 of the Victims Directive.

⁴ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, and the Committee of the Regions *Strengthening Victims’ Rights in the EU* (COM (2011) 274 final).

⁵ See chapter one in this volume.

recent years have witnessed severe impacts from corporate misconduct on vulnerable individuals and communities: the protection of the environment, the safety of food, and the safety of medical devices.

As a first element, the study focuses on the *absence of a special status dedicated to corporate victims*, both within the Victims Directive and the EU sectoral legislations (section 2). Despite this ‘silence’, several elements demonstrate that the EU legislature pays a certain attention to corporate victims, thereby giving rise to a complex and fragmentary picture. First, the EU is significantly concerned with certain *fundamental human interests* affected by corporate misconduct (section 3). Having identified the ‘protected interests’, the chapter then moves into examining specifically the *types of protection* to which those interests are currently entitled under EU law in the three sectoral fields of environmental protection, food, and medical device safety. It specifically inquires into the applicable regimes of liability for corporate infringements, by focusing, in particular, on the role of criminal law (sections 4 and 5).

It then explores the *degree of protection* that human life and health benefit from in those liability schemes, looking specifically at the risk-based approach and the precautionary principle, which shape the regulation of all three sectors (section 6).

Finally, before entering into the analysis, some elements are worth highlighting that, although not specifically addressed in this chapter, should be kept in mind as they significantly contribute to defining the legal framework concerning corporate victims at the European level. On the one hand, *human rights law*, which can be directly breached by the criminal conduct of corporate actors, plays an important role in defining the protected status of the victim.⁶ Particularly in relation to corporate crime, the recent case law of the European Court of Human Rights in relation to (collective) environmental crimes clearly shows how the dimensions of criminal law and human rights law are strictly interconnected and how the latter is increasingly expanding (Vozza 2017). On the other hand, there is intense debate among scholars concerning the extent and modalities of *public participation in decisions* that potentially affect human health.⁷ Entailing public

⁶ See chapter four in this volume.

⁷ See, for instance, in relation to public consultation for projects with a potential environmental impact, the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment; and the Directive 2014/52/EU of the

consultation and information, this instrument involves a broader, participative, dimension of (potential) victims' protection, which, with specific relation to *environmental matters*, is strictly connected with the well-known 1998 UNECE Århus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters.

2. The EU Legislation and the Missing Corporate Victim

Despite their special vulnerability and particular needs, individuals who have suffered from corporate crime and corporate violence⁸ do not benefit from an ad hoc protective framework under EU law.

The absence of an express concern for the corporate victim in the three selected EU legal frameworks emerges clearly when analysing two dimensions.

On one side, in the Victims Directive, the general—and so far most important—EU legal document on victim protection, no mention is made specifically of victims of *corporate crime*.⁹ Significantly, among the categories of offences whose victims demand particular protection from secondary or repeat victimisation,¹⁰ the Directive does not include illicit behaviours related to corporations.

On the other side, Victims Directive's concern for the victims of crime (their vulnerability, needs, and rights)¹¹ is not mirrored in the EU regulation on corporate infringements within the three sectors that this research focuses on: environmental protection, food safety, and medical device safety. This is partially due to the fact that two out of the three selected fields—food and medical device safety—do not expressly provide for criminal offences, which rules out the applicability of a strict notion of corporate victim as 'victim of corporate crime'. However, even in the only field (out of the three) where criminal offences exist—environmental protection—the notion

European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. See also, with specific reference to public consultation and information of the public in relation to Genetically Modified Organisms (GMO), the Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms.

⁸ On the concept of 'corporate violence' and the needs of victims of corporate misconduct, see chapter six in this volume.

⁹ See, eg, chapter one in this volume.

¹⁰ Recital 57 of the Victims Directive.

¹¹ See chapter six in this volume.

of ‘victim’ appears to be completely absent, demonstrating, from the outset, the scarce attention of the EU lawmakers to the criminological category of ‘victim of corporate crime and corporate violence’.

In other words, while the general Directive guarantees protection to vulnerable victims of crime without this specifically encompassing a corporate victim, the three law frameworks that deal with some of the most ‘violent’ infringements of the legal order perpetrated by corporations do not seem to consider the victim of crime at all.

Numerous hypotheses can be offered as to the reasons for such a lacuna within the EU legal framework in relation to corporate victims, especially where infringements take the form of criminal offences.

As an explanation of the silent attitude, it could be argued that it is the product of a negligent omission on the part of oblivious EU criminal lawmakers. At first glance, such an explanation could seem reasonable and acceptable, given the criticism that has arisen in relation to EU criminal policy. As a matter of fact, in recent years, EU criminal lawmakers have attracted numerous severe criticisms, stressing the need for a greater consideration of basic principles of criminal law and questioning the preponderance of rather symbolic and functionalistic approaches to criminal offences (Faure 2004). Notably, it has been observed that the EU influence on criminal policy, enhanced by the Treaty of Lisbon, risks ending up misusing criminal law as a mere tool to promote the objectives of the Treaty and in particular their economic dimension (Satzger 2012). Such a ‘Durkheimian turn’ is, in fact, encouraged by those commentators who underscore the potential of criminal sanctions to express certain judgements of disapproval and strengthen the common (moral) values and strategic purposes of the Union (Nuotio 2005; Elholm and Colson 2016). In other words, with the aim of promoting mutual trust among Member States, the creation of social consensus through criminalisation would be ‘part of a larger project to give political identity to the EU’ (Elholm and Colson 2016: 58; Sotis 2007). After all, it is the Commission itself that recognises, in its 2004 Green Paper on the approximation, mutual recognition, and enforcement of criminal sanction in the EU, that the ‘symbolic message’ put out by common offences and penalties ‘would help to give the general public a shared sense of justice’.¹² Accordingly, the ‘silent attitude’ of the EU

¹² European Commission *Green Paper on the approximation, mutual recognition, and enforcement of criminal sanctions in the European Union* (COM(2004)334 final) p 9.

legislation in relation to corporate victims, whose vulnerabilities and needs have been almost entirely unaddressed, could raise similar concerns. Following such an approach, the European lawmakers could be criticised for having ‘forgotten’ to establish minimum requirements for the protection of this particular category of vulnerable individuals.

That said, one might wonder whether such a lacuna follows a quite cognisant logic. In other words, the question arises as to whether this represents a deliberate choice by EU legislators, who wish to leave the complex issue of corporate victims outside the scope of the Directive. As a matter of fact, neither scholars nor Member States have yet reached a clear and widespread consensus on whether and to what extent a role for corporate victims should be acknowledged (especially in criminal law), due to the complexity as well as the recent nature of the issues at stake. In other words, the ‘silence’ of the EU legislation is not necessarily to be met with criticism, as it could be representative of a (beneficial) moderate approach deliberately chosen by the European institutions in a time where the status of corporate victims still appears to be uncertain.

This paper wishes to contribute to the debate by clarifying a certain number of crucial issues that arise from the legal analysis of the three chosen sectors under a victim-focused lens. In particular, beside the lack of a dedicated status for corporate victims, the initial assumption that the latter are not entitled to any consideration within the EU legal framework should, in fact, be nuanced. To this end, however, a brief methodological excursion is needed. Although the Victims Directive already adopts an extensive definition of ‘victim of *crime*’¹³, in order to encompass in the present analysis areas of EU law that do not include criminal provisions, the present chapter further stretches the boundaries of the notion of ‘corporate victim’ so as to

¹³ For the purposes of the Victims Directive, art 2(1)(a) includes in the definition of ‘victim’ ‘a natural person who has suffered harm, including physical, mental, or emotional harm or economic loss which was directly caused by a criminal offence’, as well as ‘family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person’s death’. In this case, ‘harm’ suffered by family members should be interpreted ‘in the context of the individual emotional relationship and/or direct material inter-dependence between the deceased victim and the relative(s) concerned’ (see DG Justice Guidance Document, p 10). Recital 19 further specifies that ‘[a] person should be considered to be a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them’.

include therein victims of corporate violations regardless of their specific (civil, administrative, or criminal) branch of regulation.

3. Safeguarding Victims' Fundamental Interests: The Protection of Human Life and Health

As has been mentioned, a blanket analysis of the EU legal framework on environmental protection, as well as the safety of food and medical products, shows that the victim of corporate violations is not expressly entitled, in these three sectors, to an ad hoc protective status.

On a closer look, however, the same legal documents, though not expressly framing them as a 'victim', still provide a significant safeguard to any human being who is actually (by harm) or potentially (by risk) affected by corporate misconduct. They regulate the actual or potential impact of illicit corporate acts on certain human 'protected values', regarded at times in their individual dimension (individual life and health), and at other times in their collective one (public health). In other words, notwithstanding the absence of a formal status for the corporate victim in those three specific sectors, human interests are still deemed to deserve, under EU law, a 'high level of protection' against corporate illicit acts.

With specific reference to environmental law, it is widely recognised today that EU law embraces a wide notion of the environment, which also encompasses human beings. According to the latest Environment Action Programme,¹⁴ the safeguarding of 'health and quality of life' stands among the four priority areas of the environmental strategy of the Union. It is a strategy that is attuned with art 191(1) TFEU, which states that the Union policy on environment aims at the protection, *inter alia*, of human health.

The two notions—environment and health—are so closely intertwined across EU secondary legislation that EU environmental law is divided between an 'ecocentric' and an 'anthropocentric' approach. In fact, it has been noted that, in the landscape of EU legal strategies, the safeguarding of human health benefits from much less attention than the environment tout court, and is in a sense 'parasitic'

¹⁴ Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'.

on environmental regulation (Thieffry 2015). However, health issues appear to significantly ‘reinforce’ environmental regulation as, by engaging human protected values, the EU lawmaker thereby precludes the ‘relaxation of safety requirements’ (De Sadeleer 2014: 38). At times, the two notions are coupled in provisions that aim at guaranteeing a ‘high level of protection of the environment and human health’. Other times the ‘human factor’ is encapsulated in the notion of environment or ‘environmental damage’ itself, which in certain legal documents is outlined in such a way that it encompasses the negative impact on human health as well. Suffice to recall, on this point, that the 2004/35/EC Environmental Liability Directive (the ‘ELD’), with specific regard to soil pollution, comprises in the definition of ‘land damage’ any land contamination that creates a significant risk that human health is adversely affected by the contamination of land with certain substances.¹⁵

Accordingly, numerous legal documents in EU environmental law nowadays expressly regulate the potential or actual adverse effects of corporate activity on human life and health. One of the most significant legal documents is undoubtedly the 2008/99/EC Directive (examined in detail in section 5), in which significant references can be found—both in the preamble and the text—to the ‘anthropocentric’ environmental perspective, in addition to the ‘ecocentric’ one. Without attempting an exhaustive recollection here, it is worth mentioning the numerous legal tools that address (though not necessarily with criminal law) the adverse effects on human health of the production and use of chemicals;¹⁶ the illicit treatment, use, management, and shipment of hazardous waste produced by all sorts of industrial activities;¹⁷ ‘environmental noise’ caused inter alia by air traffic and industrial activity;¹⁸ the anthropogenic discharge of certain dangerous substances into the

¹⁵ Art 2(1)(c) of the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

¹⁶ See, eg, Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the registration, evaluation, authorisation, and restriction of chemicals (REACH), establishing a European Chemicals Agency.

¹⁷ See, eg, Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste (‘Waste Framework Directive’); Regulation (EC) 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

¹⁸ See, eg, Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise.

aquatic environment;¹⁹ and emissions of atmospheric pollutants.²⁰ Concerns for human health are also widely present in the mentioned ELD on environmental liability, which, acknowledging the numerous polluted sites that present serious risks for human health, expressly recognises the threat to human health caused by dangerous professional activities.²¹

Similarly, EU secondary legislation on food and medical device safety aims to guarantee *inter alia* a ‘high level of protection of human health’ and life. The recent Regulation 2017/745 on medical devices specifically imposes obligations on manufacturers in order to protect the life and health of patients and users, and describes as a ‘serious incident’ caused by a defective device the death of a patient, the serious deterioration of a patient’s state of health, or a serious public health threat.²² Similarly, the Regulation 2017/746 on *in vitro* diagnostic medical devices describes a ‘serious adverse event’, caused by a defective device, as death or serious deterioration in the health of the patient.²³ On a parallel path stands also the recent Regulation 2017/625 on food safety, which aims at guaranteeing a high level of protection of human health, by ensuring that the food placed on the market is not unfit for consumption, contaminated, or in any way injurious to health.²⁴

These tools are in line with the broader framework of principles in the TFEU, which sets the standard at a high level of protection for human health in numerous provisions that deal specifically with the quality and safety of medicinal products and devices for medical use, as well as consumer protection (art 114(3) and art 169(1)). Similarly,

¹⁹ See, eg, Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

²⁰ See, eg, Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants.

²¹ Recitals 8–9 of the ELD.

²² Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices.

²³ Regulation (EU) 2017/746 of the European Parliament and of the Council of 5 April 2017 on *in vitro* diagnostic medical devices.

²⁴ Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health, and plant protection products. See also Regulation (EC) 853/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs.

the EU Charter of Fundamental Rights provides for the right to life and physical integrity (arts 2 and 3) and for a high level of consumer protection in all Union policies (art 38).

The examination of the numerous legal documents in the field of environmental protection as well as food and medical device safety, does not merely demonstrate the substantial concern of EU lawmakers for certain human protected values: it also attests, in a couple of rare passages, a peculiar attention to the ‘vulnerability’ of those individuals or communities that are potentially or actually affected by corporate activity.

This is the case, for instance, for Regulation (EC) 1907/2006 on the production and use of chemicals (‘REACH Regulation’), which aims at guaranteeing a high level of protection for human health, having regard to ‘relevant human population groups and possibly to certain vulnerable sub-populations’.²⁵

Another significant example is Regulation (EC) 1107/2009 on plant protection products, aimed at preventing such products or their residues having immediate or delayed harmful effects on human health.²⁶ The Regulation stresses that special attention should be paid to the protection of ‘vulnerable groups’ of the population,²⁷ meaning ‘persons needing specific consideration when assessing the acute and chronic health effects of plant protection products. These include pregnant and nursing women, the unborn, infants and children, the elderly and workers and residents subject to high pesticide exposure over the long term’.²⁸ The same reference to ‘vulnerable groups’, with an almost identical definition, is contained also in Framework Regulation 528/2012 on biocidal products, which aims at providing a high level of protection for human health by preventing and reducing risks deriving from such products.²⁹

Overall, the examination of the framework allows us to elaborate two significant first findings.

First, despite the lack of an express reference to the criminological

²⁵ Recital 69 of the REACH Regulation.

²⁶ Arts 4(2)(a) and 4(3)(b) of Regulation (EC) 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products.

²⁷ Recital 8 of the Regulation on plant protection products.

²⁸ Art 3(14) of the Regulation on plant protection products.

²⁹ Recital 3 and art 1(1) of Regulation (EU) 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products.

specificities of corporate victims—both in the 2012 Victims Directive and in the environmental, food, and medical device legal frameworks—the recurring attention to the safeguarding of human life and health in the examined EU legal frameworks proves the existence of an ‘intensified’ concern toward human beings affected by corporate misconduct. In particular, the attention to categories of ‘vulnerable’ individuals, although fragmented and partial, carries a significant potential for the three examined sectors to further elaborate on the notion and protection of a corporate victim.

Second, although not specifically encompassing the notion of ‘victim’, all the examined legal documents have a potential impact on national criminal justice systems and their application of EU law. Namely, they could potentially serve as significant references in light of the obligation of domestic jurisdictions to interpret national law in conformity with EU law. The fact that a similar path was followed by the Court of Justice of the European Union in the *Pupino* case in relation to the status of the victim within Italian criminal proceedings could further reinforce this hypothesis.³⁰ Nevertheless, it should be kept in mind that the recourse to EU law by the criminal judge with the deliberate purpose of strengthening the position of the victims can further hinder the already delicate balance with the rights of the accused and the principle of *nullum crimen sine lege* (Fletcher 2005; Sgubbi and Manes 2007).

4. Framing Individuals’ and Legal Entities’ Liability for Corporate Misconduct

Despite the lack of a specific notion of ‘corporate victim’ at the EU level, it has been demonstrated so far that the fundamental interests of individuals and communities affected by illicit corporate acts benefit from a ‘high level’ of protection in the EU legal frameworks on environment, food, and medical devices. The question arises, then, as to what *types of responses* exist, under EU law, to curb the phenomenon of gross corporate violations and thereby indirectly protect those fundamental human interests. The present section, therefore, examines the schemes of liability adopted in EU sectoral laws on environmental protection, food, and medical devices, embracing, under a wide notion of ‘corporate liability’, the liability

³⁰ ECJ, Case C-105/03 *Pupino* [2005].

of both the *legal entities* and the *natural persons* who operate in the context of and in the interest of the corporation.³¹

At first glance, across the EU legislation in all three examined fields, a recurring provision shapes the contours of legal entities' liability for potential or actual violations of human life and health, and in a rather flexible manner. The provision requires Member States to address corporate non-compliance with the required standards via an appropriate framework of 'effective, proportionate and dissuasive penalties', thereby leaving the discretion on the type of applicable law (administrative, civil, or criminal) entirely to the Member State.

The Court of Justice and the associated literature have greatly contributed to the clarification of such notions of 'effectiveness', 'dissuasiveness', and 'proportionality'. With particular reference to criminal law and the environment (Faure 2010; Faure 2011), *effectiveness* has been described as suitability to reach the goals imposed by the legislature (ie a high level of protection of human health), as well as restoration of the harm done and prevention of future harm. *Dissuasiveness* would refer to Becker's deterrence notion and the economic theory of crime. And *proportionality* relates to the balance between the seriousness of the infringement and the fundamental interests at stake on one side, and, on the other, the magnitude of the penalty which must not exceed what is necessary to achieve the said goals.³²

In addition to this general provision, recurring in all three fields of environmental protection, food and medical device safety, there are legal documents whereby the liability scheme for legal entities' violations is more narrowly identified.

The most recurring one is a regime of *administrative* or *civil liability*, which, in a strict victim-focused perspective, sets out a preponderantly remedial and compensatory apparatus.

A significant reference in this sense is the mentioned Environmental Liability Directive (2004/35/EC), which establishes a scheme of environmental liability based on the polluter-pays principle with the aim of preventing and remedying environmental damage. The

³¹ See, for instance, the notion of 'manufacturer' adopted by the Regulation (EU) 2017/745 on medical devices, which includes both the 'natural or legal person' who manufactures, refurbishes, or markets a device (art 2(30)).

³² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law* (COM(2011) 573 final) p 9.

Directive creates a ‘double’ civil liability regime: on the one hand, a form of strict liability for professional operators engaging in activities that are able to cause a risk to human health and the environment (Annex III). On the other hand, a less rigorous form of culpable responsibility is provided for other entities (not included in Annex III), which perform activities that are not intrinsically dangerous and that cause, with fault or negligence, environmental damage to protected species and natural habitats. In the light of victim protection, however, it is important to point out that the ELD does *not* apply to *individual* harm such as personal injury or—even more so—death, nor to damage to private property or economic loss.³³ This aspect is somewhat surprising, given the extensive emphasis placed by the Directive on the impact of risky corporate activities on human health; in fact, this omission has been criticised in the literature as ‘devoiding’ victims of environmental damage of their very nature (Thieffry 2015). However, the ELD has put in place a significant array of (primary, complementary, and compensatory)³⁴ measures to ensure the remedy of environmental damage, which—it is worth mentioning—qualifies as ‘significant’ if it entails ‘adverse effects on human health’.³⁵

On the contrary, liability for *individual* harm to human protected interests is specifically addressed in the EU laws on food and medical devices, which fall within the scope of application of the EU general regulation on defective products. The ‘high level of protection of consumers’ from defective products is a strategic goal in EU policy: one that is strictly intertwined with the protection of human health in the Treaty (art 169 TFEU) and that shapes food and health policies thoroughly. Accordingly, in addition to the prescription of ‘effective, dissuasive, and proportionate penalties’, the EU legislation on food products and medical devices³⁶ contains express references to the Directive 85/374/EEC on liability for defective products,³⁷ thereby

³³ Art 3(3) and Recital 14 of the ELD.

³⁴ Art 6 of the ELD.

³⁵ Annex I to the ELD.

³⁶ See, eg, Regulation (EC) 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority, and laying down procedures in matters of food safety (General Food Law); see also the Regulation (EU) 2017/745 on medical devices.

³⁷ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (‘Product Liability Directive’). See also the Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on

triggering the general regime of civil liability without fault for those who produce and place on the market unsafe products. An effective example of this synergy between general product safety regulation and sectoral EU law is provided by the recent 2017 Regulation on medical devices, which prescribes that ‘the manufacturer shall, in a manner that is proportionate to the risk class, type of device and the size of the enterprise, have measures in place to provide sufficient financial coverage in respect of their potential liability under Directive 85/374/EEC’ in order to guarantee compensation to the victim.³⁸ Through this reference, since potential damages paid to users of defective devices represent increasing costs for the enterprise, the Directive on product liability pushes corporations to ‘internalize’ (Rihtar 2013: 223) the potential future compensation of damages, ie potential victims. As to food safety, it is worth recalling that in 1999 liability of manufacturers for defective products was extended specifically to agricultural products.³⁹

Keeping in mind the protection of the fundamental interests of life and health, it should be noted that the Directive on liability for defective products takes specifically into account the liability (and obligations of compensation) for manufacturers and importers of those defective products that have caused (also) ‘death and personal injury’. As the Green Paper on product liability clarifies, the Directive aims at achieving a balance: protecting victims’ needs while avoiding a ‘crushing liability’ (Faure 2000) on the enterprise,⁴⁰ namely by requiring the victim to prove the defect, the damage, and the causal nexus between the two,⁴¹ as well as limiting in time and quantity the possibility of compensation.⁴²

general product safety (‘General Product Safety Directive’), whose perimeter of application, however, does not interfere with that of the Directive 85/374 (art 17).

³⁸ Art 10 of the Regulation (EU) 2017/745 on medical devices.

³⁹ Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products.

⁴⁰ European Commission *Green paper: Liability for defective products* (COM(1999)396 final) pp 2, 18–19.

⁴¹ See art 4 of the Product Liability Directive. Although the burden of proof of the defect, the damage, and the causal nexus between the two is on the victim, the producers can be exempt from liability if they prove that they did not circulate the product; or the defect was due to compliance with mandatory regulations issued by public authorities; or the state of scientific and technical knowledge at that time did not allow the detection of the defect (art 7).

⁴² Arts 10, 11, and 17 of the Product liability Directive. See also ECJ, Case C-154/00 *Commission v Greece* [2002], where the Court expressly recognised that the

5. The Role of Criminal Law in Tackling Corporate Misconduct

As has been mentioned above, out of the three sectoral legal frameworks that are examined in this study, a specific regime of *criminal liability* applies only to the field of environmental protection; the laws on food and medical device safety do not yet comprise any express criminal provision. Although reduced to environmental law only, the use of EU criminal law to curb illicit corporate acts deserves particular attention as it calls directly into question the criminological notion of ‘victim’, although presenting certain problematic theoretical issues.

The ‘turn’ toward criminal sanctions in EU environmental law has been urged by the stated insufficiency of existing (civil and administrative) penalties to achieve environmental compliance, as well as the need to strengthen deterrence and demonstrate qualitatively stronger social disapproval compared to non-criminal sanctions.

The issue of the EU competence in (environmental) criminal law between the first and third pillar, as well as in the post-Lisbon era, has been widely addressed in the literature (Vervaele 2014; Mitsilegas, Bergström, and Konstadinides 2016). The ‘saga’ of the annulled 2003 Council Framework Decision on the protection of the environment through criminal law⁴³ is well known, and the landmark judgment of the Court of Justice in the case C-176/03⁴⁴ opened the way for EU law makers to oblige the adoption of ‘effective, proportionate and dissuasive *criminal* penalties’ as a tool to combat serious environmental offences. Yet, whether this tool represents an effective path to curb harmful or dangerous corporate activities for vulnerable individuals is still to be proved.

The most significant references for environmental protection at the EU level at present are the 2008/99/EC Directive on the protection of the environment through criminal law (or the ‘Directive on environmental crime’),⁴⁵ and the 2009/123/EC Directive on ship-

limits to the scope of the Directive ‘are the result of a complex balancing of different interests’, which include ‘guaranteeing that competition will not be distorted, facilitating trade within the common market, consumer protection and ensuring the sound administration of justice’, at 29.

⁴³ See former Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law.

⁴⁴ ECJ, Case C-176/03 *Commission of the European Communities v Council of the European Union* [2005].

⁴⁵ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

source pollution and on the introduction of penalties for infringements (amending the 2005/35/EC Directive).⁴⁶

From a victim-focused perspective, the 2008 Directive on environmental crime targets, under art 3, any activity that *inter alia* ‘causes or is likely to cause death or serious injury to any person’. Therefore, the actual harm (‘causes’) or endangerment (‘likely to cause’) to human life and health is here clearly targeted through the description of the criminal event (death and injury). However, it is worth noting that, contrary to the 1998 Council of Europe Convention on the protection of the environment through criminal law (not yet entered into force)—where impact on human health aggravates liability⁴⁷—the Directive does not distinguish damage to the environment from damage to human life and health on a statutory basis.

Observing closely the liability scheme designed by the Directive, legal entities are held liable if, according to art 6(1)

the offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, based on: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person.

The liability regime for the legal person applies also where the offence has been made possible by the lack of supervision or control by such person (art 6(2)).

In order to amount to a criminal offence, under art 3 the activity must be unlawful, ie in breach of the EU environmental legislation listed in Annex A (comprising a number of regulatory measures on eg pollution; discharge of materials or ionising radiations into air, soil, or water; collection, transport, recovery, and disposal of waste; dangerous activities or storage/usage of dangerous substances in the operation of a plant), or of the Euratom Treaty or legislation adopted in its pursuance. Alternatively, the conduct must infringe upon a law, an administrative regulation, or a decision of a Member State that gives

⁴⁶ Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

⁴⁷ Art 2(1) of the 1998 Council of Europe Convention on the protection of the environment through criminal law.

effect to the mentioned Community legislation. From a subjective point of view, the Directive requires that the individual conduct was committed with intent or at least serious negligence, thereby positively detaching the responsibility scheme from mere strict liability.

However, considering the long-persisting dependence of environmental criminal law on environmental administrative law (Faure 2016), such an ‘open reference’ technique as used by art 2 to describe the unlawful content of the conduct still raises concerns in light of the fundamental principle of legality. This aspect, as well as the recourse to vague notions (eg ‘negligible quantities’ or ‘dangerous activities’) has been specifically addressed by the Manifesto on European Criminal Policy, proposed by the European Criminal Policy Initiative,⁴⁸ as well as some commentators who have demanded stricter coherence with fundamental principles of criminal law (Faure 2011; Satzger 2012).

As to penalties, it should be highlighted that the Directive adopts a double standard as to the nature of sanctions that apply to natural and legal persons. The former must be expressly punished by Member States through effective, dissuasive, and proportionate *criminal* penalties (art 6), whereas the effective, dissuasive, and proportionate penalties for legal persons need not necessarily be of criminal nature (art 7). Therefore, the text partially differs from the one of the 1998 Convention on environmental crime, which expressly refers to ‘criminal or administrative sanctions on legal persons’ as effective tools to prevent environmental crime.⁴⁹ The adopted solution clearly reflects a compromise between the different legal cultures of Member States across the EU in relation to the liability regime for corporations (Fiorella and Stile 2012; Manacorda 2016).⁵⁰ However, the Directive still frames those unlawful corporate conducts as ‘criminal offences’ and stresses that environmental compliance should be strengthened

⁴⁸ ‘A Manifesto on European Criminal Policy’ was first published in 2009 (and later adapted in 2011) in seven languages in *Zeitschrift für Internationale Strafrechtsdogmatik* (www.zis-online.it) by criminal law scholars from ten different European countries in order to propose a ‘balanced and coherent concept of criminal policy’ in light of certain fundamental principles.

⁴⁹ Preamble and art 9 of the Convention on the protection of the environment through criminal law.

⁵⁰ In its preparatory documents to the Directive on environmental crime, the Commission expressly recognised that ‘for some Member States it might be difficult to provide for criminal sanctions against legal persons without changing fundamental principles of their national legal systems’. See the Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law (COM(2001)139 final) at 3 (c).

through criminal penalties as they ‘demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law’.⁵¹

On the same line, the only other reference in the EU environmental criminal framework, the 2009 Directive on ship-source pollution, criminalises as infringements under art 4 the discharge of polluting substances (ie oil and noxious liquid) ‘if committed with intent, recklessly or by serious negligence’. It is interesting to note that the Directive initially required Member States to adopt ‘effective, dissuasive and proportionate penalties’ to address the liable natural or legal person, expressly including ‘administrative’ or ‘criminal’ ones, whose content (length of imprisonment and amount of fine) was specified by the mentioned annulled Framework Decision. However, the amending Directive in 2009 has reshaped the sanctioning scheme according to the same double standard mentioned above, reserving criminal penalties for natural persons only. The liability scheme for legal persons exactly reproduces the one in the 2008 Directive on environmental crime. However, compared to the latter, the concerns for fundamental human interests in this second legal tool are extremely scarce, and the only reference to ‘human health’ is found in Annex II to the original 2005 Directive in the description of the polluting substances.

Overall, the examined framework certainly proves that environmental protection represents a crucial sector in today’s EU criminal policy. However, the issue arises as to whether the specific features of this criminal law tool are suitable to provide for effective protection of victims’ needs.

In proclaiming a ‘EU criminal policy by 2020’, the 2011 Communication of the Commission recalled that EU criminal law measures should be firmly grounded in EU-wide standards for victims’ rights, in line with the EU Charter of Fundamental Rights.⁵² It further stated that EU *criminal* legislation can add important value to the domestic criminal law systems and foster the confidence of citizens to buy goods and services from providers by adopting minimum standards *inter alia* for victims of crime.⁵³ It could hence be argued

⁵¹ Recital 3 of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

⁵² COM(2011) 573 final, p 12.

⁵³ COM(2011) 573 final, p 5.

that shaping infringements as criminal offences demonstrates stronger attention from the EU lawmakers to the most fundamental values of vulnerable individuals. However, it could also be argued that, where a criminal liability regime for corporations does not specifically take into account the rights and needs of victims, criminalisation risks remaining nothing but a void formula.

Overall, looking at the broader picture, while the highlighted elements reveal designs in EU criminal policy to stigmatise corporate misconduct through criminal offences and (potentially criminal) penalties, it clearly appears that corporate criminal liability has not been structured at the EU level in order to protect victims of corporations. Not expressly required in the food and medical device sectors,⁵⁴ it relies in the field of environmental protection on a restricted number of provisions, some of which present problematic features.

And what is more, even where criminalisation of corporate conduct is the preferred choice of national lawmakers, effective restoration for the victims is often left to civil justice, as shown in the decision issued by the Court of Justice of the European Union in the *Giovanardi* case.⁵⁵ Indeed, the array of solutions and remedial schemes available to the victim of corporate violations, examined in section 4, includes important alternatives to criminal law, which should be examined and weighed carefully as potentially more impactful on the interests of victims of corporate misconduct.

6. The Risk-based Approach and the Precautionary Principle

Having laid out the *types* of liability provided by the EU legal framework with regards to curbing corporate misconduct, it is now worth examining the *degree* of protection that fundamental human interests enjoy under such liability schemes. At root, the EU strategy for tackling corporate violations is predominantly *risk-centred*: fundamental interests such as human life and health are protected from illicit corporate acts as early as the stage of being exposed to risk.

⁵⁴ It should be observed, however, that, despite not expressly framing provisions in terms of *criminal* offences, the EU laws and the CJEU grant Member States a wide margin of appreciation to criminalise corporate misconduct in the fields of food (Simonato 2016) and medical device safety, as emerges from a recent comparative report on (criminal) food regulation across national jurisdictions (Nieto Martín 2016).

⁵⁵ ECJ, Case C-79/11 *Giovanardi* [2011].

Under such an approach, which is adopted across the EU legal frameworks on environmental protection as well as on food and medical device safety, it is precisely the creation of a (certain or uncertain) ‘risk’ that triggers liability and remedial measures.

As a matter of fact, numerous legal tools on environmental protection (eg waste management, use of chemicals), food (biocides, pesticides, GMOs), and medical device safety expressly aim at ‘preventing’, ‘minimising’, or ‘reducing’ the likelihood of an ‘unacceptable risk’ to human health or the ‘endangerment’ of human health.⁵⁶

With reference to food safety, the General Food Law, Regulation (EC) 178/2002, specifically states that food law is aimed at the reduction, elimination, or avoidance of a risk to health, which is defined as a function of the probability of an adverse health effect and the severity of that effect, consequential to a hazard.⁵⁷ As a consequence, the determination of effective, proportionate, and targeted measures or other actions to protect health is based on risk analysis (risk assessment, risk management, and risk communication).⁵⁸

Similarly, with regard to the safety of medicinal products, under Directive 2001/83/EC ‘risk’ is ‘any risk relating to the quality, safety, or efficacy of the medicinal product as regards patients’ health or public health’ (art 1(28)). It entails, for instance, that an application to obtain the marketing authorisation for a medicinal product should contain a risk-management system aimed at identifying, characterising, preventing, or minimising risks related to medicinal products (art 8 and art 1(28)(b)).

Things get more complicated, however, where the risk-based policy needs to cope with *uncertain* risks to human life and health. The increasing complexity and rapid evolution of technology (eg in a highly technical field like medicine), as well as the increasing

⁵⁶ See, eg, the numerous references in the preambles and texts of the mentioned REACH Regulation; Regulation on shipment of waste; Waste Framework Directive; Regulation (EU) 2017/625 on official controls and other official activities performed to ensure the application of food and feed law; Regulation (EU) 2017/745 on medical devices; Regulation (EU) 2017/746 on in vitro diagnostic medical devices. See, also, the regulation on genetically modified organisms (GMO), which represents one of the most significant examples of risk-regulation in EU law: Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms.

⁵⁷ Art 3 of General Food Law.

⁵⁸ Recital 17 of General Food Law.

awareness of the effects of certain substances (eg used in industrial activities and possibly contaminating the environment or foodstuffs), trigger the application of the precautionary principle.

The latter was expressly established initially under art 191 TFEU in the EU policy on environment only, although today it has been extended to the regulation of food⁵⁹ and medical devices. It is widely known that the principle allows the establishment of liability for risks, despite scientific uncertainty about the potential harmful effects of certain products. In fact, according to the Communication on the precautionary principle adopted by the Commission in 2000, the precautionary principle ‘may be invoked when a phenomenon, product or process may have a dangerous effect, identified by a scientific and objective evaluation, if this evaluation does not allow the risk to be determined with sufficient certainty’.⁶⁰

The principle is strictly connected with product liability, although it is in relation to criminal liability that the principle of precaution shows its most problematic traits.

With specific reference to criminal law, it consists in a ‘preventive action’ (Macrory 2014; D’Ambrosio, Giudicelli-Delage, and Manacorda 2018 forthcoming), whereby the threshold at which a conduct amounts to an offence is set at the level of mere creation of an uncertain risk, before the occurrence of a prejudice. The implications and perils of the precautionary principle in EU criminal law have been widely addressed in the literature, which has shed light on the ‘dilemma’ of the EU legislature in setting the delicate balance between the freedom of persons and organisations involved in economic activities on the one hand, and the risk of negative effects on human life and health on the other (Macrory 2014).

As a first remark, it should be recalled that the EU legal texts do not contain any obligation for domestic jurisdictions to have recourse to such a precautionary approach in assessing the criminal liability of individuals or corporations. Even so, the principle has generated intense debate, both at the jurisprudential and scholarly level.

While precaution can prove a fruitful component of civil and administrative liability schemes for potentially harmful industrial activities, the attribution of criminal liability on the basis of a mere

⁵⁹ The General Food Law introduced the precautionary principle as a fundamental principle of EU food policy under art 7(1).

⁶⁰ Communication from the Commission on the Precautionary Principle (COM (2000)1 final).

uncertain risk demands careful examination in the light of fundamental principles of criminal liability.

In particular, the question arises as to *whether* the mandate of criminal law to attribute individual culpability retrospectively can be deemed compatible with the ‘protection of future generations’ (Castronuovo 2010). In fact, the precautionary principle is conceptualised as a tool to guarantee future generations against uncertain technological risks by adopting a diachronic perspective (Castronuovo 2010).

Under a strict criminal law perspective, then, the criminalisation of behaviour on the basis of its uncertain future effects appears problematically to lower the threshold of the offence even beyond abstract endangerment and, consequently, to *expand* criminal liability in a manner that calls into question the fundamental criminal law principles of legality, *extrema ratio*, and culpability. However, at a *normative* level, provided that proportionality is carefully assessed, a restricted scope for precautionary criminalisation should not be excluded, namely in case of misdemeanours related to the breach of threshold limit values conventionally established for the exercise of potentially dangerous activities.

On the contrary, what should be avoided is the application of the precautionary principle not by the (criminal) legislator but by the (criminal) judge, ie at the level of *assessment* of criminal liability. As a matter of fact, especially in national legal systems where the assessment of the causality nexus is based on the *condicio sine qua non* rule, the most problematic issue lies in the possible use of the principle as a substitute for causation in ascertaining the link between the conduct and the harmful result (D’Ambrosio, Giudicelli-Delage, and Manacorda 2018 forthcoming).

Overall, despite the criticisms—mainly connected to its use in criminal law—the precautionary principle could, at first glance, represent a significant protective tool for potential and future victims. However, the *direct* impact it can offer to corporate victims seems to be significantly limited, and coherent with the fact that provisions on environmental protection, food, and medical device safety were *not* originally designed to protect victims.

7. Concluding Remarks: ‘The Sound of Silence’

This research stemmed from a challenging premise: that the EU is *silent* on victims of corporate crime. However, the examination of the

sectoral legal frameworks on environmental protection, food, and medical device safety under a victim-focused perspective has allowed the emergence of a much more complex, diversified, and fragmented picture.

To extend our metaphor, we may say that there is not complete silence here. There is indeed a sound, and it is the product of the potentialities as well as the limitations that shape the safeguards for victims of corporate misconduct.

On one side, it has progressively been demonstrated that contemporary EU law is characterised by an intensified attention toward the fundamental interests of vulnerable individuals affected by corporate misconduct. Although only partially triggering the application of criminal law, the EU laws on environment, food, and medical devices provide victims of corporate violations with a significant protective framework, shaped by the different liability schemes for both legal and natural persons. While criminal law in these fields remains residual and often highly problematic, the remedial and compensatory solutions offered by the regulations on environmental damage and defective (food and medical) products seem, on the contrary, to offer significant tools for victims of corporations.

On the other side, the analysis has shed light on the existing limits of protection for victims of corporations. Mainly rooted in EU criminal law, they are identifiable *inter alia* in the perils of unbalancing criminal justice in favour of the victim, and applying the precautionary principle as a substitute for causality and as an interpretative criterion in the assessment of criminal liability. Given the unrelenting tension between protecting vulnerable victims and preserving the integrity of fundamental principles, the absence of *ad hoc* criminal liability for corporate violations appears, perhaps, to indicate the enduring restraint of EU lawmakers before barriers that, once removed, would irreversibly extend the boundaries of criminal liability.

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CHAPTER IV

VICTIMS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

by Marc Engelhart

CONTENTS: 1. Introduction. – 2. Victims and Human Rights. – 3. Victim's Rights under the ECHR. – 3.1 Positive Obligations and Horizontal Effect. – 3.2. Protection under the Specific Rights. – 3.2.1. Art 2 - Right to Life. – 3.2.2. Art 3 - Prohibition of Torture et al. – 3.2.3. Art 4 - Prohibition of Slavery and Forced Labour. – 3.2.4. Art 6 - Fair Trial. – 3.2.5. – Art 8 - Right to Respect for Private and Family Life. – 3.2.6. Arts 10, 11 - Freedom of Expression, Freedom of Assembly and Association. – 3.2.7. Art 13 - Effective Remedy. – 3.3. Conclusion. – 4. Convention Rights and the Directive 2012/29/EU. – 5. Future Perspectives.

1. Introduction

This chapter explores the protection of victims of crime under the European Convention on Human Rights (ECHR; see Gialuz 2015; Emmerson, Ashworth, and Macdonald 2012: 785). In recent decades, the situation of victims of crime has increasingly been a focus of attention in European and international law. The ECHR, which is wide-ranging in application and is backed up by the European Court of Human Rights (ECtHR), plays a major role in recognising victims' needs and developing human rights law accordingly. In what follows, we set out the general relationship between human rights and victims of crime (section 2), before turning to an analysis of the ECHR with its legal machinery of positive obligations (section 3.1) and specific rights (section 3.2). After comparing the Convention rights with the Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime (section 4), the contribution concludes with some thoughts on the further development of victims' rights (section 5).

The ECHR is not the only relevant instrument in regard to victims of crime: the Council of Europe took up the subject in the 1970s, and

in 1983 drew up the European Convention on the compensation of victims of violent crimes (Greer 1996; Muller-Rappard 1990).¹ This was one of the first binding international instruments that tried to set minimum standards for victims. The treaty was ratified by 26 countries and is still in force, although many of its regulations have been succeeded or amended by EU legislation.² The Council of Europe has not set up another general treaty on victims since 1983, but has rather concentrated on specific crimes and in this context included provisions for the protection of victims.³ Additionally, the Committee of Ministers has issued various recommendations on assistance to crime victims.⁴

2. Victims and Human Rights

Victims and human rights is a topic that cannot claim to have a long history, and on the international level it has received attention only in the last two decades (Bassiouni 2006; Klug 2004).⁵ Hence, criminal law and the position of victims of crimes has developed separately from human rights law. It is hardly surprising, therefore, that the distinction between victims of crime and victims of human rights violations is not clear cut (Wemmers 2012; see also Cavanaugh 2016: 11). The term ‘victims of crime’ primarily refers to the fact of a person being directly affected by a crime (as defined by national laws). In contrast, human rights violations focus on the State neglecting its national (often constitutional) and international obligations to protect certain basic values.⁶

Thus the class of victims of crime is not coextensive with the class

¹ European Convention on the Compensation of Victims of Violent Crimes, 24 November 1983, CETS n 116 (entered into force on 1 February 1988).

² Eg Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings; Dir 2004/80/EC of 29 April 2004 relating to compensation to crime victims; Dir 2012/29/EU 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.

³ Eg the Convention on the Prevention of Terrorism (CETS n 196, 2005) and the Convention on Action against Trafficking in Human Beings (CETS n 197, 2005).

⁴ Council of Europe, Recommendation Rec(2006)8 of the Committee of Ministers to Member States on assistance to crime victims, adopted on 14 June 2006 with further references to previous recommendations.

⁵ See also chapter five in this volume.

⁶ See also chapter one in this volume.

of victims of a violation of the ECHR, although victims of crime can receive the status of victim of a violation of the provisions of the ECHR where State authorities fail to discharge their obligations under the Convention relating to the effective protection and prosecution of criminal acts.

The term ‘victim of crime’ is not mentioned and ipso facto not defined in the ECHR. A commonly accepted definition (Dijk 2005; Cavanaugh 2016: 8) stems from the 1985 UN Declaration on basic principles of justice for victims of crime and abuse of power, where victims are defined as

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.⁷

In what follows, based on this broad definition which covers a wide range of (potential) victims, the ECHR and its approach to victims will be analysed in more detail.

Human rights law has taken up the subject of victims of crime at a rather late stage of its development, as it has very much concentrated on the rights of the defendant in the context of criminal justice. This is a result of legal developments during the European Enlightenment, when the victim of crime received the status of main witness (among all available evidence) in order to guarantee objectivity and impartiality in the proceedings (Weigend 1989: 86). Victims therefore had a very limited role in the criminal justice system.

Integrating victims into proceedings on the level of national and international (especially European Union) law (Groenhuijsen 2013) is a newer development in discussions of criminal justice, dating to the second half of the 20th century (Weigend 1989: 377; Walther 2000: 297). In international law, therefore, we can now rely on an emerging body of specific regulations and even acts pertaining to victims and their rights in criminal and other proceedings (Bassiouni 2006: 211). Yet, especially within discussions on criminal justice, there are still

⁷ United Nations, General Assembly Resolution 40/34 of 29 November 1985 (<http://www.un.org/documents/ga/res/40/a40r034.htm>, last accessed on 15 October 2017). See again in this volume chapter five, by Gabriele Della Morte.

fears that victims' rights might impede the historically hard-won defendants' rights (Cape 2004; Kett-Straub 2017; see also Schüemann 1986).

What remains? Becoming the victim of a crime does not automatically constitute a human rights violation. There must in addition be some (missing) State action that hinders the victim in dealing with his situation as a victim. From a human rights perspective this raises questions of how far a State has to protect individuals from the acts of other individuals, and what kinds of remedies have to be provided. This touches on the function of human rights as positive obligations (see section 3.1).

3. Victim's Rights under the ECHR

The ECHR does not explicitly provide for specific rights for the victims of crime, nor does it even directly address victims of crime. As a consequence, victims' rights must be derived from the more general Convention rights, a method that has been taken up and recognised by the jurisprudence of the ECtHR. This jurisprudence shows that the Convention has by no means left victims of crime out of the scope of its protection, and indeed reveals that victims play a vital part within the overall protection mechanism of the ECHR.

3.1. Positive Obligations and Horizontal Effect

A cornerstone for the protection of victims of crime is the recognition of the doctrine of positive obligations of the State under the ECHR, as this provides for a duty of the State to protect individuals from the criminal acts of others (Than 2003).

This doctrine recognises that States not only have a duty to refrain from violating the Convention rights by the actions of State authorities, but also have the positive duty to prevent violations of certain rights by the actions of State and non-State actors (Dröge 2003; Mowbray 2004; Krieger 2014). The doctrine means that the State has to be proactive in providing sufficient protection from threats created by other persons, and in case of victimisation must take sufficient measures for remedy. The reason for this approach is that individuals can only enjoy the rights and freedoms guaranteed by the ECHR if a certain level of protection is reached. This doctrine has been key to triggering the recognition of victims' rights (Doak 2008: 39; see also in regard to sexual violence Londono 2007).

After the first decision referring to positive obligations, the *Marckx* case in 1979,⁸ which dealt only with the effective respect for family life, it did not take long until the Court applied the concept to protection in the sphere of criminal law. In the leading case of *X and Y v the Netherlands* of 1985, where Dutch law did not provide for the possibility of filing a complaint about the sexual abuse of a mentally ill 16-year old, the court stated that art 8

may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.⁹

The Court indicated that the values in question required the application of criminal measures (and not merely civil regulations) in order to guarantee a sufficient standard of protection.¹⁰ The rights do not only apply in the vertical setting between State and individual but also have a horizontal effect between individuals. In the following years the Court extended the concept not only to other articles of the Convention but also developed the requirements in more detail (see 3.2).¹¹ In this respect, positive obligations for States have been established regarding the right to life and the prohibition of torture, as well as many other rights such as the prohibition of slavery and forced labour.

3.2. *Protection under the Specific Rights*

The following sections provide a more detailed examination of victims' rights in regard to the right to life (3.2.1), the prohibition of torture (3.2.2), the prohibition of slavery and forced labour (3.2.3), rights to a fair trial (3.2.4), the right to respect for private and family life (3.2.5), the freedom of expression, assembly, and association (3.2.6), and the right to effective remedies (3.2.7).

⁸ ECtHR, *Marckx v Belgium* [1979], para 31.

⁹ ECtHR, *X and Y v the Netherlands* [1985], para 23.

¹⁰ ECtHR, *X and Y v the Netherlands* [1985], para 27.

¹¹ An overview is given by the Court in ECtHR, *Özgür Gündem v Turkey* [2000], para 42.

3.2.1. Art 2 – Right to Life

In regard to art 2 the Court has developed a substantial number of victims' rights based on a positive obligation of the State to protect the lives of all persons within its territory (Meyer-Ladewig et al 2017: art 2, paras 21–31).

The landmark decision was *Osman v UK* in 1998, where the Court held that the State has 'to take appropriate steps to safeguard the lives' within its jurisdiction including 'effective criminal-law provisions', an effective law enforcement system, and the recourse to 'preventive operational measures'.¹² This was a first big step towards more precise requirements after the vague obligation to 'adopt measures' in the case *X and Y v the Netherlands*.

A first line of argument here deals with the obligation of the State to actively take up protective measures when the State reasonably knows or should know about a threat against the life of a person (Emmerson, Ashworth, and Macdonald 2012: 790), eg:

- a prisoner sharing a cell with a dangerous person,¹³
- a journalist receiving death threats,¹⁴
- a wife being threatened by her husband,¹⁵
- in cases of the use of dangerous substances (such as HIV-infected blood plasma¹⁶ or asbestos in industrial production¹⁷),
- in cases of environmental hazards (the running of a dangerous waste disposal site¹⁸ or the opening of a water reservoir¹⁹).

As to the necessary protection mechanisms, the Court frequently points to importance of criminal provisions in order to deter people from the behaviour in question.²⁰

A second line of argument concerns the necessity of the State to conduct effective investigations, especially in cases of intentional killings or where dangerous environmental substances/circumstances are involved. This implies a right to an effective judicial investiga-

¹² ECtHR, *Osman v UK* [1998], paras 115–16.

¹³ ECtHR, *Paul and Audrey Edwards v UK* [2002].

¹⁴ ECtHR, *Kılıç v Turkey* [2000].

¹⁵ ECtHR, *Kontrova v Slovakia* [2007].

¹⁶ ECtHR, *Oyal v Turkey* [2010].

¹⁷ ECtHR, *Brincat et al v Malta* [2014].

¹⁸ ECtHR, *Öneryildiz v Turkey* [2004].

¹⁹ ECtHR, *Kolyadenko v Russia* [2012].

²⁰ ECtHR, *Oğur v Turkey* [1999], para 88; *Streletz, Kessler, and Krenz v Germany* [2001], para 86; *Mastromatteo v Italy* [2002], para 89; *Siliadin v France* [2005]; *Moncanu et al v Romania* [2014]; *Camekan v Turkey* [2014], paras 51 ff.

tion,²¹ and includes taking up *criminal* investigations.²² The investigations must be timely as well as *ex officio*, ie not dependant on actions of the victims.²³ The investigations must also be independent and impartial,²⁴ and conducted in such a way as to enable the State to punish the persons guilty of the crime,²⁵ meaning that serious efforts to solve the case must be made.²⁶ Especially in the context of serious violations, the Court speaks of a right to know the truth about the circumstances surrounding the events in question (Cavanaugh 2016: 27).²⁷

Although the Court requires criminal proceedings to be initiated and conducted, there is no right to punishment granted to the victim.²⁸ Circumstances (such as a lack of sufficient evidence) can warrant the ending of proceedings without punishment or reference to civil (damages) proceedings (Meyer-Ladewig et al 2017: art 2, para 29). In this respect, the Court affords States considerable flexibility concerning the outcomes of criminal proceedings.

Conducting the investigation includes informing the victim (or the victim's relatives) about the proceedings, so as to enable them to learn the truth and to take the necessary steps.²⁹ This means eg:

- involving the victim's next-of-kin *ex officio*;³⁰
- providing information on the progress and the result of the investigation and on procedural measures adopted;³¹
- ensuring access to documents during the prosecution and the trial, including witness testimonies³² and other information used during the proceedings;³³

²¹ ECtHR, *Association '21 December 1989' et al v Romania* [2011], para 144.

²² ECtHR, *Kılıç v Turkey* [2000].

²³ ECtHR, *Estamirov v Russia* [2006].

²⁴ ECtHR, *Öneryildiz v Turkey* [2004], paras 64, 73.

²⁵ ECtHR, *Moncanu et al v Romania* [2014].

²⁶ ECtHR, *Dündar v Turkey* [2005].

²⁷ ECtHR, *Association '21 December 1989' et al v Romania* [2011], para 144.

²⁸ ECtHR, *Zavoloka v Latvia* [2009], para 40. See also chapter one in this volume.

²⁹ ECtHR, *Association '21 December 1989' et al v Romania* [2011], para 144; *Hugh Jordan v UK* [2001], para 109.

³⁰ At least in a case of violent death, see ECtHR, *Slimani v France* [2004], paras 44–47.

³¹ ECtHR, *Association '21 December 1989' et al v Romania* [2011], para 140; *Güleç v Turkey* [1998], para 82; *Hugh Jordan v UK* [2001], para 142.

³² ECtHR, *Ogur v Turkey* [1999], para 92.

³³ ECtHR, *Yvon v France* [2003].

³⁴ ECtHR, *Hugh Jordan v UK* [2001], para 142.

- the right to a legal representative;³⁴
- the possibility of filing new motions to take evidence;³⁵
- legal aid to enable the victim's or victim's family's effective participation in the proceedings;
- a possible right to compensation.³⁶

3.2.2. Art 3 – Prohibition of Torture et al

The concept of positive obligations was broadened by the Court in the 1990s by including art 3 on cases of torture and inhuman or degrading treatment or punishment. The leading decision in this regard was the case *A v UK* in 1998, where the Court considered that domestic legislation failed to protect a nine-year-old boy from inhuman and degrading treatment by his stepfather as national law regarded it as 'reasonable chastisement'.³⁷ The Court emphasised that positive obligations exist not only in regard to State authorities but also in regard to private persons.

Since then the Court has stressed the obligation of the State to carry out effective official investigations.³⁸ In the case *M.C. v Bulgaria* the Court applied a three-step approach that requires States to implement criminal measures, and to conduct effective criminal investigations as well as prosecutions of the behaviour in question (in this case rape, see Londono 2007: 161).³⁹ In this respect the Court applied standards rather similar to those in art 2 cases, although it did not use the term 'preventive operational measures'.

3.2.3. Art 4 – Prohibition of Slavery and Forced Labour

Similar to the judgements in regard to arts 2 and 3, the Court has applied the protective principle to art 4. Following the lines of argument already established, in the leading decision *Siliadin v France*

³⁵ ECtHR, *Rajkowska v Poland* [2007].

³⁶ ECtHR, *Association '21 December 1989' et al v Romania* [2011], para 144.

³⁷ ECtHR, *A v the United Kingdom* [1998], para 22.

³⁸ See, eg, ECtHR, *Assenov et al v Bulgaria* [1998], para 102; *Selmouni v France* [1999], para 79; *El-Masri v Macedonia* [2012]; *Ibrahim Demirtaş v Turkey* [2014]; *O'Keeffe v Ireland* [2014], para 172.

³⁹ ECtHR, *M.C. v Bulgaria* [2003], para 153. Confirmed in, eg, *O'Keeffe v Ireland* [2014], para 148.

of 2005 the Court held that States have to penalise and effectively prosecute acts that maintain persons in a situation of slavery or forced labour.⁴⁰ In its 2010 judgment *Rantsev v Cyprus and Russia* the Court emphasised the need for practical and adequate measures for protecting potential victims as well as the need for effective prosecutions of incidents.⁴¹ Hence, art 4 entails a procedural obligation to investigate situations, just as in arts 2 and 3.⁴²

3.2.4. Art 6 – Fair Trial

The jurisprudence in regard to art 6 is not only the most important in practice for the accused in criminal proceedings (Meyer-Ladewig et al 2017, art 6, para 1), but also of importance for the rights of victims (Gialuz 2015: 26). As the term ‘criminal’ is interpreted quite broadly,⁴³ these rights can apply to a substantial number of cases, although the Court does not apply the same standards when an offence of a more administrative character (*malum prohibitum*) rather than a serious crime (*malum in se*) is concerned.⁴⁴

In the leading case of *Doorson v the Netherlands* the Court stated that in certain cases the interests of the accused and his defence must be balanced with the interests of the victim (eg as a witness).⁴⁵ The fair trial principle enables the Court to strike a balance between the rights of the accused and those of the victims.⁴⁶ Possible measures for protecting victims are:

- allowing vulnerable victims as witnesses not to be cross-examined (especially children or victims in sexual offences, see *Londono* 2007: 169),⁴⁷

⁴⁰ ECtHR, *Siliadin v France* [2005], para 112.

⁴¹ ECtHR, *Rantsev v Cyprus and Russia* [2010], paras 284 ff.

⁴² ECtHR, *Rantsev v Cyprus and Russia* [2010], para 288. Confirmed in *C.N. v UK* [2012], para 69.

⁴³ See, eg, ECtHR, *Öztürk v Germany* [1984], paras 50–54 on including administrative offences (Ordnungswidrigkeiten) and *Engel et al v the Netherlands* [1976], para 82 on disciplinary measures.

⁴⁴ See ECtHR, *Jussila v Finland* [2006], para 43.

⁴⁵ ECtHR, *Doorson v the Netherlands* [1996], para 70. See also chapter one in this volume.

⁴⁶ See, eg, ECtHR, *Al-Khawaja and Tahery v UK* [2011], para 146; *N.F.B. v Germany* [2001].

⁴⁷ ECtHR, *W.S. v Poland* [2007], para 57; *S.N. v Sweden* [2002], paras 47–52.

- allowing anonymous witness statements in order to safeguard the victim,⁴⁸
- allowing video testimonies and video recording in order to avoid direct contact between the perpetrator and the victim.⁴⁹

Yet the ECtHR also makes clear that reducing the right of confrontation of the accused in such cases should be otherwise counterbalanced by the State courts,⁵⁰ and cannot lead to the complete restriction of the right of the accused to confront a victim as a witness.⁵¹

The ECtHR also decided that a victim of a crime can claim rights under art 6 para 1 of the Convention even when he lodges a civil-party complaint based on the offence: victims' rights shall not be diminished merely because national law does not provide for a criminal participation right for compensation (but leaves this to civil procedure).⁵² In this respect the Court accepts the victim's right of access to the courts for compensation in cases of crime (Meyer-Ladewig et al 2017: art 6, paras 12, 41). The limits are drawn where victims merely seek 'private revenge' or demand an *actio popularis*, goals that are not covered by the Convention.⁵³ Also, under art 6 the ECHR does not confer any right to have third parties prosecuted or sentenced for a criminal offence.⁵⁴

Hence art 6 of the Convention in its civil alternative ('civil rights and obligations') is applicable to victims who take part in the criminal trial and seek compensation (even as a civil party), as well as to victims who are not requesting a remedy for damage in the criminal proceedings but where the remedy is requested in a distinct civil lawsuit. This means, by contrast, that participation even in a criminal proceeding without seeking compensation (eg for retributive reasons, such as provided by the German 'Nebenklage', see Meyer-Ladewig et al 2017: art 6, para 12) is not covered.⁵⁵

In so far as art 6 para 1 is applicable, it guarantees victims the right of access to the file and to documents regarding the crime committed,

⁴⁸ ECtHR, *Krasniki v Czech Republic* [2006], para 76.

⁴⁹ On the limits in order to enable verification by the defence, see also ECtHR, *Gani v Spain* [2013], para 48; *W.S. v Poland* [2007], para 61.

⁵⁰ ECtHR, *S.N. v Sweden* [2002], para 47; *Doorson v the Netherlands* [1996], para 75.

⁵¹ ECtHR, *P.S. v Germany* [2002], para 47; *Doorson v the Netherlands* [1996], para 75.

⁵² ECtHR, *Perez v France* [2004], paras 70–72.

⁵³ ECtHR, *Perez v France* [2004], para 70; *Gorou v Greece (n 2)* [2009], para 24.

⁵⁴ *Gorou v Greece (n 2)* [2009], para 24.

⁵⁵ ECtHR, *Perez v France* [2004], para 70; *Garimpo v Portugal* [2004].

the right to be heard, and the right to receive a reasoned court decision. However, in contrast to the rights of the accused, art 6 provides much more limited procedural guarantees to victims.

3.2.5. Art 8 – Right to Respect for Private and Family Life

Within the context of art 8 the Court has acknowledged that the State has a duty to protect individuals from infringements of their rights not only by the State but also by other persons,⁵⁶ including environmental dangers caused by industrial production.⁵⁷ Similar to the positive obligations under arts 2, 3, and 4, this can mean implementing criminal measures and conducting effective criminal investigations and proceedings.⁵⁸

Hence the mechanisms developed are now applied not only to the most serious violations of rights but also to less grave acts affecting individuals' physical and mental welfare. Yet the Court is quite cautious about creating obligations which are too strict, as it seeks to strike a fair balance between the general interest of the public and the competing interests of the victims.⁵⁹ Thus it affords much flexibility to States as how to reach the necessary level of protection.

3.2.6. Arts 10, 11 – Freedom of Expression, Freedom of Assembly and Association

In regard to arts 10 and 11 the Court has also applied the principle of positive obligations. The Court assumed that there is a duty of the State to protect the right of freedom of expression, something which may require positive measures of protection against violence in the sphere between individuals.⁶⁰ Similar duties to protect were

⁵⁶ ECtHR, *E.S. v Sweden* [2012], paras 57–59; *Schüth v Germany* [2010], para 55; *Airy v Ireland* [1979], paras 32–33.

⁵⁷ ECtHR, *Tatar v Romania* [2009], paras 87–88.

⁵⁸ ECtHR, *X and Y v the Netherlands* [1985], para 23; *M.C. v Bulgaria* [2003], paras 152–53.

⁵⁹ ECtHR, *McGinley and Egan v UK* [1998], para 98.

⁶⁰ ECtHR, *Özgür Gündem v Turkey* [2000], para 43. See also ECtHR, *Dink v Turkey* [2010], para 138. See also *Stoll v Switzerland* [2007], para 155 (need for appropriate criminal sanctions to prevent the disclosure of certain confidential items of information).

considered in regard to the right to freedom of assembly and freedom of association in art 11.⁶¹ Although the State is obliged to take measures, the Court is not very detailed about the kind of obligations involved. Thus, similar to art 8, it leaves States great flexibility as to how to achieve a minimum level of protection.

3.2.7. Art 13 – Effective Remedy

Art 13 amends the material obligations set out in other provisions of the Convention. Especially in regard to violations of arts 2 and 3 it creates a separate obligation for sound and effective investigations into the incidents by State authorities.⁶² Further, national law must provide for adequate compensation mechanisms,⁶³ including compensation for non-material damages.⁶⁴

3.3. Conclusion

The jurisprudence of the ECtHR in regard to the protection of victims reflects the international and national development of human rights law, from the duty of State authorities not to infringe rights to the obligation to implement a more comprehensive protection mechanism, including actively addressing possible violations of rights by private parties (positive obligations).

Although this development is quite straightforward in its ambitions to improve victim's rights, it reveals a constant tension between addressing persons as the victims of crime on the one hand and being the victim of a human rights violation on the other. Being the victim of crime entails being a human rights victim only in particular cases. In this regard, two very different concepts from criminal law/criminology/victimology and from public law come into contact. This represents a rather new approach within the system of criminal justice,

⁶¹ ECtHR, *Ouranio Toxo et al v Greece* [2005], para 37. See also ECtHR, *Plattform 'Ärzte für das Leben' v Austria* [1988], para 32.

⁶² See ECtHR, *CLR v Romania* [2014], para 149 with further references.

⁶³ ECtHR, *O'Keeffe v Ireland* [2014], paras 177 ff.; *McGlinchey et al v UK* [2003], para 66; *Aksoy v Turkey* [1996], para 98.

⁶⁴ ECtHR, *Poghosyan and Baghdasaryan v Armenia* [2012], para 46; *McGlinchey et al v UK* [2003], para 66; *Z et al v UK* [2001], para 109.

of integrating all these aspects into a human-rights-based view on different stakeholders (including victims) (Doak 2008: 30).

Thus far, the jurisprudence of the ECtHR has mainly pursued the following lines: protect the victims of crime through the criminal justice system on the one hand, and protect the victims from the detrimental effects of criminal trials on the other (Gialuz 2015: 29).

Within the concept of positive obligations the Court has established a duty to implement criminal measures as an effective protection mechanism for deterring potential perpetrators. This obligation, first recognised in respect to the right to life and the prohibition of torture, has been extended to many other rights. In view of the constant broadening of the concept, it can be expected that the doctrine of positive obligations will be applied to even more rights and protected values as a kind of general concept of the Convention. For victims this means that the State duty to protect comprises a ‘right not to be victimised’ (as a primary victim).

A constant line of reasoning concerns not only the implementation of criminal measures but also their effective enforcement. The Court stresses the importance of effective investigations and of putting perpetrators on trial, although there is no right to have someone convicted.⁶⁵ This emphasis on State practice shows that a number—perhaps the majority—of shortcomings in States do not concern the criminal law in the books but criminal law in action. We hence see a specific victim’s ‘right to investigation’ being developed (but see Gialuz 2015: 31).

When it comes to the details of how to protect potential victims from crime, the Court not only seems to have no clear concept in mind but indeed remains rather vague (Krieger 2014: 212; Klatt 2011: 711). The Court very much leaves implementation to the States, with a wide margin of appreciation. Their reasoning, however, seems to follow the general rule that the more important the protected good, the more detailed is the Court’s review. This at least indicates that the Court follows a certain concept of legal goods (*Rechtsgutskonzept*). Also, the Court requires stricter measures when vulnerable groups (eg children) are concerned. What remains open, however, is the development of a concept for operational and other measures that would form the minimum standard for effective protection mechanisms.

Besides the preventive obligation to protect potential victims from

⁶⁵ See again chapter one in this volume.

crime, the Court has accepted several mechanisms that aim at protecting victims during the proceedings of criminal trials (Emmer-son, Ashworth, and Macdonald 2012: 823). In this regard one can speak of a developing ‘right to avoid secondary victimisation’. Again, the more vulnerable the victim, the stricter is the standard.

Interestingly, although the Court has accepted several rights of the victim in regard to the criminal trial, it has not recognised a right to participation in the trial. It is up to the States and their different legal systems how they provide for sufficient information and reparation for the victim, be it in criminal or other proceedings. This reluctance must be seen in the light of the Court’s jurisprudence, wherein it is clear that guaranteeing effective rights for the accused should not be impaired by too far-reaching rights of victim participation. Hence it is to be expected that the Court will continue its path of protecting specifically vulnerable victims, but will tend not to accept more general participation rights in criminal trials.

This shows the problems which human rights law has in dealing with the traditional focus on the rights of the accused in criminal proceedings. This has not only led to many years of neglect of victims’ rights, but also to a neglect to develop criteria for balancing the often contrary interests of victims and the accused. Hence the ECtHR faces a kind of dilemma: accepting victims’ rights in the criminal process can pose the risk of diminishing the established rights of the accused.⁶⁶ Accordingly the Court more or less has to develop a balancing test from scratch.

4. Convention Rights and the Directive 2012/29/EU

Comparing the standards set up by the ECtHR and the Directive 2012/29/EU shows that the Directive has taken up the basic line set by the Court, and developed it into an overall victim-sensitive system with very specific rights for victims of crimes. The Directive is the most comprehensive and detailed program for integrating victims into the criminal justice system on the international level.⁶⁷ It provides for rights to protection, rights to receive information, rights to receive support, participation rights, and rights for compensation. Both the Victims Directive and the ECtHR concentrate on individuals and

⁶⁶ This issue is addressed in this volume in chapter one by Claudia Mazzucato.

⁶⁷ See chapters one and two in this volume.

individual rights. Aspects of collective victimisation and approaches to dealing with this have not been taken up so far.

A central element of Directive 2012/29/EU is to provide rights to protection (arts 18–24), stating clearly that States should avoid secondary victimisation. This is along the same lines as emphasised by the ECtHR. The scope of the right to protection in art 18 is rather broad, much as it is in the jurisprudence of the ECtHR, covering family members and extending to protection from ‘emotional or psychological harm’. The protection mechanisms are very detailed—eg States shall ensure that courts have separate waiting rooms for victims (although this is restricted to new court premises). The Victims Directive (arts 23, 24) and the ECtHR concentrate on vulnerable victims, granting them enhanced protection mechanisms.

Although this development and the emphasis on avoiding secondary victimisation are to be welcomed, one must concede from the point of scientific research that the empirical data is rather scarce on the scope and conditions of secondary victimisation (Kölbel and Bork 2012: 38; Bock 2013: 208). In order to extend and improve measures for avoiding secondary victimisation, it is necessary to know more about its mechanisms.

The effect on the rights of the accused are rarely mentioned in the Directive 2012/29/EU, although art 18 States that victims’ rights are ‘without prejudice to the rights of the defence’. This is of course not true if one looks eg at the protection mechanisms in art 23, para 3 granted to vulnerable victims. These restrictions on the defence can be justified without violating fair trial rights (such as those of art 6 ECHR), but it would have been preferable if the Directive had stated explicitly—as the ECtHR does—that victims’ rights have an effect on those of the accused, and that a solution can only be found by balancing both sets of rights.

Concerning the rights to receive information, the Victims Directive is very specific (much more than the Framework Decision 2001/220/JHA was) and tries to put the victim in a situation to understand their rights and the proceedings. The information rights are very detailed, in many respects more than as established by the ECtHR. A major difference is the underlying approach. The Directive 2012/29/EU is very technical (language support, information about certain stages, etc) whereas the ECtHR lays much more emphasis on the right to be informed about the truth and the facts of the case. Such information might also be received via the various rights in the Directive, but the difference is that the Directive establishes a formal position for the victim, whereas the ECtHR concentrates more on

putting the victim in a position to understand what has happened in the past and to cope with the situation now.

As far as the rights to receive support⁶⁸ are concerned (arts 8 and 9), the Victims Directive takes up an aspect which is scarcely touched upon by the ECtHR. The Directive not only obliges States to set up institutions (institutional guarantee), but also to task them with at least basic support services. Although these are very general obligations, leaving States much discretion in implementing them, and with much depending on the availability of financial resources, the right to receive support might be something the ECtHR could develop in more detail in the future as a criterion for avoiding secondary victimisation.

Directive 2012/29/EU provides for a certain set of participation rights, such as the right to receive written acknowledgement of a complaint (art 5, para 1); the right to be heard, including the right to provide evidence (art 10); and the right to legal aid (art 13). These rights are very similar to the ones granted by the jurisprudence of the ECtHR. What both regimes have in common is that neither provides for a full right of participation in the proceedings or in the trial. Also, the victim has no right to punishment. To this extent, then, the victim has no right to be a formal party in the proceedings, although the victim can initiate certain procedural steps and has certain control rights. Under both regimes, however, it is important that the national judicial systems have enough flexibility to settle criminal cases without a judgment.

As for the rights to compensation, the Victims Directive does not provide for a right for damages etc but merely gives a right to a decision on compensation within the criminal trial (art 16), a right to reimbursement of certain expenses (art 14), and the right to the return of seized property (art 15). To this extent, EU law is still governed by the Directive 2004/80/EC on the compensation of victims of violent intentional crimes with the amendments of the Directive 2012/29/EU. This means compensation is limited to certain crimes. It is not clear whether the ECtHR goes any further in this respect, as it touches upon compensation mainly in the context of serious violations of arts 2 and 3 ECHR.

Directive 2012/29/EU is also very cautious on the subject of restorative justice, although it mentions it explicitly in art 12.⁶⁹ Overall, it gives States the opportunity to refer to such measures but

⁶⁸ See chapter eight in this volume.

⁶⁹ See chapter nine in this volume.

sets no novel standard, and even seems to lag behind standard practice in some national systems (Kilchling 2015; Bock 2013: 207; Kerner 2015). Hence the Victims Directive shows the same restraints as the ECtHR in adopting new conflict solution models.

One aspect the Directive 2012/29/EU does not really take up, but which is of great importance to the ECtHR, is the right to a speedy, serious, and thorough investigation. The Directive very much depends on trust in the national systems that investigations shall actually be taken up either *ex officio* or following a complaint by the victim. ECtHR jurisprudence, on the other hand, shows that in practice, and especially in delicate cases (such as the involvement of public authorities), in quite a number of instances this trust is not warranted. In order to provide a solution to this problem, stronger victim rights could be warranted, especially during the investigation period (although without impeding public investigations).

Last but not least, the protection from becoming a victim plays a major role in the ECtHR's jurisprudence. Directive 2012/29/EU does not specify any victim-specific policies in this regard, but leaves this issue to the subject-oriented legislation.⁷⁰ Hence the general preventive obligations set up by the ECtHR remain of special importance.

5. Future Perspectives

The ECHR, and its implementation through the jurisprudence of the ECtHR, have manifested an ongoing process of including and expanding the rights of victims of crime within a human rights regime. It demonstrates clearly that a modern human rights protection system comprises detailed positive obligations on States not only to actively prevent individuals becoming victims of crime, but also to support victims. Yet the realisation of victims' rights requires these principles to be put into practice as enforceable rights, extending beyond a case-by-case approach.⁷¹ The Directive 2012/29/EU, with its detailed sets of rights for victims, shows how this can be achieved. It can claim significant progress on the international level as well as on most national levels. As a consequence, the protection of victims is now

⁷⁰ See, eg, Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, art 18.

⁷¹ See chapter seven in this volume.

widespread not only in European criminal policy but also in legislation and judicial practice (Schünemann 2011: 446). A decade ago, it would have been fair to observe that the international legal system was far from being victim-oriented (Bassiouni 2006: 278); but this has finally begun to change. The stronger integration of victims has come to characterise the criminal justice process, and is now a vital part of doing justice (Schöch 2013: 233).

Whereas many victim rights are now regulated and governed by EU law, with the possibility of involving the ECJ, the ECHR still remains the ‘backbone’ for victims’ rights (especially in cases where judicial systems are under stress). It not only guarantees an unavoidable and legally enforceable threshold, but also allows for ‘checking’ whether rights are really observed in practice. It may be expected that the ECtHR will continue its path of elaborating and recognising victims’ rights, and will have recourse to Directive 2012/29/EU as an example of a well-established set of rights.

Strengthening the position of victims in criminal proceedings gives them a role far beyond being merely a witness (and in so far just another piece of evidence): indeed, it has shifted them from a passive to an active role (Herrmann 2010). But strengthening victims’ rights in many cases conflicts with the rights of the accused; and hence the ECtHR is very cautious eg in regard to restricting fair trial rights under art 6, trying to balance them with victims’ rights.

Thus, more than ever, the development of far-reaching victims’ rights raises questions about the aim of criminal proceedings: Is the procedure simply intended to determine the guilt of the accused? (Which leaves the victim a rather limited role.) Is it rather intended as a search for the truth within a framework of the rule of law? (Which enables the victim’s interests to be considered within a much larger scope.) Or is it indeed intended to restore legal peace? (Whereby the victim can be integrated substantially within concepts such as those offered by the restorative justice approach.)

Most judicial systems are still based on the structures of the criminal process which were an outcome of the rationalisation achieved during the Enlightenment (see Weigend 1989: 93): a perpetrator is seen primarily as violating the public order and public interests, and not only the private interests of the victim. Since that time, therefore, the public task has been seen as one of reacting to this breach of the peace; and this public reaction was (and is) not necessarily driven by the same interests as the victim. Objective public proceedings merely determine if the perpetrator has fulfilled the elements of crime. This is often only part of the historic story

(especially if the indictment has been limited to certain aspects), and is thus frustrating for victims who are seeking both truth and understanding.⁷² Principles such as *in dubio pro reo* can add to this frustration.

These dilemmas, between a limited criminal justice approach and the broader interests of the victim, cannot be solved by granting victims more rights. In this regard, criminal proceedings can serve victims' interests in only a very limited fashion. This must honestly be conceded, especially in a time of punitive criminal policies that seek to solve social problems by introducing new crimes and raising sentences, and where a (counterproductive) tendency to exploit victims for repressive purposes (Schöch 2013: 231) exists. The best that can (and should) be achieved now is a victim-friendly system, but not a victim-oriented one. This means effective rights to information, support, and reparation, but only limited participation rights in proceedings.

If one wants to include victims any further this would mean adjusting the aim of the criminal process. Such efforts should not be rejected simply because they would change the system, but we should be clear that they *would* change the system. Restorative justice could be one of the concepts that could better address social conflicts, because it is much broader than relying on criminal offences alone, and could provide for more sustainable solutions in regard to restoring public peace. It could also take up measures in cases where the collective dimension (collective victimisation) is a central element.⁷³ Although restorative justice is at least now mentioned in the Directive 2012/29/EU, it is far from being taken up in European policy (Schünemann 2011: 460). Thus there is still much potential for it to be used in future reforms. The ECtHR's latest emphasis on rehabilitation and reintegration of the offender into society as mandatory factors for States' penal policies,⁷⁴ opens the door to seeking new models of participation for both victims and offenders in public proceedings.

⁷² See chapter six and again chapter seven in this volume.

⁷³ See again chapter nine in this volume.

⁷⁴ ECtHR, *Hutchinson v UK* [2017], para 43.

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CHAPTER V

VICTIMS IN INTERNATIONAL LAW: AN OVERVIEW

by Gabriele Della Morte

CONTENTS: 1. Introduction. – 2. The Definition of Victim (Under International Law). – 3. The Procedural and Substantial Dimension of Victims under International Law. – 3.1. The Procedural Dimension. – 3.2. The Substantial Dimension. – 4. The Right to Redress and Reparation. – 5. Conclusion.

1. Introduction

It is true that ‘Victims’ rights have received over the years limited attention in International Law’ (Van Boven 2015).¹ This is principally because international law is primarily directed at the relationship between States, and not individuals.²

Nonetheless, there are instruments from which it is possible to detect the elements that allow the recognition of a victim under international law. We are referring to two documents in particular: first, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by United Nations General Assembly Resolution 40/34 of 29 November 1985; and second, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and

¹ For an introduction to the subject, see Bonacker and Safferling 2013; Gorski 2015; Stoitchkova 2010; Clapham 2006; Droedge 2006; de Greiff 2006; Shelton 2005.

² Traditionally, since States were the original actors on the international scene, individuals were regarded as a kind of ‘object’ mediated by the States. Nowadays, this perception is changing, along with international law, as has been duly noted by Gorski 2015: ‘There is no definition of the term “individuals” in international treaties’.

Serious Violation of International Humanitarian Law, adopted by the General Assembly on 16 December 2005.³

2. The Definition of Victim (under International Law)

From a comparative analysis of these two documents, we can deduce that the term ‘victims’ means, first of all,

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.⁴

Under this definition, a person may be considered a victim ‘regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim’.⁵ Moreover, this provision includes, if appropriate, ‘the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization’.⁶ Additionally, these definitions shall be relevant to ‘all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability’.⁷

These principles allow for several different interpretations.

- (i) A person is a victim because he or she has suffered physical or mental injury, or even emotional suffering, economic loss, or a substantial impairment of their fundamental rights;

³ It is worth mentioning that ‘serious violations’ are different from ‘grave breaches’ in international law. In fact, the first term indicates a violation that could constitute a crime under international law, irrespective of the national or international context of armed conflict. On the other hand, the expression ‘grave breaches’ refers to severe violations of humanitarian law carried out within the context of international armed conflict.

⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereafter, General Assembly Resolution 40/34 of 29 November 1985), para A.1.

⁵ Ibid para A.2.

⁶ Ibid para A.2.

⁷ Ibid para A.3.

- (ii) There are direct victims as well as indirect victims (such as family members or dependants of the victims);
- (iii) A person could be a victim individually as well as collectively;
- (iv) There are different kinds of harm or loss (that could be caused by an act as well as by an omission).

Moreover, even though neither of these two instruments is referring to legal persons or entities, this possibility is not excluded in some specific areas (the so-called *regimes* of international law). It is worth mentioning the regime of international criminal law, since Rule 85 of Procedure and Evidence of the International Criminal Court (ICC) clearly states that victims may also include organisations or institutions that have sustained harm to any of their property which is dedicated to religion, education, art, etc.⁸

3. The Procedural and Substantial Dimension of Victims under International Law

The rights of victims under international law are encompassed in two different spheres: procedural and substantial.

3.1. The Procedural Dimension

Starting with the procedural dimension, it is worth noting that arts 4 to 7 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), as well as arts 12 to 14 of the Basic Principles and Guidelines (2005), specify the content of the equal access of justice to obtain effective remedies. The subject is well known in international law as it has been explored in a large number of

⁸ See International Criminal Court, Rules of Procedure and Evidence, s III ('Victims and witnesses'), sub-s 1 ('Definition and general principle relating to victims'), r 85 ('Definition of victims'): 'For the purposes of the Statute and the Rules of Procedure and Evidence: (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'. On the notion of 'victim' as a 'natural person' according to the Directive 2012/29/EU of the European Parliament and 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/EU law, see chapter one in this volume.

international conventions and declarations adopted at a universal level,⁹ as well as at a regional one.¹⁰

To summarise, what a victim can effectively do is set out in the section of the documents dedicated to ‘Access to justice’.

First of all, victims have to be treated with ‘compassion and respect’.¹¹ They are entitled ‘to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered’.¹² These ‘mechanisms’, that are as much judicial as administrative, should be established ‘where necessary’ to obtain redress,¹³ and include formal and informal process.¹⁴ This process should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings; (b) Allowing the views and concerns of victims to be presented; (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures

⁹ See, eg, art 3 of the Hague Convention concerning the Laws and Customs of War on Land (1907); art 8 of the Universal Declaration of Human Rights (1948); art 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1, 1977); art 2 of the International Covenant on Civil and Political Rights (1966); art 6 of the International Convention on the Elimination of all Forms of Racial Discrimination (1965); art 14 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984); art 39 of the Convention on the Rights of the Child (1989).

The definitions contained in these instruments are quite large. Hence, the General Comment adopted by the Human Rights Committee on 29 March 2004 specifies that: ‘The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level—national, regional or local—are in a position to engage the responsibility of the State Party’ (see General Comment No. 31: ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’). Moreover, the Convention on the Rights of the Child states that (as an example): ‘States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child’.

¹⁰ See, eg, art 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); art 25 of the American Convention of Human Rights (1969); art 7 of the African Charter on Human and People’s Rights (1981).

¹¹ Art 4 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985).

¹² *Ibid.*

¹³ *Ibid* art 5.

¹⁴ Such as mediation, arbitration, and customary justice or indigenous practices. *Ibid* art 7.

to minimize inconvenience to victims; and (e) Avoiding unnecessary delay'.¹⁵

Furthermore, the Basic Principles and Guidelines (2005) provide that, in case of gross violation of international human rights law or of a serious violation of international humanitarian law, 'Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws'.¹⁶ To that end, States should undertake 'procedures to allow groups of victims to present claims for reparation',¹⁷ and it is highlighted that an 'adequate, effective and prompt remedy for gross violations [...] should include all available and appropriate international processes in which a person may have legal standing'.¹⁸

3.2. *The Substantial Dimension*

With regard to the duty to provide redress, the topic of reparation is divided into different categories: (a) restitution, (b) compensation, (c) rehabilitation, (d) satisfaction and, if necessary, (e) guarantee of non-repetition.

Starting from (a) restitution, this includes a fair 'return of property or payment for the harm or loss suffered' by 'victims, their families or dependants'.¹⁹ States are required to 'review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases'.²⁰ In addition, 'in cases of substantial harm to the environment', restitution consists of 'restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation'.²¹ Finally, if the harm is caused by an agent 'acting in an official or quasi-official

¹⁵ Ibid art 6.

¹⁶ Basic Principles and Guidelines (2005), art 12. Consequently, States should: '(a) Disseminate [...] information about all available remedies [...]; (b) Take measures to minimize the inconvenience to victims and their representatives [...]; (c) Provide proper assistance to victims seeking access to justice; (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy'.

¹⁷ Basic Principles and Guidelines (2005), art 13.

¹⁸ Basic Principles and Guidelines (2005), art 14.

¹⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), art 8.

²⁰ 'In addition to other criminal sanctions', *ibid* art 9.

²¹ 'Whenever such harm results in the dislocation of a community', *ibid*, art 10.

capacity' the victims will be entitled to receive restitution directly from the State.²²

The standard concerning (b), compensation, States that the above-mentioned principle should be provided 'for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case'.²³ If compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to some groups of victims, in particular. These groups include: '(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization'.²⁴ Finally, for that purpose, 'national funds for compensation to victims' are encouraged.²⁵

Concerning (c) rehabilitation, this 'should include medical and psychological care as well as legal and social services' (Basic Principles and Guidelines (2005) art 21).

Regarding (d) satisfaction, this takes into account a large amount of hypotheses, from 'Effective measures aimed at the cessation of continuing violations' (art 22(a)) to the 'Verification of the facts and full and public disclosure of the truth' (art 22(b)); from the search for those who have disappeared (art 22(c)) to the official declaration or judicial decision restoring the reputation of the victim (art 22(d)); from 'public apology' (art 22(e)) to 'Judicial and administrative sanctions against persons liable for the violations' (art 22(f)); and from 'Commemorations and tributes to the victims' (art 22(g)) to 'Inclusion of an accurate account of the violations [...] training and in educational material at all levels' (art 22(h)).

Lastly, the (e) guarantee of non-repetition is expressly pro-

²² Ibid art 11.

²³ Basic Principles and Guidelines (2005), art 20. In case of gross violations of international human rights law and serious violations of international humanitarian law, compensation should be provided in cases of: '(a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services'.

²⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), art 12.

²⁵ Ibid art 13.

vided—‘where applicable’—in the Basic Principles and Guidelines (2005), art 23. The measures include: ensuring civilian control of military forces (art 23(a)); ensuring international standards of due process (art 23(b)); strengthening the independence of the judiciary (art 23(c)); protecting in particular categories such as legal, medical, or media, as well as human rights defenders (art 23(d)); consolidating human rights and international humanitarian law education in all sectors of society (art 23(e)); endorsing the observance of codes of conduct and promoting mechanisms for preventing and monitoring social conflicts and their resolution (art 23(f–g)); and strengthening legislative reform that can contribute to fighting against gross violations of international human rights law and serious violations of international humanitarian law (art 23(h)).

4. The Right to Redress and Reparation

In general terms, a large number of human rights bodies, judicial as well as quasi-judicial, envisage the possibility of the victim making a claim. It is sufficient to recall the Human Rights Committee,²⁶ the Committee on the Elimination of Racial Discrimination,²⁷ the Committee against Torture,²⁸ and the Committee on the Elimination of Discrimination against Women.²⁹

In any case, the most important contribution to the definition of the concept of ‘victim’—apart from the European Union Victims Directive establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, which is the subject of the present research—derives from the experience of the regional courts of human rights. We are referring, first of all, to the European Court of Human Rights, secondly, to other courts or organisations, such as the Inter-

²⁶ Under the First Optional Protocol of the International Covenant on Civil and Political Rights (1966).

²⁷ The body of 18 independent experts who monitor the implementation of the Convention on the Elimination of All Forms of Racial Discrimination (1965).

²⁸ The body of 10 independent experts who monitor the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

²⁹ The body of 23 independent experts who monitor the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979).

American Court of Human Rights, and, finally, to the African Commission of Human Rights.

Starting with the European Court of Human Rights,³⁰ the definition of the term ‘victim’, elaborated by judges sitting in Strasbourg, recognises several stages of evolution that will be examined subsequently. One of the topics directly connected to the subject of this research is, for example, the attitude of the European Court of Human Rights towards patients who have been contaminated through blood transfusions. We refer, for example, to *G. N. et al v Italy*, a judgement delivered on 1 December 2009.³¹ The case, concerning the discriminatory treatment applied in such contamination cases, involves Italian nationals who have been made sick by viruses—such as HIV—due to the transfusion of infected blood during medical treatment.³² Moreover, there is a rich jurisprudence of the European Court of Human Rights concerning environmental risks taken by the States.³³ A large number of these cases concern the responsibility of the State in having allowed the establishment of various companies on Italian territory. These companies did not pay sufficient attention to the environment. As a consequence, they caused health problems in the local population and the European Court condemned those States that had displayed a lack of vigilance or that had not provided effective relief.

The Inter-American system of protection of human rights, the Commission as well as the Court, has developed an interesting and rich practice on the subject, especially in relation to the rights of indigenous people.³⁴

Finally, it should also be noted that in the African system of protection of human rights there is growing attention to this kind of problem. It is sufficient to quote, for example, a case in which the

³⁰ See in this volume chapter four, by Marc Engelhart.

³¹ ECtHR, *G. N. et al v Italy* [2009].

³² See also chapter three and chapter seven in this volume.

³³ See, eg, ECtHR, *Guerra v Italy* [1998]. The case concerns the effect of toxic emissions on applicants and their right to respect for their private and family life; more specifically, it concerns the failure to provide the local population with information about the risk involved, and how to proceed in case of accidents near the chemical factory. The Court held that Italy did not fulfil its obligation to secure the applicants’ right to respect for their private and family life, in breach of art 8 of the Convention, and that there was a violation of that provision.

See also chapter three and chapter seven in this volume.

³⁴ Moreover, in 1990 the Commission established a special *Rapporteur* on the Rights of Indigenous Peoples with the mandate to coordinate actions in this regard.

African Commission on Human and Peoples' Rights found that the Nigerian military government had exploited oil reserves through its relationship with the Shell Petroleum Development Corporation, with no regard for the health or environment of the Ogoni people.³⁵

With respect to the international criminal law regime, the Rome statute of the International Criminal Court grants victims the right to stand in judicial proceedings by presenting their own views and concerns before the Court.

The participation scheme includes various modalities. In particular, the statute of the International Criminal Court expressly provides judges with the power to order a convicted person to pay compensation at the end of the trial. The victims who will benefit from this compensation payment may be individual or collective, depending on the Court. Reparations may include both monetary and non-monetary compensation (such as return of property, or symbolic measures like public apologies). Furthermore, in order to collect the funds essential to comply with the obligation of reparation, in the case that the convicted person does not have sufficient resources to do so, States Parties to the ICC Treaty have established a special fund (the 'Trust Fund for Victims that Can Contribute to Fighting').³⁶

5. Conclusion

As stated in the Preamble of the Basic Principles and Guidelines adopted by the General Assembly on 16 December 2005, 'in honouring the victims' right [...] the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field'.

Today, we are observing an increasing recognition of the rights of

³⁵ See *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*. In a decision on its merits, the Commission stated that Nigeria had violated the African Charter on Human and Peoples' Rights and called for an end to Nigerian attacks against the Ogoni people. See African Commission on Human and Peoples' Rights, Communication 155/96 [2002].

³⁶ Under art 79(1) of the statute of the International Criminal Court: 'A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims'. Under art 79(2): 'The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund'. This is the first incident of this kind in the global struggle to end impunity for the most serious crimes.

victims in international law. This heightened recognition is represented by the establishment of human rights bodies, both judicial and quasi-judicial, that are increasing the protection offered to victims, especially in the fields of gross violation of human rights and the serious violation of humanitarian law. Moreover, even though the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the Basic Principles and Guidelines (2005) are soft law instruments that are not legally binding for States, the principles enshrined in those instruments are exerting an influence.

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PART II

**VICTIMOLOGICAL PERSPECTIVES
AND EMPIRICAL FINDINGS**

CHAPTER VI

CORPORATE VIOLENCE: HARMFUL CONSEQUENCES AND VICTIMS' NEEDS. AN OVERVIEW *by Arianna Visconti **

CONTENTS: 1. Introduction: Harmful Consequences of Crime and Individual Assessment of Victims' Needs. – 2. The Notion of 'Corporate Violence' and its Social Perception. – 3. Prevalence of Corporate Violence and Harmful Global Effects. – 4. The Impact of Corporate Violence on Individuals. – 5. Conclusion: A First Overview of the Needs of Corporate Violence Victims.

1. Introduction: Harmful Consequences of Crime and Individual Assessment of Victims' Needs

As has been explained in previous chapters, the very definition of 'victim' given in the Directive 2012/29/EU, establishing minimum standards on the rights, support, and protection of victims of crime, revolves around the *harm* suffered by the person as a consequence of the commission of a criminal offence. According to art 2(1)(a)

'victim' means:

- (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;
- (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.

Therefore, an overview of the harms caused to victims by

* Dr Marta Lamanuzzi, PhD, and Ms Eliana Greco, PhD student, contributed to the bibliographical research.

offences falling under the (criminological, as we shall see) category of ‘corporate violence’ is per se relevant to the scope and purpose of this study. Yet there is an even more compelling need for such a review of existing literature on corporate violence’s harmful effects (as well as for autonomous empirical research on this subject, the results of which will be discussed mainly in the following chapters): namely, the close nexus between harms suffered and the victim’s *needs*, an issue which, in turn, lies at the heart of the Victims Directive, and particularly of the provisions pertaining to the victim’s right to *protection*.

The needs of victims (a subject never easy to define and explore: see Walklate 1989) are indeed strictly related to their reactions to the crime suffered and thus *also* to the typology and extent of the related harms (alongside several other features, ranging from the type and/or circumstances of the crime to the victim’s personality traits, from the victim’s social status and education to social context, etc). For instance (and while acknowledging the present need for generalisation and, to some extent, simplification), the deeper the feeling of loss of control suffered by the victim as a consequence of the crime, the greater the need for information (as a way to regain control over their lives and future); the more intense their psychological distress as a consequence of the offence, the greater the need to feel heard and recognised; the stronger the feeling of vulnerability resulting from the traumatic experience of crime, the greater the need for reassurance and protection (ten Boom and Kuijpers 2012; Tizzani 2012).

The Victims Directive’s starting point is a consideration of ‘victims’ multiple needs when involved in criminal proceedings, including the need to receive information, assistance, support, protection and compensation’ (recital 62), which in turn, following a trend supported by an ever growing (albeit heterogeneous) victims’ rights movement (Walklate 1989; Garland 2001; Strang 2001; Bassiouni 2006; Richards 2009; Wolhuter, Olley, and Denham 2009; Waller 2011), results in translating the (perceived, general) *needs* of victims into as many victims’ *rights* (right to understand and to be understood, arts 3, 5, and 7; right to receive information, arts 4, 6, and 11; right to support and legal aid, arts 8, 9, and 13; right to be heard and to get a review of a decision not to prosecute, arts 10 and 11; right to have access to safe and competent restorative justice services, art 12; right to reimbursement of expenses, return of property, and to a decision on compensation from the offender, arts 14–16; and right to protection, including protection of privacy, arts 18–24). These are

rights which should be granted—at least at a basic, or ‘minimum’, level—in a uniform way in all Member States, irrespective of the victim’s nationality or country of residence, as an expression of the more basic right to non-discrimination and equal treatment of any individual who happens to suffer a crime within the European Union (Fonseca Morillo and Bellander Todino 2017).¹

As stated, amongst the needs—and ensuing rights—taken into account by the Directive 2012/29/EU, the most prominent is certainly the need for/right to *protection*. Specifically, according to art 18

Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members.

It is with respect to victims’ protection needs that art 22 establishes a specific duty for Member States to ‘ensure that victims receive a timely and individual assessment’ aimed at identifying such specific needs, as well as determining ‘whether and to what extent they would benefit from special measures in the course of criminal proceedings’ provided for under arts 23 and 24.

It must be noted that art 22 does *not* specify *how* said assessment should be made—a thorny issue even for victimology scholars (Walklate 1989)—nor exactly *who* is to be charged with this task. With respect to this second issue, it can be inferred from recital 61²

¹ See chapter one and chapter two in this volume.

² Recital 61: ‘Any officials involved in criminal proceedings who are likely to come into personal contact with victims should be able to access and receive appropriate initial and ongoing training, to a level appropriate to their contact with victims, so that they are able to identify victims and their needs and deal with them in a respectful, sensitive, professional and non-discriminatory manner. Persons who are likely to be involved in the individual assessment to identify victims’ specific protection needs and to determine their need for special protection measures should receive specific training on how to carry out such an assessment. Member States should ensure such training for police services and court staff. Equally, training should be promoted for lawyers, prosecutors and judges and for practitioners who provide victim support or restorative justice services. This requirement should include training on the specific support services to which victims should be referred or specialist training where their work focuses on victims with specific needs and specific

and art 25³ that the process of individual assessment can involve a plurality of different professionals, ie, all those who—directly, because of their role in the criminal investigations and proceedings—‘are likely to come into personal contact with victims’, as well as all those who, at any stage, ‘are likely to be involved in the individual assessment’ (all of whom should, therefore, be granted ‘appropriate initial and ongoing training’). Thus, people charged with the individual assessment of victims’ protection needs are, firstly and directly, ‘police officers’, ‘court staff’, ‘judges’ and ‘prosecutors’; but also ‘lawyers’ and any person ‘providing victim support and restorative justice services’ can become ‘involved’ in said evaluation, either prior to (or even in the absence of) initiation of criminal proceedings, or at the request of one of the professionals primarily charged with the task.

The Victims Directive, however, besides stressing the necessity for *individualisation* of the assessment⁴—which is reflected in the

psychological training, as appropriate. Where relevant, such training should be gender sensitive. Member States’ actions on training should be complemented by guidelines, recommendations and exchange of best practices in accordance with the Budapest roadmap’.

³ Art 25: ‘1. Member States shall ensure that officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.

2. Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request that those responsible for the training of judges and prosecutors involved in criminal proceedings make available both general and specialist training to increase the awareness of judges and prosecutors of the needs of victims.

3. With due respect for the independence of the legal profession, Member States shall recommend that those responsible for the training of lawyers make available both general and specialist training to increase the awareness of lawyers of the needs of victims.

4. Through their public services or by funding victim support organisations, Member States shall encourage initiatives enabling those providing victim support and restorative justice services to receive adequate training to a level appropriate to their contact with victims and observe professional standards to ensure such services are provided in an impartial, respectful and professional manner.

5. In accordance with the duties involved, and the nature and level of contact the practitioner has with victims, training shall aim to enable the practitioner to recognise victims and to treat them in a respectful, professional and non-discriminatory manner’.

⁴ This is specifically stressed also in the European Commission, DG Justice Guidance Document related to the transposition and implementation of the 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, December 2013,

provision that it ‘shall be carried out with the close involvement of the victim and shall take into account their wishes’ (art 22(6)), as well as in the duty to update it ‘throughout the criminal proceedings’ whenever ‘the elements that form the basis of the individual assessment have changed significantly’ (art 22(7))—provides at least some indication about the *factual grounds* for the assessment itself. Namely, art 22(2) establishes that

The individual assessment shall, in particular, take into account:

- (a) the personal characteristics of the victim;
- (b) the type or nature of the crime; and
- (c) the circumstances of the crime.

These three factual elements, to be ‘taken into account’ while assessing the ‘protection needs’ of each and any individual victim, can be read as an attempt at introducing into the legal framework of the Victims Directive at least some of the conceptual achievements of the long and multifaceted victimological debate on *victimisation risks* (Sparks 1982; Walklate 1989; Miethe and Meier 1994; Saponaro 2004; Scardaccione 2015; Wolhuter, Olley and Denham 2009; Scarcella Prandstraller 2012), and particularly on the identification of possible vulnerability factors, ie, elements—related to personal characteristics, ‘ecological’ settings, contingent circumstances, cultural features, etc—which can produce ‘variations in proneness to victimization among different types of persons, places, organizations, situations etc, where proneness in turn is defined in terms of differences in the a priori probability of victimization’ (Sparks 1982: 33).

The preamble to the Victims Directive elaborates more on possible factual clues of specific vulnerability of individual victims, stating that

Individual assessments should take into account the personal characteristics of the victim such as his or her age, gender and gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, residence status, communication difficulties, relationship to or dependence on the offender and previous experience of crime. They should also 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, whether the victim’s residence is in a high crime or gang dominated area,

p 4 (online at <https://e-justice.europa.eu/fileDownload.do?id=05758a3a-9e2e-49a5-a7ec-3737c3ad6876>, last accessed on 7 August 2017).

or whether the victim's country of origin is not the Member State where the crime was committed. [recital 56]

All the elements listed above—which, it might be worth noticing, appear to refer to the ‘traditional’ typologies of ‘vulnerable’ victims,⁵ ie, children, elders, victims of violence in close relationships, etc—are to be taken as specifications and (mere) examples of the three basic features to be considered according to art 22(2), ie, *personal characteristics* of the victim, *circumstances* of the crime, and *type or nature* of the offence. Under this last feature, it must be noted how the *negative consequences* of the crime receive, once again, a central relevance in the Victims Directive, as it is ‘the severity of the crime and the degree of apparent harm suffered by the victim’ which can justify adaptations in the ‘extent of the individual assessment’ of the victim's needs (art 22(5)).

It is thus self-evident how a thorough examination of the available studies on ‘corporate violence’, its harmful consequences, the context it provides for the ensuing victimisation and, on the whole, its impact on individual victims, constitutes an essential starting point to try and achieve a better understanding about the needs of this kind of victim, the vulnerability factors they may be subject to, and the best way to individually assess their protection needs. In the following paragraphs the reader will, therefore, be presented with a discussion on the concept of ‘corporate violence’ itself, its slow surfacing into the criminological and victimological debate, and the reasons behind the difficulty in understanding it as a form of ‘proper’ violence. An overview of the harmful consequences—typically collective in nature—of this kind of offence will follow, which is aimed at shedding some light on the possible individual reactions and, ultimately, individual needs of victims of corporate violence.⁶

⁵ See chapter one in this volume.

⁶ Practical tools for the individual assessment of the needs of victims of corporate violence, which have been developed as outputs of the project, are available online at www.victimsandcorporations.eu. See Victims and Corporations (2017) *Individual Assessment of Corporate Violence Victims' Needs. A Practical Guide* (Milan, Università Cattolica del Sacro Cuore, Centro Studi ‘Federico Stella’ sulla Giustizia penale e la Politica criminale). See also, at the same address, the tools specifically adapted for the three interested countries, in Italian, German and Dutch (all listed in the section ‘Victims and Corporations Project Publications and Tools’).

2. The Notion of ‘Corporate Violence’ and its Social Perception

The fact that ‘managers murder and corporations kill’ (Punch 2000) has been acknowledged by the criminological literature for several decades. The term ‘corporate violence’ has come to be used to refer to that ‘specific subset of corporate deviance’ (Punch 2000: 243) that causes deaths, injuries, or illnesses to physical persons through illegal or harmful behaviours that occur during the course of the legitimate business activity of such economic organisations, basically through violations of health and safety regulations and the consequent harm to workers, the production and marketing of unsafe products, and the pollution of air, water, and soil by industrial production or waste disposal (Hills 1987; Mokhiber 1988; Clinard 1990; Punch 1996; Stretesky and Lynch 1999; Friedrichs 2007; Tombs 2010; Klein 2014). Thus, ‘corporate violence’ can be defined, in short, as any crime committed by a corporation in the course of its legitimate activity, which results in harm to the health, physical integrity, or life of a natural person.

This definition, albeit apparently simple, conceals a wide range of problems which have affected and still affect attempts at studying, methodically and in depth, such a phenomenon, as well as its human cost, and which also account for the scarcity of victimological data (Walklate 1989) with which our research has had to contend. This section will, therefore, be devoted to briefly acknowledging and discussing such difficulties, in order to better understand the scope and meaning of available information.

The first element that contributes to explaining why social scientists have devoted, on the whole, very little attention to victims of corporate crime—and, more specifically, of corporate violence—is strictly related to the ambiguity concerning the ‘criminal’ status of such behaviours, on the one hand, as well as their fitness to be defined as ‘true’ violence, on the other. With the exception of the few ‘extreme or “monster” cases of corporate crime and harm that gain visibility’ in the media and the public arena, the usual ‘pulverisation’ of corporate crime and corporate harms, and their basic ‘everyday incidence’ in less apparent forms (Tombs and Whyte 2015: 37), contribute to an ambiguity which also affects, as we will see, the social perception of the victims of such crimes as ‘proper’ victims, as well as their own self-perception as such, with important consequences on report rates, data availability, attitudes towards law enforcement, and the psychological impact on those affected.

While criminologists are nowadays well acquainted with definitions

of ‘crime’ which do not just reflect what specific legal systems set as ‘criminal offences’, and which are therefore conceived to include a wider range of illegal, deviant, or harmful behaviours (Brown, Esbensen, and Geis 2010), it is nonetheless true that the social perception of crime is still strictly related to what the law frames as such. And when it comes to white-collar and corporate ‘crimes’, many of these harmful behaviours, even when illegal under the law (which does not always happen: see Mokhiber 1988), are often qualified as mere administrative or civil offences, or, if criminal, as misdemeanours, or have the traits of *mala quia prohibita* (ie ‘artificial’, ‘regulatory’ offences), which are very complex to understand for the general public, and often entrusted to regulatory bodies instead of to ordinary police forces for investigation and sanctioning. Alternatively, they may have been criminalised only recently, and have therefore not yet penetrated the social awareness of what is ‘properly’ criminal; or, even more straightforwardly, they may not be uniformly criminalised under different national legislations; or, finally, in many cases they are not actually enforced and thus are ‘non-existent’ for all practical purposes. All these occurrences contribute to a widespread social perception that corporate crime is not ‘true crime’ and that its victims are, therefore, not ‘true victims’ (Sutherland 1949; Walklate 1989; Moore and Mills 1990; Stitt and Giacompassi 1993; Croall 2001; Tombs and Whyte 2006; Friedrichs 2007; Croall 2009; Hall 2013; Skinnider 2013; Tombs and Whyte 2015; Hall 2016).

This is even more true for *corporate violence*, which, albeit defined as such due to the specific kind of damage—to life, health and physical integrity—it causes, does not match the requisites of what is generally, and socially, understood as ‘violence’: that is, basically, direct interpersonal violence, which, in turn, is commonly associated with conventional predatory offences, voluntary homicide, organised crime, and terrorism (Walklate 1989; Stretesky and Lynch 1999; Punch 2000; Friedrichs 2007; Tombs 2007; Bisschop and Vande Walle 2013; Klein 2014; Pemberton 2014; Walters 2014; Lynch and Barrett 2015). Even in recent decades, when—as widely stated in the literature—the general public’s awareness of white-collar and corporate crime has increased, together with its perceived seriousness (Piquero, Carmichael, and Piquero 2008; Holtfreter, Van Slyke, Bratton, and Gertz 2008; Cullen, Hartman, and Lero Jonson 2009), corporate violence still appears to fall well short of the levels of perceived seriousness and punitive attitudes that public opinion displays towards common, ‘street’ crimes of comparable or lesser harmfulness (Michel 2016).

This is basically due to the *structural* traits of this specific kind of

violence (Stretesky and Lynch 1999; Punch 2000; Friedrichs 2007; Tombs 2007; Bisschop and Vande Walle 2013; Klein 2014; Pemberton 2014; Walters 2014; Lynch and Barrett 2015; Michel 2016). Firstly, it is generally *indirect*, as it does not result from interpersonal aggression, but, instead, from complex organisational policies, decisions, and actions, undertaken on behalf of the corporation and in the course of its legitimate business activity, which indirectly result in the exposure of people to harmful consequences; this is true, for instance, for all the cases directly examined during our empirical research.⁷ This also means that such damaging consequences are quite often *removed in space and time* (in some cases this temporal distance can amount to years or even decades, as is the case with long-latent illnesses) from the actual corporate decision or action that triggered the chain of events that ultimately led to people being injured or killed. Another implication of this feature is related to frequent *difficulties* in understanding, and/or demonstrating, the *causal relationship* between the corporate action and its harmful effects, a difficulty which is, in some cases, so insuperable that it leads to the failure, or even the abandonment, of criminal prosecutions.⁸ This same organisational origin of corporate violence also accounts for its basically *involuntary* nature, which in turn sets it apart from what is generally conceived as ‘violence’. Corporate actions leading to the harming of people are basically motivated by the desire to increase corporate profits and/or ensure corporate survival, and the ‘violence’ is a consequence, rather than a specifically intended outcome, of such decisions. These decisions arise from complex corporate hierarchies and procedures that also often make it almost impossible to attach responsibility to just one or several clearly identifiable individuals, as is the rule with ‘common’ violence.

The complexity and opacity of the phenomenon can be further—and greatly—increased by the ever-growing globalisation of production and distribution, where complex inter-organisational relationships are now the rule, leading, for instance, to long and *transnational* supply chains where pressure from the top corporate actors to keep costs low imposes ever tighter margins down the chain

⁷ See Visconti, A (ed) (2017) *Needs of Victims of Corporate Violence: Empirical Findings: Comprehensive Report* (Milan, Università Cattolica del Sacro Cuore, Centro Studi ‘Federico Stella’ sulla Giustizia penale e la Politica criminale), online at www.victimsandcorporations.eu.

⁸ See chapter seven in this volume.

itself, thus, at the same time, increasing the criminogenic pushes on actors lower down the chain, as well as the passing down of blame and responsibilities in case of ‘accidents’ (Tombs and Whyte 2015).

All these features explain why ‘corporate violence’ is not generally framed as ‘violence’ either by scholars or by the general public, and thus also contribute to accounting for the scarcity of empirical data and scientific literature on the subject. In fact, some of the ‘structural’ traits of these crimes also affect their reporting and, thus, the availability of official statistics, as well as of reliable data about the scope of their harmful consequences. As our knowledge of crime largely depends on reports by the affected people, when—as it happens in these cases—they are generally unable to perceive the harm for very long periods (or at all), or to connect it with its causes, or to recognise its relevance under criminal law (when provided for), any attempt at studying the phenomenon will be severely influenced by a huge dark figure. As has been observed, ‘the majority of those suffering from corporate crime remain unaware of their victimization—either not knowing it has happened to them or viewing their “misfortune” as an accident or “no one’s fault”’ (Box 1983: 17). This feature of corporate violence also affects the possibility of using victimisation surveys to (at least partially) fill the gap in knowledge due to the unavailability of reliable official crime statistics, as this kind of research tool, if applied with any degree of success, would require that corporate violence victims be able to identify themselves as crime victims, which they all too often are not able to do (Walklate 1989). This, in turn, contributes to accounting for the already mentioned comparatively *scarce* criminological and victimological literature available to us, for the purpose of extracting useful data on victims’ needs with specific regard to corporate violence.

Finally, the lack of public understanding of this form of violence as ‘proper’ violence has repercussions on the way this class of victims is perceived, both by public institutions and society at large on the one hand, and by themselves on the other, which, in turn, affects the propensity to report such offences and, as we shall see, the scope and features of the harms caused and the victims’ consequent needs.

3. Prevalence of Corporate Violence and Harmful Global Effects

The harmful effects of corporate violence are basically connected to three main fields of activity (unsafe environmental practices, marketing of unsafe products, and violations of health and safety regulations in the

workplace),⁹ and can be classified under three different typologies (physical, economic, and emotional or psychological costs) according to the consequences of such activities—consequences which, in turn, can take different forms for different kinds of corporate violence.

Firstly, there is the damage connected to *unsafe environmental practices*. It is likely that the various forms of pollution originating from such practices constitute the most common and most far-reaching form of corporate violence (Mokhiber 1988; Donohoe 2003; Tombs and Hillyard 2004; Friedrichs 2007; Rosoff, Pontell, and Tillman 2007; Hall 2013; Skinnider 2013; Klein 2014; Walters 2014; Lynch and Barrett 2015; Tombs and Whyte 2015). Of course, environmental harm does not arise from corporate actions alone (individual behaviours, small farming, State-run facilities, etc, also account for a fair share of global pollution), nor does it only affect humans. However, for the purposes of this analysis, we are interested in all (and only) harmful consequences to humans that can be related to environmental crimes committed by corporations, which, in turn, may involve illegal disposal of dangerous waste, toxic emissions in the air, and contamination of water and/or soil.

The main common feature of damage related to these offences is its particularly wide extent and long duration. Such contaminations, both when due to long-term industrial activities (such as in the asbestos cases, some of which we studied during the course of our empirical research: see the next chapter in this volume and the data collected in Visconti 2017; see also Clinard 1990; Rosoff, Pontell, and Tillman 2007) and to sudden and devastating ‘accidents’ (such as the notorious Bophal disaster or Macondo oil spill: see also Punch 1996; Pearce and Tombs 1998; Croall 2010; Garrett 2014; Steinzor 2015), generally possess a particularly high diffusivity, both directly and indirectly. Directly, the pollution (particularly air and water pollution) usually spreads over large territorial areas and thus affects large sections of the population; indirectly, the contamination has a tendency to enter the food chain and thus to spread further, also thanks to the widening of global markets.

Toxic chemicals thus released and disseminated may then produce both immediate (as is the rule with ‘accidents’) and, even more frequently, deferred effects, as they generally affect human health through accumulation and/or combination, and many of the resulting

⁹ See chapter three in this volume for references to the European policies and legislation.

illnesses have long latency periods (as happens, for instance, with asbestos-related mesotheliomas), or may even present themselves in future generations, as with increased miscarriage rates or foetal deformity rates related to exposure to certain substances (Lynch and Stretesky 2001; Friedrichs 2007; Rosoff, Pontell, and Tillman 2007). All of this, of course, in many cases, makes it even more difficult to connect specific corporate and individual actors to specific responsibilities for specific harms to individuals and communities, thus contributing to the general opacity already mentioned as a common feature in the study, as well as in the prevention and repression, of corporate violence.

Secondly, dangerous industrial and commercial practices can lead to the marketing of *unsafe products*, with negative consequences on the health and safety of consumers (Hills 1987; Mokhiber 1988; Walklate 1989; Clinard 1990; Croall 2001; Friedrichs 2007; Rosoff, Pontell, and Tillman 2007; Croall 2008; Croall 2009; Croall 2012; Klein 2014; Steinzor 2015; Tombs and Whyte 2015). Almost any kind of product can be affected, from motor vehicles (as with the notorious Ford Pinto case: see Hills 1987; Becker, Jipson, and Bruce 2000; Rosoff, Pontell, and Tillman 2007) to children's toys, from household products to cosmetics, etc. For reasons already stated in the introduction to this book, here we will mainly focus on food products, as well as drugs and medical devices.

Illegal practices related to food manipulation and commercialisation do not always imply risks for human health: many criminal (or civil, or administrative) offences in this field are related to frauds on the origin, quality, or quantity of the product, without safety implications, and therefore, even if the related economic harm to consumers may be huge, they fall outside the scope of the present work. Also, even though they may be related to harmful consequences to people's wellbeing, we will not specifically take into account the marketing of foods and drinks rich in fats, sugars and the like, made more pleasing (and even addicting) for consumers, and often deceptively advertised (Croall 2009; Croall 2012). Food contamination with dangerous substances is, therefore, the main focus of our attention. It may arise from the abuse of chemicals and/or drugs in farming, which then seep into processed foods and drinks (thus, in some instances, overlapping with the environmental crimes just described); or from a lack of adequate controls respecting the legal limits for each dangerous substance; or it may stem from intentional adulteration with the purpose of raising profits through an increase in production volumes, food durability, or the like; or it may be the result

of unsanitary conditions in the processing, transport, and conservation of foodstuffs.

The harmful effects of such practices (Clinard 1990; Croall 2001; Friedrichs 2007; Rosoff, Pontell, and Tillman 2007; Croall 2008; Croall 2009; Steinzor 2015; Tombs and Whyte 2015; Leighton 2016), besides generally involving a plurality of consumers (a collective dimension of the offence being a constant of corporate crime and corporate violence: see, amongst others, Sutherland 1949; Walklate 1989), can be both immediate, as is generally the case with severe food poisoning due to bacteria or other very toxic contaminants, and deferred, as is more common with chemicals and some biological elements (such as, for instance, mycotoxins: see Wild and Gong 2010), sometimes requiring the accumulation and/or combination with further substances to produce perceivable harms to health. Such effects may also largely vary in their severity, ranging from bland and transitory diseases to fatal occurrences, particularly when the exposed person presents other vulnerability factors (such as very young or very old age, previous illnesses, etc).

When referring to pharmaceutical products and devices (Braithwaite 1984; Walklate 1989; Clinard 1990; Punch 1996; Croall 2001; Friedrichs 2007; Rosoff, Pontell, and Tillman 2007; Dodge 2009; Klein 2014; Steinzor 2015; Tombs and Whyte 2015), harm to patients' health can originate, once again, from unsafe production procedures (such as, for instance, in the case of haemoderivative drugs extracted from infected blood collected and/or processed without due precautions, which will be discussed further on in this book),¹⁰ as well as from the concealment or downplaying of dangerous side effects or flaws (such as in the notorious Thalidomide and mechanical heart valves cases: Braithwaite 1984; Clinard 1990; Punch 1996; Rosoff, Pontell, and Tillman 2007; see also Visconti 2017), and even, in some cases, from downright fraud (such as in the notorious and recent case of breast implants filled with industrial silicone instead of approved medical silicone: Sage, Huet, and Rosnoble 2012; Tombs and Whyte 2015). While in some occurrences the deadly or health-threatening consequences make their appearance in a short space of time, once again cases of long-delayed—and, often, long-lasting—harms are

¹⁰ See chapter seven in this volume and, for more details on the harmful consequences on victims, the already mentioned *Needs of Victims of Corporate Violence: Empirical Findings: Comprehensive Report*, online at www.victimsandcorporations.eu.

frequent, occasionally (as in the aforementioned Thalidomide case, where the drug produced severe foetal deformities) even affecting future generations. Thus, also in these cases, problems of causality arise, which in turn can lead to a lack of personal and/or social perception of the offence, as well as to the impossibility of achieving a declaration of criminal responsibility by any court of law.

Finally, the third field of activity affects the lives and health of workers (in the form of both accidents and work-related illnesses). The harmful consequences of corporate policies often result from *violations of health and safety regulations in the workplace*, due to negligence on the employer's part and/or cost-cutting policies (Box 1983; Hills 1987; Walklate 1989; Clinard 1990; Croall 2001; Friedrichs 2007; Rosoff, Pontell, and Tillman 2007; Tombs 2007; Croall 2008; Snell and Tombs 2011; Bisschop and Vande Walle 2013; Tombs 2014; Steinzor 2015; Tombs and Whyte 2015; Matthews et al 2016). Even if this specific branch of corporate violence is not a direct object of our study (due to the absence of EU legislation on the subject), criminological literature on the victims of unsafe working conditions has also been taken into account, as many of the physical, economic, and psychological consequences suffered by these victims share common features with those suffered by victims of corporate violence in general; in the asbestos-related cases studied during our empirical research workers were also typically affected, together with a broader range of local population.

With respect to the different kinds of harmful consequences experienced by victims of corporate violence, the first and most obvious typology—the one which qualifies them, at least from a criminological and victimological viewpoint, as ‘violence’—of course relates to physical ‘costs’, ie *personal injuries, illnesses, and loss of life* (Box 1983; Hills 1987; Mokhiber 1988; Walklate 1989; Clinard 1990; Poveda 1994; Punch 1996; Punch 2000; Croall 2001; Lynch and Stretesky 2001; Donohoe 2003; Friedrichs 2007; Rosoff, Pontell, and Tillman 2007; Tombs 2007; Croall 2008; Croall 2009; Dodge 2009; Tombs and Whyte 2009; Croall 2010; Snell and Tombs 2011; Bisschop and Vande Walle 2013; Hall 2013; Klein 2014; Tombs 2014; Lynch and Barrett 2015; Steinzor 2015; Tombs and Whyte 2015; Leighton 2016; see also Visconti 2017, for an overview of our empirical research). As already stated, these physical harms can vary in magnitude from transient, mild, short-term illnesses to life-long, often disabling, maladies and life-threatening (and ultimately lethal) conditions, and may even affect future generations, in the form of

negative effects on human fertility, teratogenic effects on foetuses, or the transmission of toxic substances to infants through mother's milk.

Any attempt at measuring the scope of physical costs relative to corporate violence is undermined by the previously mentioned huge dark figure, as well as by the underlying problems in reconstructing causation between specific actions and specific harms. For instance, it has been estimated that as many as 800,000 premature deaths per year can globally be attributed to air pollution, with at least 24,000 premature deaths yearly due to the same cause in the United Kingdom alone (Tombs and Whyte 2009; Croall 2010), and an estimated 13,200 to 34,000 premature deaths per year due to small-particle emissions from coal-fired power plants in the United States (Lynch and Barrett 2015). However, it is all but impossible to precisely calculate how many of these deaths can be related to violations of environmental law by private corporations (and, from a criminal law viewpoint, it is generally not possible to demonstrate a specific causal connection between a single death and the actions of a single corporation or of a single individual).

With respect to environmental disasters, it can be slightly easier to get a reliable account of the physical harm (or, at least, of the direct and immediate harm) caused: for instance, the already mentioned industrial 'accident' of Bhopal, which occurred on 3 December 1984, caused, through the release of a toxic cloud of methyl isocyanate, between 3,000 and 5,000 deaths and at least 200,000 recorded injuries and illnesses (Punch 1996; Pearce and Tombs 1998; Croall 2010).

Similarly, bouts of food poisoning resulting in illnesses severe enough to require medical care are generally recorded, even if lesser (and, likely, more frequent) intoxications often fail to be reported to the authorities, and/or be connected to hazardous corporate behaviours (Croall 2010; Tombs and Whyte 2015). For instance, in November 2008 a single outbreak of salmonella due to the sale, on the US market, of a stock of contaminated peanuts (which became infected with the bacteria due to unsanitary conditions in the processing plants and were distributed notwithstanding the management's awareness of test positivity for salmonella) caused nine deaths, 714 confirmed cases of illness, of which 166 required hospitalisation, and an estimated number of between 11,000 and 20,700 total cases of food poisoning (Leighton 2016). A previous episode also registered in the United States—an outbreak of *Escherichia Coli* which, in 1993, involved 73 restaurants of the 'Jack in the Box' chain—is reported to have caused the (ascertained) infection of 708 people, the hospitalisation of 171 of them, 45 of which were children, and four deaths (all children aged

below seven), as well as several permanent injuries, including kidney and brain damage (Roberts 2008; AAJ 2015).

Work-related deaths, injuries, and illnesses are generally recorded, at least for social security purposes (even if a certain amount of unrecorded ‘accidents’ are also to be assumed, the extent of which will likely vary according to various factors, such as the rate of illegal work, the severity of injuries suffered, etc); but, once again, it is often difficult to discern between actual fatalities and harmful effects which are instead the result of health and safety law violations. A comparison provided by Poveda (1994) between work days lost in the United States in the year 1990 due to non-fatal injuries related to ‘street’ crime, and work days lost in the same nation and time due to non-fatal work-related injuries and illnesses, shows a result of 5.9 million lost days for the former, against 60.4 million for the latter. The World Health Organization has estimated ¹¹ that in 2004 asbestos-related lung cancer, mesothelioma, and asbestosis from occupational exposures resulted in 107,000 deaths and 1,523,000 Disability Adjusted Life Years (not to mention the several thousands of deaths which can be attributed to other asbestos-related diseases, as well as to non-occupational exposures to asbestos, such as those—also analysed in our empirical research—of family members of asbestos workers contaminated via clothes, or residents in the neighbourhood of plants where by-products of asbestos production were used in the civil construction sector).

Once again, it is all but impossible to extract from such data the exact amount of harm to health ascribable to corporate *offences*; but, on the whole, it can be safely assumed that this kind of corporate violence, while greatly underestimated in official statistics (Box 1983; Tombs and Whyte 2015), causes a far larger amount of deaths, injuries, and illnesses than common crime (Walklate 1989; Tombs 2007), or even than the most-feared crime of terrorism (considering that, according to the last available data, victims of terrorist attacks globally amounted to a ‘mere’ 29,376 in 2015: see Institute for Economics and Peace 2016).

But, of course, the kind of harm most intuitively related to corporate crime in general is *economic* in nature (Poveda 1994; Shover, Fox, and Mills 1994; Levi 2001; Friedrichs 2007; Croall 2008; Croall 2009; Croall 2010; Snell and Tombs 2011; Hall 2013; Tombs

¹¹ Data available at http://www.who.int/ipcs/assessment/public_health/asbestos/en/ (last accessed on 7 August 2017).

2014; Matthews et al 2016). Such economic harm is in no way easier to measure than physical harm, both because it is not generally accounted for in corporate balance sheets, being usually regarded as ‘externalities’ (Tombs and Whyte 2015), but also because it encompasses both direct and indirect costs (Friedrichs 2007).

Direct costs are typically defined in terms of the victims’ monetary losses, and are usually reckoned in relation to frauds, financial crimes, antitrust violations, tax evasion, and the like. Even if, also with respect to this kind of harm, precise estimations are hard to achieve, it can be safely assumed that the overall economic losses due to corporate crime dwarf those related to common crime (Sutherland 1949). Another comparison provided by Poveda (1994) gives us an example of such disproportion, by matching the five billion dollar losses due to conventional crime in the United States in the year 1990, against the 200 billion dollar losses due (solely) to the Savings & Loans scandal in the same period (see also Punch 1996; Rosoff, Pontell, and Tillman 2007). Direct economic losses may, however, also stem from episodes of corporate violence: consider the case of people forced to relocate from a highly polluted area, or losing their jobs (and therefore incomes) due to work-related accidents or diseases, or, more generally, to injuries or illnesses resulting from any of the violations reviewed above, or having to pay for expensive therapies for these same injuries or illnesses.

Indirect economic costs are even harder to estimate, as they include a wide range of negative collective effects, such as higher insurance rates, higher law enforcement costs, higher public healthcare expenditures, loss of investors’ confidence and consequent decline in stock values or increase in bond interest rates, costs for soil or water clearances that are ultimately shouldered by the citizenry, higher taxes, etc. According to the most recent European Environment Agency report, for instance, air pollution and greenhouse gases from industry cost Europe between €59 and €189 billion in 2012 (while over the period 2008–2012 the estimated cost was at least €329 billion and possibly up to €1,053 billion), comprehensive of the negative economic impact of a number of harmful air pollution consequences including premature deaths, hospital costs, lost work days, health problems, damage to buildings, and reduced agricultural yields (EEA 2014). Once again, to distinguish between costs related to actual law violations by corporations and costs related to air pollution in general is all but impossible; yet even if the former did amount to a tenth of such costs, its impact would dwarf that of all indirect costs of street crime.

Finally, the *emotional and psychological costs* of corporate violence should also be taken into account (Ganzini, McFarland, and Bloom 1990; Shover, Fox, and Mills 1994; Croall 2001; Levi 2001; Friedrichs 2007; Rosoff, Pontell, and Tillman 2007; Croall 2008; Snell and Tombs 2011; Arrigo and Lynch 2015; Matthews et al 2016). The literature is particularly scant with respect to such costs, the majority of it focusing on the victims of fraud, instead of corporate violence (with some exceptions for victims of workplace offences and for residents in highly polluted areas). Yet we can assume (an assumption which found confirmation in the interviews conducted during our empirical research)¹² that some of the data collected in relation to economic crime might also apply, at least to some extent, to corporate violence. As the analysis of its psychological impact brings us more directly within the perspective of the individual victim, however, we will discuss this topic in the following section.

4. The Impact of Corporate Violence on Individuals

As we have just observed, the existing (and scant) literature on corporate violence mainly focuses on the study of its harmful consequences as a social phenomenon—which is understandable, considering the usual collective dimension of these offences. Consequently, said literature generally focuses on analysing the general traits of corporate violence and on measuring, or at least estimating, as precisely as possible its overall dimension. This, however, means that studies and research that instead focus on the individual perspective of the single victim (Walklate 1989), with their specific losses, sufferings, fears, needs, etc, are even more rare—yet this is exactly the perspective which is most directly relevant for an effective implementation of Directive 2012/29/EU, as highlighted in the first section of this chapter. Nonetheless, some useful information can be collected through a review of the pertinent literature, particularly thanks to case studies and a few victimisation studies based on individual interviews. We can also observe that the results of

¹² The sample, as stated in the above mentioned report, was not very numerous (in total, 26 semi-structured interviews and 8 focus groups were carried out in the three involved countries), but the methodology allowed for an in-depth analysis of victims' and professionals' perceptions of corporate violence harmful consequences.

the empirical research carried out as part of our project basically confirmed the information reported by the available literature.

The first trait common to all white-collar and corporate crimes is related to an element of ‘violation of implied or delegated trust’ due, basically, to the great asymmetry of information—and, more generally, power—that exists between those (individuals or corporations) who run a business and all the stakeholders (consumers, workers, stockholders, creditors, public agencies, local communities, etc) potentially affected by its negative, and in some case criminal, outcomes (Sutherland 1940: 3; Sutherland 1949; Reiss and Biderman 1980; Shapiro 1990; Nelken 1994). This means that any form of corporate crime—and thus, for our purposes, corporate violence—also implies a breach of (at least implicit) trust against the victim. This is an element absent in the majority of conventional crimes, but which is immediately apparent in cases of product safety violations (imagine, for instance, a person suffering from an illness requiring the administration of a specific drug, who has no choice but to literally place their health and life in the hands of the manufacturer of that drug), as well as in any case of violations of health and safety regulations in the workplace by the employer. The same feature, however, can also be traced in environmental crimes: for instance, residents in an area potentially affected by industrial plant emissions can only trust in the corporation’s respect for environmental laws. Thus, it can be expected that, once a victim of corporate crime becomes aware of the violation suffered, feelings of betrayal, rage, resentment, frustration, and mistrust will arise.

This expectation is confirmed by those studies (admittedly few), based on interviews of victims of corporate crime (albeit of financial fraud), which analyse the psychological impact of this kind of victimisation (Shover, Fox, and Mills 1994; Ganzini, McFarland, and Bloom 1990; Levi 2001; Spalek 2001). Such sentiments of *mistrust* and *resentment* can also end up being directed towards all similar economic and financial organisations and, especially when a failure to act was perceived on the part of public regulatory agencies or, following the reporting of the crime, on the part of law enforcement agencies and/or the judiciary, victims may develop a wider feeling of abandonment, insecurity, and distrust against public institutions and the law. The victims interviewed in the course of our research often expressed like sentiments of widespread distrust towards public as well as private institutions; moreover, in some specific cases these feelings got to some extent exacerbated by the implicit, and betrayed, promise

of a better future they had attached, for instance, to a certain factory or drug (see Visconti 2017 for all the details).

Such sentiments may be further fuelled by several specific problems that victims of corporate crime can face while dealing with law enforcement agencies: from a basic difficulty in picking the right agency from within a maze of public bodies with overlapping competences, to public officers treating them with a generally bureaucratic and indifferent attitude; from a lack of effective support programmes,¹³ to a general—institutional as well as public—perception of them as being less ‘deserving’ of public sympathy, less vulnerable, and on the whole less harmed than victims of common crime, and so on (Moore and Mills 1990; Arrigo and Lynch 2015).

All in all, victims of corporate crimes and corporate violence may experience *secondary victimisation* (ie the negative consequences a victim may suffer because of the way in which others—particularly law enforcement agencies, primary groups, and the broader community—respond to them and to the offence that occurred to them: see Mawby and Walklate 1994; Wolhuter, Olley, and Denham 2009; Scarcella Prandstraller 2012) at the hands of the legal system, due to a general feeling of being ‘second-rate’ victims or just ‘bureaucratic files’, abandoned by the public institutions that should protect and ‘avenge’ them, and often crushed under the powerful, and sometimes quite aggressive, defence strategies that corporate actors can display against them (Clinard 1990; Shover, Fox, and Mills 1994; Snell and Tombs 2011; Arrigo and Lynch 2015).

Evidence that inadequate assistance provided by public agencies (failure in providing information, support, counselling, and legal ‘closure’) greatly contributes to the victims’ distress, and appears to be associated with the increased likelihood of the affected persons developing a mental health condition, has emerged from a recent survey of bereaved family members of workers killed on the job in Australia (Matthews et al 2016).

Sentiments of shame, guilt, and self-blame are also reported, particularly by victims of fraud (according to the common perception that they, at least to some extent, ‘contributed’ to the crime), in many ways similar to those experienced by victims of rape (Levi 2001), with whom victims of fraud appear also to share higher rates of major depressive episodes and generalised anxiety disorders after the crime

¹³ See also chapter eight in this volume.

(Ganzini, McFarland, and Bloom 1990). It is probably not too far-fetched to assume that similar feelings might be developed also by (at least some) victims of corporate violence, particularly when a shared public narrative exists which places at least part of the blame on them, as is often the case with work-related accidents (because that job was, after all, a ‘choice’ of the employee, or because the ‘accident’ was ‘victim precipitated’), as well as with illnesses or injuries suffered by consumers (according to the common mentality of *caveat emptor!*) (Tombs 2007; Croall 2008; Bisschop and Vande Walle 2013).

In actual fact, bereaved family members of victims of work-related deaths display rates of post-traumatic stress disorder (PTSD), prolonged grief disorder (PGD), and depressive disorder (MDD) even higher than family members of victims of homicide or fatal accidents, as well as high levels of anxiety, feelings of isolation, mood swings, fear, and guilt (Matthews et al 2016). One medical professional interviewed in the course of our research stated that some family members of people deceased because of asbestos-related illnesses also developed like mental conditions, probably related to multiple bereavements as well as to the fear of developing the same disease due to like environmental exposure (see Visconti 2017).

The quality of life of victims of corporate violence can obviously also be severely affected by a set of more immediate and *practical* negative consequences (Shover, Fox, and Mills 1994; Croall 2001; Levi 2001; Friedrichs 2007; Rosoff, Pontell, and Tillman 2007; Croall 2010; Snell and Tombs 2011; Matthews et al 2016), which many of the people interviewed in the course of our research also experienced. Damage to health and/or physical integrity may imply the need for complex therapies that may disrupt a person’s—and often their family’s—economic and psychological wellbeing, cause the loss of jobs and incomes, and place a strain on social and affective relationships. The death of a loved one, besides often depriving the family of its ‘breadwinner’, or anyway affecting its income, is a traumatic event for their relatives, which can be further exacerbated by the failure to find out the ‘truth’ about causes and responsibilities, which is an all-too-common occurrence in cases of corporate violence (Snell and Tombs 2011; Matthews et al 2016), as already noted above. In some very serious cases of environmental pollution, individuals or whole communities may even be forced to relocate, with a severe disruption of their social bonds and identity (Arrigo and Lynch 2015; Rosoff, Pontell, and Tillman 2007, also with specific reference to the examples of the Love Canal dumping site and of the Times Beach case: 142–189).

For those unable to take such extreme measures, however, *repeated victimisation* is a concrete risk (Friedrichs 2007; Croall 2008; Croall 2009): people working in unsafe establishments who cannot find other jobs in a safer environment, residents unable to leave a polluted territory, etc, will thus remain exposed to those same elements that have once caused harm to them or to their relatives and friends. This is especially likely when multiple vulnerability factors happen to add to each other, as is the case for instance with the documented tendency to find the most polluting factories, or the largest waste dumping sites, in the proximity of the poorest communities (Stretesky and Lynch 1999; Croall 2001; Lynch and Stretesky 2001; Rosoff, Pontell, and Tillman 2007; Croall 2008; Croall 2010; Bisschop and Vande Walle 2013; Hall 2013; Walters 2014; Arrigo and Lynch 2015; Tombs and Whyte 2015). But the intertwining of vulnerability factors may occur also with respect to other social groups, as happens, for instance, with the marketing of unsafe drugs or medical devices specifically targeted at women (Friedrichs 2007; Dodge 2009; Croall 2009), or with the already mentioned increased risks for the very young and very old, as well as for the already ill, when exposed to adulterated food (Croall 2009; Steinzor 2015).

5. Conclusion: A First Overview of the Needs of Corporate Violence Victims

On the whole, the preliminary data drawn from the criminological and victimological literature, as largely confirmed by the results of our empirical research, hint at a series of needs of corporate crime and corporate violence victims (see also Croall 2008; Matthews et al 2016), which an effective implementation of the Directive 2012/29/EU should provide.

It seems that this type of victim will often experience a need for specific psychological and emotional support¹⁴ that is in no way lesser than the one experienced by victims of ‘common’ crimes and ‘true’ violence and, due to the greater legal and regulatory complexities implicit in these offences, also an increased need for information and legal support, particularly in order to deal with the great disproportion of resources that usually opposes victims and offenders in this area.

With respect to practical support needs, the majority of these

¹⁴ See chapter eight in this volume.

victims appear likely to require specialised medical and social assistance, especially in all cases of long-term and/or disabling diseases, as well as in all cases of exposure to the risk of contracting long-latent illnesses, which imply a further, specific need for preventive screening.

More generally, it can be safely assumed that victims of corporate violence, whether they are aware of it or not, are characterised by a need for further research and advocacy, due to the structural features of crimes that, as of today, remain opaque and underestimated in the eyes of both the general population and public institutions. This need is actually expressed by some of these victims, by organising themselves into associations which not only provide their members with information and support,¹⁵ but also often work to shape new public policies to help people who have suffered the same kind of offences.

Finally, and connected with the previous assumption, it does not appear too far-fetched to suppose (and has been indeed confirmed by some of the people interviewed in the course of our empirical research) that these victims, whom society and institutions often fail to recognise and treat as such, may experience on occasions an even greater need of recognition of their ‘victim status’¹⁶ and of the wrongs they have suffered, than many victims of ‘common’ crimes, thus placing an (even) greater value on ‘moral’ redress (including a reasonable assurance that no further offences and, therefore, no further victimisation, will happen) than on instrumental outcomes (see also Garrett 2014; Hall 2016).

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¹⁵ See chapter seven and chapter eight in this volume.

¹⁶ See chapter one in this volume.

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CHAPTER VII

VICTIMS OF CORPORATE VIOLENCE AND THE CRIMINAL JUSTICE SYSTEM: NEEDS, EXPECTATIONS, AND RELATIONSHIPS WITH CORPORATIONS

by Stefania Giavazzi

CONTENTS: 1. The Survey of Case Law: An Overview. – 2. Victims' Access to Justice: Obstacles and Problematic Issues. – 3. Victims' Participation in Criminal Proceedings: Needs, Expectations, and Obstacles. – 4. Victims' Right to Obtain a Decision on Compensation. – 5. The Role of Corporations in Avoiding Victimisation.

1. The Survey of Case Law: An Overview

The primary purpose of this chapter is to provide a general overview of the position of the victims of corporate violence within criminal proceedings, from the investigation phase to the final judgment outcome, in the light of some European leading cases as well as the project's empirical findings. The contribution will focus on the obstacles arising out of the criminal proceeding as regards guaranteeing victims' rights, and responding to victims' needs and expectations in terms of justice. Further, attention will be paid to the position of corporations in dealing with this type of victims when criminal proceedings do take place, and in avoiding victimisation.

The review of case law as well the empirical findings have confirmed some of the project's assumptions: the victims of corporate violence are not a minority, they are vulnerable, and there is a lack of awareness of their victimisation among the judicial operators and the providers of social services. The survey of case law also offered hints at a more general understanding of the context and framing of the notion of corporate violence. Within the *environmental field*, for example, questions arose concerning whether the category of so-called disasters (calamitous events that cause severe human, material, and economic or environmental losses) is compliant with the notion of

corporate violence.¹ Of course, corporate violence occurs only when the disaster may be ascribed to the criminal behaviour of a corporation or its representatives. Problems arise when we look at the *effects* caused by disasters; in fact, corporate violence can be considered to have occurred only when events have simultaneously caused harm to human life and to the environment, while harm to environment is not enough to qualify the fact as violent. This distinction, however, has proved to be quite difficult to maintain in practice, because the ‘double damage’, even when present, is not always charged in the count of indictment. In fact, depending on the public prosecutor’s choices and the nature of national criminal systems, environmental disasters may be charged indifferently as criminal offences against human life/health or public safety, and/or environmental crimes. This consideration has a consequence not only for the definition of a case as one of corporate violence, but also on the victims’ right to access justice. In fact, offences that focus only on harms to public safety or to the environment may exclude the right of individual victims to participate in criminal proceedings, because they cannot be strictly considered as ‘victims’ according to the type of offences charged to the defendants, and the harms they suffer cannot be directly related to the specific crimes under judgment.

Some general remarks specifically relate to the field of *food safety*, where the project has found very few cases that fit the notion of corporate violence. The reasons for this may be summarised as follows. Firstly, more than other sectors and especially so in Europe, the food sector seems to benefit from the precautionary approach², which prevents the dissemination of diseases as well as contamination on a large scale. In fact, it’s more frequent to find frauds against consumers being related to rotten or unsafe food—as in the horsemeat scandal or the cases of salmonella in European countries—the majority of which raise specific issues of food quality, while only rarely causing severe and widespread harm to people’s health. Also, in other well-known food scandals—for example the Chinese milk scandal or the sprouts with E. Coli in Germany³—the perpetrators, or the sources of contaminated raw materials, were located outside Europe.

¹ On this notion see in this volume chapter six, by Arianna Visconti.

² Addressed by Stefano Manacorda and Irene Gasparini, chapter three in this volume.

³ For references, see Giavazzi 2016a.

Secondly, most of cases belonging to this sector present three permanent characteristics: (a) harms usually affect single individual victims or small groups (thus, they rarely cause widespread victimisation); (b) defendants are often farmers, small operators (non-incorporated), or small firms; (c) the food industry has a long supply chain, in which corporations normally occupy the final place (they just package and distribute the products). These features mean that it is quite difficult to determine in which phase the contamination or the poisoning of food occurred, not to mention the related liabilities of food corporations. Such characteristics are present, for example, in well-known cases, such as ‘Mad Cow disease’,⁴ and the poisoned wine (methanol contamination) which occurred in Italy in the 1990s⁵ and in the Czech Republic in 2012.⁶

General remarks can also be made concerning the different approaches to corporate violence adopted by in the various European countries’ criminal systems. In fact, assuming that the same type of harm is suffered as a consequence of similar types of corporate violence, the effective opportunity to obtain a criminal judgment varies from one country to another. For example, there are many criminal proceedings involving asbestos-related diseases in Italy, while in Belgium the sample is significantly less extensive, and in Germany apparently it does not exist at all. A difference in approach among the European countries has also been identified with respect to the role of victims’ associations. In Italy, these are widely admitted to participate as parties in criminal proceedings, while in Germany participation is limited to victims as individuals. In Belgium and Germany, victims may count on victim support services, while in Italy such services do not yet exist. In addition, in Germany victims’ associations are

⁴ ‘Mad cow disease’ (BSE: Bovine spongiform encephalopathy) was first discovered in the United Kingdom. By June 2014, 177 people in the United Kingdom, and 52 elsewhere, had fallen ill and died as a result. The BSE crisis led to the European Union banning exports of British beef with effect from March 1996; the ban lasted for ten years before it was finally lifted on 1 May 2006. For references, see Giavazzi 2016a, pp 137–38.

⁵ Corte Suprema di Cassazione, 16 April 1994 n 4426, *Cassazione penale* (1994) 186.

⁶ In 2012, forty people in the Czech Republic and Poland died—and many others were taken to hospital—as a result of methanol poisoning. The poisonings continued for several years after the main wave; as of April 2014, there were 51 dead and many others had suffered permanent health damage. For references, see Giavazzi 2016a, p 137 n 2.

supported both by federal and State funds, while in Italy no public funding is available to support similar associations.⁷

With reference to all three sectors, a common, general finding can be pointed out: for many cases with an evidently high level of victimisation, criminal proceedings never start or else take decades to reach the trial phase or a judgment. It is a matter of fact that in many scandals with hundreds or thousands of victims all over Europe, there is no evidence of criminal judgments against the corporations or their representatives. The reasons for this will be examined below, but we may anticipate that many obstacles affect, with different consequences, the victims' right to access justice, the victims' right to obtain a decision on the compensation for damages, and the victims' right to be protected from secondary victimisation during criminal proceedings. In brief, the relevant topics are: the lack of information about the risks or the effects caused by consuming unhealthy food, using toxic products, or being exposed to harmful substances for a long period of time; difficulties in collecting evidence about the causation link between the intake of or exposure to a risky substance and the harm to a single individual's health; difficulties in collecting evidence about the liability (guilt) of corporate representatives; lack of competence and resources among first responders; and the negative attitude of corporations in dealing with victims.

Despite the abovementioned difficulties in the selection process, victims or professionals involved in some key cases (such as the Thalidomide case, the Infected Blood case, the Asbestos-related Disease cases, the Exxon Franking case, the Eschede Disaster, the Holzschutzmittel case, the Ghislenghien Disaster, the Train Accident in Wetteren, the Kik Karachi Pakistan case, or the German Airport Detectors case) have participated in project activities and shared their experiences.⁸ Several European cases of corporate violence which have led to criminal proceedings have been identified and analysed in Italy, Germany, and Belgium. Some of them—such as the Poly Implant Prothèse (PIP) case, the 'Land of Fires' case, 'Mad cow' disease, Glyphosate, relevant accidents at work, and some disasters—have been

⁷ See chapter eight in this volume.

⁸ For a list of cases involved, as well as interviews and focus groups conducted in Italy, Germany, and Belgium, see the country-specific Methodology and Cases sections in *Needs of Victims of Corporate Violence: Empirical Findings: Comprehensive Report* (Giavazzi, Mazzucato, and Visconti 2017; Engelhart, Hillemanns, and Schenk 2017; Lauwaert 2017).

considered as additional benchmark cases, while, according to the project criteria, fourteen criminal proceedings have been used as *leading cases* to test a range of key factors: the victims' specific needs in accessing justice, victims' status within the criminal proceedings, problems related to victims' participation in the criminal proceedings, information and support received by victims before and during the criminal proceedings, and the role of corporations.⁹

All the selected leading criminal proceedings involve a significant number of victims: hundreds or even thousands of individuals, and in many cases entire communities. The type of victims varies widely, but they usually belong to the categories of workers, ex-workers, citizens living in the area where the plants are placed or the disaster took place, patients, and consumers.¹⁰

As regards asbestos-related diseases, the Italian criminal proceeding *Eternit Casale* (also known as the Eternit case) may be considered the leading case, for many reasons. It concerns thousands of people who contracted asbestos-related diseases caused by the exposure to Eternit, a fibre-cement used for the preparation of tiles, sheets for building construction, and water pipelines. The case involved the workers of a number of Italian plants, as well as residents living in the surrounding areas, who were harmed by the widespread use of the material in the cities and in the building of infrastructure. The first criminal proceeding was closed in 2015 with no conviction due to the statute of limitation, but a second criminal proceeding concerning the same facts is now ongoing. As far as asbestos-related diseases are concerned, the project also took into consideration the *Ivrea Olivetti* Italian case, which is now ongoing.¹¹ In the *environmental field*, several criminal proceedings related to harmful pollution or environmental disasters have been selected as leading cases: (a) the *Bussi sul Tirino* Italian case, which represents one of the most significant cases of water pollution caused by industrial activities in Italy. (b) The *Ilva Taranto* Italian case (also known as the Ilva case), which concerns an environmental disaster related to industrial activity carried out since 1995 in a plant located in

⁹ For the list of criteria, methodology, and a detailed analysis of each case, including the mapping of numbers and types of victims, see Giavazzi 2016b.

¹⁰ For numbers and a detailed analysis of the victims involved in each case, see Giavazzi 2016b.

¹¹ Also in this case the inhaling of asbestos fibre dust is supposed to have caused severe injuries and the death of several workers who, having worked without any protective disposals and without being informed of the risks, had been exposed to the substance for a long period.

Taranto, and to the effects such activity had on both the workers' and the population's health. The environmental disaster is linked to the dissemination of highly toxic substances in the air, the water, and the soil, posing a threat to human beings, animal life, and the environment. Its particular relevance comes from the social and political conflict it created between corporations, workers, citizens, and public institutions, as well as from the wide impact the industrial activities allegedly had on the environment. The trial is ongoing. (c) The *Porto Marghera* Italian case, which is the first and seminal case of historical pollution in Italy. The investigation concerned industrial activity carried out at the Marghera petrochemical plant (in the Venice lagoon) over more than thirty years. Under scrutiny were, in particular, the damage (mainly types of cancer) caused to human health by toxic chemical substances (vinyl chloride monomer (CVM)/polyvinyl chloride (PVC)) as well as the damage caused to the environment by productive activities around the chemical complex. The criminal proceeding ended in 2006. (d) The *Tamoil Cremona* Italian case, which concerns the alleged production of site contamination due to the industrial activity of a refinery located in the city of Cremona, along with failures in waste management. The release of toxic substances has led to the contamination of the site where the refinery lies, and subsequently—as a dynamic consequence of the pollution—the contamination of groundwater and of natural resources, particularly the waters of the Po river. The criminal proceeding is now before the Court of Appeal. (e) The *Spinetta Marengo* Italian case, which concerns water poisoning and the failure to carry out clean-ups as required by the law in the Spinetta Marengo chemical area, which has been operating since the beginning of the twentieth century, and includes plants for the production of plastic, rubber, and fluorine lubricants. The first instance judgment was issued in 2015. The appeal is ongoing. (f) The *Holzschutzmittel* German case, which concerns certain wood protection agents containing pentaclorofenol (PCP) and gamma-hexachlorocyclohexane (lindane) and certain production-related contamination substances such as dioxin and furan. The criminal proceeding ended in 1995. (g) The *Waste Dump of Mellery* Belgian case, which concerns the dumping of illegal toxic waste at the waste dump of Mellery, which is supposed to have caused the pollution of the water, soil, and air over a wide area. The final judgment was issued in 2003.

As examples of *disasters* the following criminal proceedings have been selected: (a) the *Train accident of Eschede* German case, June 1998, when a train's rubber-sprung wheel broke due to material fatigue at a very high speed, causing the train to derail and to collide with a road bridge, which collapsed instantly. The criminal proceeding ended

in 2003. (b) The *Gas Explosion in Ghislenghien* Belgian case, which is the biggest technological disaster ever in Belgium. The case concerns an enormous explosion in July 2004, following an accidental gas leak in a high-pressure gas pipe underneath the industrial zone of Ghislenghien, where construction work was taking place. The explosion caused an enormous fire and the temperature at the disaster scene reached 300°C. The final judgment was issued in 2012.

In the *pharmaceutical and medical devices sector*, the following criminal proceedings have been examined in particular: (a) The *UB Plasma* German case, which relates to the contamination with HIV of plasma supplied to hospitals. In order to save money, UB Plasma pooled the blood of several donors before testing, which was considered an unacceptable laboratory practice. This practice rendered the well-established/prevalent HIV and hepatitis tests less sensitive, with the consequence that the HIV infection of certain donors was not detected in time. Moreover, for financial reasons the company did not observe the standard quarantine period for storage of the blood plasma. Final judgment was issued in 1996. (b) The *Tri Heart Valves* Italian case, which concerns artificial cardiac valves of poor quality, not compliant with legal standards for the materials, whose breakages caused many deaths. The criminal proceeding is closed.

Consideration of these judicial cases tells us that access to justice, the obtaining of a judgment in a reasonable time, the recognition of the corporation's liabilities, and the compensation for damages, amount altogether to a real 'obstacle course'.

2. Victims' Access to Justice: Obstacles and Problematic Issues

One of the most important, general observations emerging from the project findings is that the number of victims potentially injured or harmed by the fact of corporate violence does not equal the number of victims who could effectively have access to justice or participate in the criminal proceeding. This consideration depends on a number of factors and obstacles, most of which may be considered typical of criminal proceedings involving corporate violence.

Firstly, the opportunity to access justice implies the identification of victims, while the decision to access justice assumes that victims are aware of their being victims. It is a matter of fact that except for disasters, where victims are clearly identified as people harmed by the event, in many cases a complete identification of all potential victims by the public authorities is only partially possible at the time when the

investigation starts. This is true in almost all cases concerning diseases related to pollution or contamination which lead to harm over a long period of time—where etiopathogenesis takes place over a very long period, and often the effects are latent—or where widespread damage is produced in extensive areas of land (Forti 2017; Centonze and Manacorda 2017). The lack of identification may result in a lack of victims' awareness of their status, and vice versa, with serious limitations to their right of access to justice. Difficulty in identifying victims often also leads the public prosecutors to start additional investigations and a new proceeding against the same perpetrators, charging the same offences, simply because they have discovered new victims.

It may be argued, therefore, that for some well-known cases not all the victims have yet been identified. In the Eternit case, for example, a complete identification of all victims was only partially possible at the time of first investigation and trial. Those who filed no complaint, who were not identified as victims by the relevant associations, or who were not informed or guided by the associations to ask for compensation, had no chance to access justice. This 'black hole' was not entirely remedied even when the second criminal proceeding (the so-called Eternit bis) opened in relation to deaths and diseases discovered after the beginning of the first trial. In the Ilva case the true number of potential victims may be much higher than those who have joined the ongoing criminal proceeding, because the damage, as well as the number of those potentially harmed, is still partially unknown. The chemistry and epidemiology reports lodged within the criminal proceeding showed that the continuing exposure to the toxic and polluting substances dispersed in the air as a consequence of the plant activity is still causing a decline in the population's health conditions. In the Ivrea Olivetti case it is quite certain that the victims identified within the current criminal proceeding are only a limited part of the potential victims, as the experts declared that many other deaths are expected for the period between 2017 and 2020. In the Bussi sul Tirino case, pollution has been carried on for forty years and the potential victims could number in the thousands, based on the number of persons who have been using water in the contaminated area over the timeframe for contamination of the water. In Holzschutzmittel case, around 200,000 people were estimated to have suffered physically from contact with the substances, but in the trial only 29 of the alleged 44 personal injuries were found attributable to the relevant products.

The identification of victims of corporate violence in the criminal proceeding usually depends on the public prosecutor's activities, but the role of victims themselves, or that of other subjects, is not

negligible—indeed, it is fundamental. When such victims are alone, they rarely report the crime or have enough information, resources, or strength to proceed individually. Of course, the responsibility for checking the potential facts concerning corporate violence and potential victims, as well as of reporting the potential crime to enforcement agencies, should primarily pertain to *public operators* (operators of the healthcare system, *in primis*) or *public agencies*, the bodies and entities responsible for protecting public health, the environment or workplace safety (Rotolo 2017). However, data and findings do not provide particular evidence of the effectiveness of the role played by these actors in cases of corporate violence. Of course, *corporations* could also play a role in the identification of victims, as well as informing them, especially when harmful conduct is discovered by the corporation itself before the investigation starts. Unquestionably, however, when the case has severe implications in terms of penalties and reputational damages, it cannot be expected that the corporation will report the case to the public authorities, due to the employment of defensive strategies and cost–benefit assessments (Giavazzi 2017).¹²

It therefore seems fair to affirm that ‘corporations do not disclose’ and ‘public agencies arrive too late’. Instead, media and social operators play a significant role in informing victims about their status, reporting the crime to judicial authorities and legal practitioners, and supporting victims in managing the first access to public authorities.

If you want to have control, you have to know and in order to know you have to receive information. In so far it is extremely important that the victims are filled in and put in the position to decide. That is key; because if I am able to decide, I regain a certain amount of control. [German lawyer]

The most relevant problem from the victims’ point of view is information, especially at the very beginning of the proceeding [...] the difficulties are related to the fact that victims are so many and not necessarily connected, [so] obtaining information even on access to justice is a problem [...] when the information exists, it is offered by the associations, which are private associations with their [own] interests. I’ve never seen a public association or entity informing victims on their rights. [Judicial professional. Italian focus group on environmental cases]

In fact, it is often only thanks to investigations or research

¹² For more details on this topic, see the section on preventing repeated victimisation, in *Guidelines for corporations: Preventing Victimisation and Dealing with Victims of Corporate Violence* (Giavazzi 2017, c III s 5).

conducted by environmental and consumer associations, labour unions, or journalists that victims realise that they have been harmed or potentially harmed by an environmental crime, or exposed to toxic substances produced by industrial production. It can also be affirmed that sometimes these subjects—together with the associations of victims that come into existence immediately after the concern becomes evident—are the only ones giving voice to victims' complaints, or making the existence of an investigation public. Many leading cases can be quoted in this respect. The role played—at a worldwide level—by the associations of the victims of asbestos-related diseases is well known. In particular, before and during the Eternit Casale criminal proceeding, the Italian association Afeva provided assistance in victim identification, establishing direct contact with them, and supplying coordination, legal information, and legal assistance through their own lawyers. In the Holzschutzmittel case, the victims' association played a fundamental role in giving information on the potential harm, helping detect damages, and identifying the link with the harmful substances. In the Ilva Taranto case, some associations and institutions significantly contributed to the start of the proceeding by filing criminal complaints and providing the Prosecution Office with information and evidentiary elements, while in the Spinetta Marengo case associations not only filed several criminal complaints, but also promoted epidemiological studies and published fliers and letters addressed to the population living in the area surrounding the plant, encouraging all who deemed themselves to have contracted diseases from water pollution to file claims for damages. In the Tamoiil Cremona case, the local newspaper wrote articles and dossiers on the environmental contamination of the area, while an environmental association conducted a campaign and undertook several activities to promote community awareness about the site contamination. In the Waste Dump of Mellery case a non-governmental environmental organisation lodged the criminal law suit and pushed for and obtained the cleaning up of the site.

Despite this pro-active role of third parties, however, victims may still lack awareness of being victims. The *lack of information* about the risks or the effects caused by consuming unhealthy food, using toxic products, or being exposed to harmful substances for a long period of time, is a factor which can preclude the case ever being known, and can explain why victims do not file complaints or seek access to justice.¹³

¹³ See also the Introduction in this volume.

The imbalances of information between corporations and victims (or potential victims, or the public in general) is an inescapable factor in these cases. Equally inescapable is that corporations may remain forever—or at least for a long period of time—the only holders of information about what went wrong and why. Especially when the risk of being prosecuted is significant, corporations evince a tendency to protect their information until public concerns or judicial accusations arise. The aim is clear and understandable: to assess what behaviour would be more beneficial in the event of, and only in the event of, a specific judicial accusation being lodged (Giavazzi 2017).¹⁴ Although the disclosure of sources of risks and damages does not and should not in itself imply the admission of guilt, it is true—especially in those systems adopting the mandatory prosecution principle—that such disclosure to victims or potential victims can result in the case being reported to public authorities and in a criminal investigation. Due to these circumstances, self-defensive considerations induce corporations to protect what they already know from undue reporting to public authorities, and to the public in general.

Time is another factor which may influence access to justice (for its relevance to secondary victimisation during criminal proceedings, see the following paragraph). Health problems caused by pollution, defective drugs, and contaminated food may show their effects by accumulation after years, which can create a lack of awareness that delays or prevents the making of a complaint and thus bars access to justice, as well as posing huge difficulties in producing scientific proof (Forti 2017). Time influences the access to justice also because the time span covered by the criminal behaviour is often unclear or, at least, not grasped by citizens, workers, or consumers (Centonze and Manacorda 2017). Victims can find the facts under investigation confusing and overwhelming, and have no chance to understand the link between the criminal behaviour and their diseases. Therefore, the awareness of being a victim may arise too late, when the statute of limitation or the procedural deadlines to take part in the criminal proceeding have already run out. On the other hand, when investigations and criminal proceedings start many years after the facts, memories are confused and sometimes forgotten, or victims may prefer not to reopen a past they do not want to remember.

The *technicalities* which characterise this type of cases have been

¹⁴ For a deeper analysis, see Giavazzi 2017, c III s 4.

reported as an additional obstacle from many perspectives. From a subjective point of view, when the accusation broaches scientific topics and complex legal issues, and the investigation file comprises thousands of documents, an understanding of the right to access the criminal proceeding may be outside the victims' scope of knowledge or direct control without the support of lawyers or experts.

Difficulties linked to technicalities are also closely related to the burden of proof, both in terms of the causation link and scientific evidence (Forti 2017). Even when a complaint is filed, it often proves impossible from the very beginning to demonstrate—at least according to the principles required by criminal liability—the link of causation (and therefore the guilt of the corporation) between the specific corporate representative's action or omission and the harms suffered by each individual victim.

I would opt for the criminal proceeding only when the scientific evidences have been consolidated, not in the case of hypotheses, because otherwise the proceeding does not lead to a result and creates only illusions. It's difficult but possible to build a criminal proceeding for the asbestos-related diseases, but it should not be done for many other matters, because you cannot condemn someone without being sure that he effectively caused the event. [Italian Prosecutor]

Some obstacles in terms of the causation link may also be due to the involvement of foreign corporations or products imported from abroad, which create difficulties in finding documents and identifying which corporation is responsible. The lack of a collective judicial option for victims in the European Union means that victims are expected to jointly claim damages in other jurisdictions, leading to extremely high costs, as well as the burdens of accessing justice and participating in criminal proceedings in a foreign country. A relevant example is the well-known Poly Implant Prothèse case (PIP case), for which thousands of victims all over Europe can be counted.¹⁵ Three

¹⁵ The Poly Implant Prothèse (PIP) corporation produced defective breast implants and sold them to hundreds of women. The fraud remained undetected until 2010. In March 2010, PIP silicone implants were withdrawn from the European Union market following an observed increase in implant ruptures, and confirmation by the French regulator AFSSAPS (Agence Française de Sécurité Sanitaire des Produits de Santé) of the use of substandard silicone in the manufacture of the implants. Later, AFSSAPS also found that the gel, which contained non-approved silicone, was an irritant, and that leaks could give rise to inflammation and pain. For references to the criminal judgments, victims involved, and legal concerns, see Giavazzi 2016a.

criminal proceedings have started in France (where the corporation is located), one more recently started in Spain in the face of many difficulties, while another is ongoing in Germany against the certification authority (which is located in Germany). The scandal has been cited as an example of failure of and gaps in the existing regulatory European framework on medical devices,¹⁶ but also as a blatant case of consumers not only incurring serious physical harm but also being denied the means to claim compensation for harm and costs of remedial medical treatment and surgery.

Again concerning the burden of proof, one might remark that an individual victim may not have the capacity to provide appropriate documentation or other elements to legitimate his/her status and to prove that a direct harm was suffered at the time when the criminal proceeding takes place.

One significant example is the Infected Blood case:

The police officer was telling me that my doctor made a mistake in prescribing that drug to the child [...] twenty years later [...]. I felt I was a victim again, because the justice system started too late, too late! [Victim of haemoderivative infected drugs]

We had difficulties accessing the justice system. When we started to think about a judiciary action, we found many difficulties in proving causation, because even though it's true that the drug was widespread on the market, we could not prove we had taken that particular one. We took the drug available in the medical centre at the moment we needed to take it. Our priority was to survive. Therefore we did not ask about the brand of the drug. [Victim of haemoderivative infected drugs]

Another relevant case where access to justice was denied due to time and difficulties in collecting evidence is the well-known Thalidomide case.¹⁷ In 1968 a large criminal trial began in Germany, charging several representatives of Grünenthal, the corporation which

¹⁶ Proposal for a regulation of the European Parliament and of the Council on medical devices, and amending Directive 2001/83/EC, Regulation (EC) 178/2002 and Regulation (EC) 1223/2009.

¹⁷ Thalidomide was originally prescribed as a 'wonder' drug for morning sickness, headaches, coughs, insomnia, and colds, thus notably for use in pregnant women. Shortly after the drug went on sale in West Germany, between 5,000 and 7,000 infants were born with phocomelia (a malformation of the limbs). Only 40% of these children survived. Throughout the world, about 10,000 cases were reported of infants with phocomelia due to thalidomide; only 50% survived. Thalidomide was pulled from the market in 1961.

developed the drug, of negligent homicide and injury. After the corporation settled with the German victims, the trial ended in a sentence of no finding of guilt.¹⁸ In Belgium and Italy no criminal judgments have been checked. In Belgium a complaint against the State (rejected in the first instance and followed by an appeal) was filed, and a Parliamentary resolution finally adopted, in order to partially grant compensation to victims. Almost the same occurred in Italy, where the State provided funds for the partial compensation of some categories of victims. In a public event in 2012, fifty years after, the Grunenthal corporation partially recognised its liability and apologised for having failed to reach out ‘from person to person’ to the victims and their mothers.¹⁹

Obstacles concerning *scientific evidence* arise for two reasons: the opportunity to access (and pay) the best lawyers and experts, and the scientific uncertainty in itself (which extends or limits the categories and number of victims potentially involved). With respect to the first issue, this type of criminal proceedings is marked by a strong asymmetry of defensive means between victims and defendants. Corporations may appoint the best lawyers and experts, while victims most of the time may only count on legal aid offered free. The opportunity to pay the best experts gives a crucial advantage to corporations, because the proof of causation link mostly depends on scientific arguments:

In these kind of criminal proceedings you need the experts and there is the huge problem of the relationship between science and justice [...] a prosecutor should know who are the experts and what they did in other proceedings, because you need someone who does not have a conflict of interest. [Professional. Italian Prosecutor]

But, as said, frequently it is the lack of scientific evidence in itself

¹⁸ As part of the settlement, Grünenthal paid 100 million DM into a special foundation; the German government added 320 million DM. See Giavazzi 2016a, p. 139.

¹⁹ The public statement also includes the following passages: ‘Grünenthal has acted in accordance with the state of scientific knowledge and all industry standards for testing new drugs that were relevant and acknowledged in the 1950s and 1960s. We regret that the teratogenic [capacity to result in a malformation of an embryo] potential of thalidomide could not be detected by the tests that we and others carried out before it was marketed [...] Instead, we have been silent and we are very sorry for that’. The public statement is available at: <http://web.archive.org/web/20120901184544/>; and at http://www.contergan.grunenthal.info/grt-ctg/GRTCTG/Stellungnahme/Rede_anlaes-slich_Einweihung_des_Contergan-Denkmal/224600963.jsp.

which interferes with the demand for justice. For example, the harmfulness of glyphosate—the key ingredient in the world’s most used herbicides—is highly disputed in science and politics. The whole discussion still revolves around the possible risks or the threshold for accepting risks. Given the uncertainty of the risks, a comprehensive scientific assessment was carried out by the Member States and EFSA according to the rules for renewal of active substance approvals, to confirm that glyphosate complies with the new approval criteria laid down in the 2009 EU pesticides legislation. Following this, the European Commission has adopted the act to renew the approval of glyphosate for five years.²⁰ The International Agency for Research on Cancer,²¹ potential victims, and the public seem to have a different opinion and expressed many concerns. On October 2017 the European Commission officially received the submission of the 4th successful European Citizens’ Initiative (ECI). Over 1 million citizens called on the European Commission to propose that Member States ban glyphosate, reform the pesticide approval procedure, and to set EU-wide mandatory reduction targets for pesticide use.²² Victims also claimed damages before civil courts in France. French courts (in 2009, and in 2015) found Monsanto guilty of lying, falsely advertising its Roundup herbicide as biodegradable, environmentally friendly, and that it left the soil clean, and ordered compensation for damages for a French farmer.²³ The Monsanto Company has been found guilty of ‘ecocide’, including because of the use of glyphosate, by the International Monsanto Tribunal, a civil society initiative aimed at assessing harmful agrochemical practices.²⁴

²⁰ The proposal is available at https://ec.europa.eu/food/sites/food/files/plant/docs/pesticides_glyphosate_commission_proposal_revision4.pdf (last accessed 17 January 2018).

²¹ IARC, *Monographs Volume 112: Evaluation of Five Organophosphate Insecticides and Herbicides*, 20 March 2015, available at <https://www.iarc.fr/en/media-centre/iarcnews/pdf/MonographVolume112.pdf> (last accessed 17 January 2018).

²² On the citizens’ initiative, see Communication from the Commission on the European Citizens’ Initiative *Ban glyphosate and protect people and the environment from toxic pesticides* (C(2017) 8414 final, 12 December 2017); see also EFSA (European Food Safety Authority), ‘Conclusion on the Peer Review of the Pesticide Risk Assessment of the Active Substance Glyphosate’, 13 *EFSA Journal* (2015) 107.

²³ Tribunal de Grande Instance de Lyon, 13 February 2012 n 2012/144; Cour d’Appel de Lyon, Chambre 6, 10 September 2015 n 12/02717 (online at <http://bacaly.univ-lyon3.fr/index.php/l-arret-du-bulletin>, last accessed January 2018); Cour de Cassation, Chambre mixte, Arrêt n 284, 7 July 2017 n 15-25.651.

²⁴ <http://www.monsanto-tribunal.org/>.

The uncertainty and incoherence of epidemiological studies and scientific data may be also mentioned with reference to the Italian case known as ‘The Land of Fires’, which is one of the most significant environmental disasters in Europe. It has been proven that for decades, parts of the Campania Region (the so-called Triangle of Death, or Land of Fires) have been used for the illegal dumping, burning, and disposal of toxic waste.²⁵ The connection between contamination and the prevalence of severe diseases (especially cancer) remains contentious. The absence of information on the real risks, as well as effective answers from public authorities, has increased the State of anxiety and fear within the population, and led therefore to social conflict. Despite many complaints lodged by victims and their associations, an effective answer from the criminal justice system and the State more generally has not been obtained. Certain investigations into illegal waste trafficking have brought to light facts and crimes, but many of these proceedings have run afoul of the statute of limitations. The largest of all investigations on the trafficking of toxic waste, called Cassiopeia, ended in a no prosecution judgment.²⁶ No effective measures have been put in place by the State in order to completely restore the contaminated sites. Fires of toxic waste still continue today. The European Court of Justice condemned Italy for its long-running failure to manage waste adequately in the Campania region, or to implement sanctions.²⁷

Finally, strong limitations in accessing justice may arise due to a *lack of competence*, experience, expertise, and resources among the first responders of the judicial system. The circumstance is particularly evident in some geographical areas or in small public prosecutors’ offices. Within any given country, there may be public prosecutor’s offices that cannot afford these kind of criminal proceedings because they lack the specialisation required, or the resources to investigate the case. In other areas, the criminal proceeding goes so slowly that the crimes become time-barred. In order to obtain a quick response, these types of cases would instead require a high level of commitment on the investigation side, appropriate skills to understand the relevance of the

²⁵ The agro-economy of the region has also been adversely affected by the pollution. At the same time, the absence of judgments and the lack of effective remediation activities have been claimed as concerns by the victims for over twenty years. For more details, see Giavazzi 2016a.

²⁶ For references, see Giavazzi 2016a.

²⁷ ECJ, Case C-297/08 *Commission v Italy* [2010]; ECJ, Case C-653/13 *Commission v Italy* [2015].

evidence, and proper time and resources to guarantee the continuity of action.

The large number of victims potentially or actually involved (sometimes entire communities) also inhibits the chance of taking care for each individual victim's needs and rights. In fact, both as regards the victims' right to be recognised and to be individually informed, it is notable that individual victims' needs blend in with the others (often, dozens or hundreds) in a kind of collective action. The *collective dimension* which permeates the demand for justice in all corporate violence cases, together with the lack of time and resources, may be an obstacle to guaranteeing that each single victim is informed and protected. This consideration must be read together with the fact that investigators normally are not able to know an individual victim's personal history and, often, they do not have the expertise to understand the disease and the related consequences; in summary, they do not always seem prepared to enter into dialogue with these type of victims in particular. Discomfort in approaching the criminal justice system has been reported by many victims participating in the project.²⁸

Well, the next obstacle: there was an extreme ignorance on the side of the German judiciary towards facing such kinds of cases. [Professional. KiK case]

Some victims said they had difficulties coping with the interrogations conducted by the public authorities and, in general, in entering into dialogue with the investigators and the first responders. Such limitations should be mitigated by improving the awareness, competence, and specialisation of all the operators involved (including doctors, institutions, agencies, and media) on how to manage such cases and relate to such victims.

3. Victims' Participation in Criminal Proceedings: Needs, Expectations, and Obstacles

According to the three national procedural systems studied in this project, victims have the right to take full part in the criminal

²⁸ For references, see the country-specific sections on public sector justice in the comprehensive report of the project's empirical findings (Giavazzi, Mazzucato, and Visconti 2017, s 3.6.4; Engelhart, Hillemanns, and Schenk 2017, s 3.6.4; Lauwaert 2017, s 3.6.4).

proceedings as a directly injured party (or as family members of a victim), provided that three conditions are met: a criminal offence must have been committed; the injury or loss must have been caused directly by the offence; the damage must be personal to the victim, existing and current. The precise modalities of the mechanisms of participation, as well as the formal role attributed to victims in the relevant criminal justice system, are determined by national law. Under the Victims Directive, the victim's right to information and his/her right to protection from secondary or repeated victimisation, intimidation and retaliations, as well as the protection of private life, should influence every phase of the criminal proceeding, and also extend somewhat outside the perimeter of the proceeding.

Many victims consider the role that they may play in the investigation phase and in the trial to be extremely important; and the project findings confirm that their role is, indeed, not minor.²⁹ Victims collaborate with the investigators in the reconstruction of the relevant facts and provide active support in the gathering of evidence, including through their defence counsel and experts when available. They usually participate actively in the trial, as plaintiffs, audiences, or witnesses. It is also notable that victims continue to participate in the hearings regardless of the withdrawal of their right to claim damages due to any extrajudicial agreements reached with the corporation. This need to participate evidently goes beyond the aim of obtaining economic compensation, and it should be seen as a need to follow, step by step, the process of the ascertainment of truth.

In exercising their rights to participate in criminal proceedings, the particular vulnerability of victims of corporate violence should be considered by all the operators, and appropriate protection measures should be adopted to prevent the risk of secondary and repeated victimisation, intimidation and retaliations, or damage to privacy. Nevertheless, the judicial system seems not to be aware of these needs and vulnerabilities.

The victims' role inside the criminal proceedings involves two different orders of problem. The first is linked to the *physical attendance* of victims at the trial; the second, to the forms of *secondary victimisation* caused by the mechanisms and the outcomes of the criminal proceeding.

In general, criminal proceedings—aimed at ascertaining personal

²⁹ For references, see Giavazzi 2016a.

liability—are not able to embrace the collective dimension of the victim's status or the collective demand for justice, nor to find collective solutions in terms of reparations and compensation. With regards specifically to physical attendance, the participation of high numbers of victims at the trial stage requires a collective strategy, which is not always available. To this aim, courts should identify beforehand one or more appropriate trial courtrooms, as well as coordinate with the victims who intend to participate in order to respect their needs. In the case of particularly vulnerable victims, specifically those afflicted by illness or infirmity, audio-visual-linked courtrooms with separate and appropriate areas to receive the public are needed. Victims' awareness of their rights and the mechanisms of criminal proceedings seem to be key to building a positive spirit of collaboration with the public authorities and so to manage the trial effectively.³⁰

The active participation of victims means that they will have high public exposure during investigations, trial, and even after the final judgment. The disclosure of personal data and personal histories can often become a negative, but inevitable consequence of the publicity of the trial hearings. Due to the fact that corporate violence may affect entire communities, extensive regions of land, or strategic productive activities, which are important providers of jobs, public opinion and public issues must always be considered relevant. In the Eternit case, for example, victims faced overexposure in the media; in the Porto Marghera case, public opinion was constantly informed about the proceeding by press reports, associations, web sites, and local and national media; in the Spinetta Marengo case, many websites followed and commented upon the case; in the Telecom Olivetti case, hearings were published online.³¹ This public interest, as well as the dissemination of victims' experiences, has both advantages and disadvantages. Public opinion and media participation are instruments of information, but also instruments of pressure on public authorities, as well as on corporations, at least in terms of reputation. But the victims themselves become involved, consciously or unconsciously, in the storytelling of their lives: consequently, it is not always possible to balance privacy, personal integrity, and personal data with the freedom of information, as well as to guarantee that victims are protected from secondary victimisation. The most significant example of this

³⁰ For details and findings, see Giavazzi 2016a.

³¹ For other cases and more details, see Giavazzi 2016b.

undesirable result is the German UB plasma case, where surviving victims and their heirs did not participate in the criminal proceeding and did not want to testify in Court (probably because of the stigma of HIV).

Physical attendance and the emotional involvement of victims may expose victims to the stress of the conflict between prosecutor and defendants. This participation is not always seen as a positive factor by the judicial authorities and legal practitioners. In fact, the presence and voices of victims in the trial hall can transform it into a sounding board for the conflict. At the court hearing stage, the trial often takes on the character of a media spree or a forum for protest, where it becomes difficult to maintain civil order, the restraint required by the nature of the place, or the respect owed to the accused and to the bench. During the hearing, there may be audible public comments on the examination of witnesses or consultants; the public may express its disagreement with the bench's decisions; the victims present in the courtroom may openly express their dissent; and victims might protest outside the court house with marches or placards.³² But the presence of victims in the trial is also perceived by many judicial operators as a factor which may influence judges' personal feelings:

Judges are not robots and therefore personal feelings count. The presence of victims during the trial makes the judge feel more responsible. What do they [judges] normally do? They ask not to have the civil parties present, so as to work more easily [...] But the victim should not become victimised by the proceeding, because victims who are there but in the end do not obtain anything will feel really upset [...] Some judges think that the victims are a marginal element inside the proceeding and ask that they not occupy too much space, because victims are seen as an obstacle to the regular conduct of the trial. [Italian victims' lawyer]

With regards to the issue of secondary victimisation, instead, it must be highlighted that the criminal trial is the forum where the demand for justice for victims of corporate violence is manifested with greatest strength. Victims have a particular need to ascertain the truth, gain recognition of their status from the State and the corporation itself, call public attention to their plight, prevent future harms, and

³² In the Porto Marghera case, after the first acquittal, the judges and indeed the whole justice system were strongly perceived as unjust. After the reading of the acquittal, victims present in the room occupied the bench. The judges who issued the first instance judgment left the room (after having read the judgment) under guard.

attain a decision on compensation. In the absence of other forms of prior recognition, criminal justice becomes the only path to satisfy these needs. The application for justice is thus charged with needs and expectations related to the fact that every other path to justice may be blocked. But these strong expectations are often disregarded, with potential negative effects in terms of secondary victimisation.

In fact, the project findings point to a significant lag between the initial expectation of justice and the effective outcomes of criminal proceedings. At the end, the confidence in the criminal justice system is enormously reduced and victims also become ‘victims of the criminal proceeding’. This undesirable result is influenced by a number of circumstances. Criminal proceedings have *inescapable limitations* resulting from their very nature and operating mechanisms, which inevitably contrast with victims’ expectations, especially when victims are not adequately informed, supported, and protected. In addition, criminal proceedings on corporate violence also suffer from *pathological—not expected—limitations*, which contribute to increasing the gap between expectations and outcomes: the inefficiency of investigation tools, the lack of specialisation and competence, the delay in providing answers or indeed a lack of answers tout court, the duration of the proceeding, or an ineffectiveness in guaranteeing the victims’ rights to be informed and protected.

Analysing these limitations, it must be firstly said that the public prosecutor’s choices may have a significant impact on the victims’ expectations, and vice versa.

Complacency does not equal efficiency [...] It may be—and in these crimes it is more frequent, in others not so much—that the public prosecutor, who is also under an understandable pressure, may be inclined to show complacency towards victims, and therefore, between all the legally possible ways that exist, he may choose the one that yields immediate greater satisfaction for the victims, but which does not necessarily work for the better, and often is the opposite, it is the one that leads the victims, ultimately, to the greatest disappointment. It is a very dangerous dynamic, but frequently seen. Obviously, if I incriminate someone who has caused extensive damages for an even more serious offence, I meet approval. But one must never forget that the public prosecutor makes an hypothesis that is then subject to verifications. Therefore, the public prosecutor should have the ability, especially in crimes with a wide pool of victims, to have the calm and the technical knowledge to foresee the way that is actually practicable, and which will then survive the verification of the process. [Professional. Italian Prosecutor]

Secondly, victims may not be aware about the rules governing the criminal investigation, due to the followings: the lack of ex post explanations and ex ante information on the rights of the defence (victims should understand that the criminal proceeding is a drama not only for them, but also for the defendants, and the dimension of the rights of the defendants is often underestimated); the mechanisms for evidence within criminal proceedings (the uncertainty of scientific evidence, proof beyond any reasonable doubt, conflicting case law); and the effects of the course of time (not only with reference to the duration of investigations and trial, but also and especially as regards rulings to dismiss the proceedings and the extinction of the crime due to the statute of limitations). An identical need for explanation and understanding arises with respect to court decisions associated with a lack of evidence beyond reasonable doubt, especially where that lack is linked to the *mens rea* of the crime. Difficulties and a sense of injustice have also been reported when victims are called to understand court decisions for acquittal justified by the judge by upholding scientific theories (often very complex) pleaded by the defence, specifically in the case of conflicting case law on the issue, with opposing decisions in similar cases. In fact, unequal treatment of victims, harmed by identical corporate behaviours with identical consequences for human health, may depend on accidental factors: the circuit court where the trial takes place, the prosecutor's ability and commitment in collecting evidence and in identifying victims, the availability of epidemiological data, and experts' opinions. The lack of a unique model for compensation for damages—using the same criteria and rules—increases the salience of the issue.

Often victims think that the criminal proceeding and the conviction are their only option to obtain justice. Due to this expectation, it's very difficult to make them understand the judicial mechanisms, which may not lead to identifying a responsible individual according to the criminal justice rules. [Professional, focus group on environmental cases]

Secondary victimisation is also evident when the criminal justice system ends up being ineffective exclusively for time reasons. Despite evidence for the perpetration of offences harming victims, statutes of limitation may preclude a judgment on the corporate representatives' liability, and consequently on victims' requests for compensation. In a significant sample of cases, the final judgment stated that defendants should not be prosecuted or that conviction was not possible, due to the fact that the crime was or had become time-barred. A relevant example is the Eternit Casale case: in 2015 the Italian Supreme Court established

that the charge of disaster ceased to be applicable when the spread of asbestos dust and production waste—caused by the facilities managed by the defendant—ended; thus, the *tempus commissi delicti* was considered to be June 1986, when the Eternit bankruptcy was declared. The limitation period for the crime, which is fifteen years, therefore started in 1986 and so expired before the first degree sentence in 2012. Despite the first and second degree sentences stating the compensation for victims, according to the Italian Criminal Procedural Law a final sentence of non-prosecution due to the statute of limitation prevents plaintiffs from obtaining the compensation for damages already awarded in the previous judgments. In the Porto Marghera case, for almost all the cases under examination the court's findings could not in the end lead to conviction because the injury charges had become time-barred. In the Holzschutzmittel case, compensation claims were often denied by the courts because of time limitations, as the victims were raising claims in the 1990s (probably due to extensive media coverage) for acts committed in the 1970s/early 1980s.

In case of such final judgments, the reaction is alternatively great disappointment, misunderstanding, resignation (where the negative outcome was predictable), or desperation; in most cases, therefore, it amounts to secondary victimisation.

I didn't see justice and many victims will never have it. [Victim, focus group, Eternit case]

It's clear what happened. We are victims twice. [Victim's family member, focus group, Eternit case]

After ten years, they told us that liabilities were proved, but the crime was time-barred and therefore it was not possible to sentence. That was a kind of joke. And we did not even obtain the compensation for damages, which could, in some ways, soften the blow. [Victim, Eternit case]

Too many loopholes, which allow different interpretations, and anachronistic interpretations: if the disaster is still ongoing, why do you judge that it is time barred? This is the worst way to deny victims' rights. [Victim's family member, focus group, Eternit case]

As the public interest is often involved, the State's decisions may also impact on and interfere with the outcomes of criminal justice. The most significant example is the Italian Ilva case. In 2012, despite the persisting danger from the plant, freezing orders previously issued by the judicial authority were revoked by the Italian government, thereby allowing the restarting of the industrial activity, and the sale of a number

of products which had also been previously subject to the freeze. However, the restarting of the plant activity was subject to the adoption of measures aimed at protecting the environment. The decree was subsequently challenged, but the Italian Constitutional Court upheld it. The relevant opinion highlights that the Court deemed that the decree correctly balanced two different constitutional rights: the right to health on the one hand, and the right to work on the other, taking under due consideration the need to protect occupation. The case was brought before the European Court of Human Rights.³³ In particular, between 2013 and 2015 about 180 people filed complaints, contending that they had suffered health damages as a consequence of the plant's activity and that the Italian State failed to take all necessary measures to protect the environment and their health. They also criticised the government's decision to authorise the restarting of the plant's activity. Further to the filing of the complaints, the European Court of Human Rights formally accused the Italian State of having failed to protect the life and health of the people living in Taranto, and in the plants' surroundings, from the harmful substances dispersed by Ilva.³⁴

Despite all these undesirable results, in terms of substantive justice from the victims' perspective, the criminal proceeding remains an irreplaceable path to ascertaining the truth and establishing liabilities. The criminal justice system is felt to be a necessary and useful means to raise interest and draw attention to the case; to collect evidence when victims have no means to proceed alone; to obtain compensation when all other systems have failed or corporations refuse dialogue; and to achieve public recognition of victims' status.

I've lost any expectation and hope for what concerns the conviction of the corporations involved. But I think it should be a sentence, because it's a necessity to establish a public recognition. Without this, a State is dead. [Victim of infected haemoderivative drugs]

If we had been able to get a conviction, this would have changed a lot. Everything would have changed. I do not have a punitive way of thinking [...] but I think that a society works only if it can guarantee the recognition of liabilities and the effectiveness of sentences, not for revenge, and not only to ascertain the facts, but to empower. [Victim's family member of infected haemoderivative drugs]

³³ The ECtHR case law concerning victims' rights is addressed by Marc Engelhart, chapter four in this volume.

³⁴ ECtHR, *Cordella et al v Italy* [2013], and *Ambrogi Melle et al v Italy*, [2015] (online at <https://hudoc.echr.coe.int/eng>, last accessed 11 January 2018).

There is a common need to know the truth, it would be very important to know what really happened [...] and it would be more satisfactory if who caused the damages also admitted the truth [...] I mean to find the perpetrators and prove their liability. [Victim of Thalidomide]

One thing is a trade unionist who says, ‘there is death in that factory’ [...] Another thing is a court verdict that affirms: ‘In the name of the Italian people [...] this worker died because of that job’. [Victims’ association. Eternit case]

Finally, it is worthy of remark that in cases of acquittal or non-prosecution judgments, victims continue to demand ‘justice’ through appeals, petitions, press releases, Parliamentary questions, or active web-sites. This circumstance indicates that, in the context of corporate violence, the victims’ need to be informed and supported remains even after the end of the criminal proceeding, especially when the judgment was not able to answer to their requests in terms of reconstructing the truth and liabilities, obtaining compensation for damages, and recovering from environmental disasters. Victims’ requests are addressed to the corporation, as well as to the public authorities, even if it is almost always States which take initiatives of so-called remediation *ex post*. In the Train Accident of Eschede case, for example, the victims’ association fought publicly for an official apology; only in 2013, on the fifteen-year anniversary of the accident, did the chairman of the corporation apologise for the tragedy on behalf of Deutsche Bahn AG at the victims’ memorial. In the Holzschutzmittel case, in 2014, several parliamentarians questioned the government on the victims’ situation. The government stated that the Holzschutzmittel case was taken as a starting point for finding a European solution that was finally reached with the biocidal products Directive 98/8/EC of 16 February 1998 (now replaced by the biocidal products Regulation 528/2012 of 22 May 2012), and that damages arising from such products must be considered sufficiently covered by private law product liability regulations. The Coalition against Bayer Dangers continues today to campaign publicly against the corporation through publications and protests at annual shareholder meetings. In the Bussi sul Tirino case, after the judgment of acquittal and non-prosecution, the investigation into the extent of the contamination due to the corporation’s activity has been entrusted to a Parliamentary Commission of Inquiry on illegal activities and environmental crimes related to the cycle of waste. In the period 2014–16 the Commission conducted several analyses and initiatives, including parliamentary

hearings with the delegates of environmental associations, local institutions, and members of the National Institute of Health. A Commission for the management of economic, social, and environmental crisis has also been established. In the UB Plasma case, in 1993 the German Parliament set up an Inquiry Commission on HIV Infections through blood and blood products, whose main focus was to inquire if and to what extent the federal government and administration bore (legal) responsibility and was accountable in the context of the scandal. The commission was also mandated to clarify the financial, social, and legal situation of the victims (mainly haemophiliacs) and their relatives in order to formulate proposals in the victims' interest to the legislator. A final point was to assess the safety of blood and blood products and what needed to be done to improve them. The final report by the Inquiry Commission, which was criticised for its weakness and softness, and for not having vigorously challenged the legal status quo, was published on 25 October 1994. One of the main outcomes for victims was the institution of a foundation financed by the federal government, the German State, the German Red Cross, and the pharmaceutical industry. The establishment of the foundation implied that any further claim against the federal government, the Red Cross, and the pharmaceutical corporations, is extinguished. The financial support provided to the victims (a pension scheme) was, however, comparatively moderate. Today, the question of how to sustainably support the victims is still unresolved. The funds will be exhausted in the near future. To this day, persons with a hepatitis C infection through contaminated blood products have not received any form of financial compensation in Germany. In the Thalidomide case in Belgium a complaint against the State (rejected in the first instance and followed by an appeal) has been filed, and a Parliamentary resolution adopted, in order to recognise the responsibility of the State and to partially grant compensation to victims, who had never received any offers from the corporations, nor decisions from the criminal justice system. Almost the same process occurred in Italy, where the State provided funds for the compensation of victims in the absence of any other solutions. In the Gas Explosion in Ghislenghien case, a number of initiatives were taken outside the context of the criminal trial and after it, which provided recognition to the victims: two donations were made by gas company Fluxys to partially compensate the victims; and, as a consequence of the disaster, a law was adopted according to which victims of a technological disaster are compensated for physical damage without them having to wait until legal responsibilities have been determined through juridical procedures. This was a response to

the complaints of many victims who had had to wait for years before receiving compensation. A fund was created to make this early compensation possible. Insurance companies contribute to the fund, and after the legal procedures they mutually arrange the division of the compensation as decided by the court. Every year a commemoration is held at the site of the disaster. In the Waste Dump of Mellery case, a parliamentary commission was set up in 1993 to investigate the regulations and policies developed in Wallonia concerning the treatment of waste, and their actual implementation, in order to draw lessons for the future.

4. Victims' Right to Obtain a Decision on Compensation

Victims who participate in criminal proceedings primarily make claims for economic and moral damages directly caused by the crime. Art 16 of the Victims Directive aims to ensure that the victim obtains a decision on compensation for damages, accompanied by the provision that such a decision is secured within a 'reasonable time period' and by the duty of Member States to promote (para 2) measures to encourage offenders to provide compensation. The objective of the Directive is to ensure that the victim obtains a decision on compensation for damages, with an evident inclination towards a decision in the criminal proceeding, when such a decision is expected to be an option in the legal system concerned.

The size and type of damages claimed for depends, of course, on the type of offence and its consequences. It is quite notable that in cases of corporate violence the economic losses may concern an entire community or the safety of the environment of an entire region, and moral damage may also take the shape of a *fear of being harmed in the future*, due to the long latency of harms. These types of damages may not be easily claimed for within criminal proceedings for corporate violence, and therefore they often remain underestimated and uncompensated. In two leading cases, however, the courts, not without difficulties, significantly extended the recognition of damages to cover those related to future expected ones. In the Tamoil Cremona case, the citizen participating at the trial as a civil party representing the interests of the entire community also claimed for moral damage suffered by the municipality due to the severe pollution of surrounding areas, interpreted as a fear of being personally contaminated and of continuing to run the risk of getting sick because of exposure to toxins. Such a fear depends also on the awareness that under those

circumstances the etiopathogenesis (as the secondary effect of contamination of environmental resources) spans a very long period, and is often even latent; this is therefore a case of victimisation related to danger rather than to damage. The judgment awarded this citizen (representing the entire community) one million Euros in damages. In the Spinetta Marengo case, the court expressly stigmatised the strategy of filing of civil claims in relation to damages which will never be ascertained in the context of that criminal proceeding (because unrelated to the charges). Individual victims who had filed civil claims for damages arising from the exposure to poisoned water were not awarded damages when they could not prove they had drunk or used poisoned water. Likewise, no damages were awarded to those who supported their claim only by indicating that they lived in the plant surroundings, since the claims were very general and it had not been possible to ascertain even their actual ‘suffering’ as arising from the awareness or the fear of having been exposed to toxic substances. The Court, however, affirmed the principle that the right not to be alarmed about one’s own health conditions and not to spend a lifetime with health concerns arising from polluting activities is a need deserving of legal protection, in that it is part of the broader right to health, which also includes the right to peace of mind. On this basis, approximately thirty individuals were awarded damages: those who had worked in the plant, or who had filed blood analyses with the Court showing the presence of particular metals in their blood, or who had reported having changed their life habits as a consequence of the Chromium Emergency scandal (eg who used to water their home vegetable garden with water drawn from wells connected to the plant, and who had to stop and start drinking only mineral water).

One of the findings of the project is that in many leading cases of corporate violence, the criminal proceeding *does not provide compensation to victims*. There are various different reasons for this.

A first obstacle is linked to certain restrictive *procedural burdens*, which prevent individual victims claiming for personal damages. Many victims or potential victims cannot prove they suffered a direct damage at the time and place where the trial takes place. Where damage is caused by the normal management of industrial activities, in fact, crimes charged are often those aiming to protect collective and not individual interests; the nature of certain crimes of corporate violence—crimes of danger or crimes with no result—requires only the evidence of *collective damage* (eg crimes consisting in the exposure to pollution or contamination caused by industrial activities). In these cases, despite the fact that the crime has also caused harm to

human health, individual victims have no opportunity to participate in the criminal proceeding by claiming for personal compensation, because individual harms are not related to the type of crime charged to the defendants. But even when manslaughter or injuries are charged and victims can claim for individual damages, the relevant problems in terms of burden of proof (the causation link between the corporation's actions or omissions and individual harms, and personal intention or negligence), or the lack of scientific evidence, can lead to acquittals which preclude any form of compensation. Conflicting judgments, justified by appealing to different scientific theories, are perceived as unequal treatment by victims who reasonably expect to have the same compensation as that obtained by other persons in exactly the same situation.

Due to all these obstacles, and despite the fact that harm or danger of harm is ascertained, many criminal proceedings end with no decision or the denegation of any form of compensation for damages suffered by individual victims. In the *Bussi sul Tirino* case, as ascertained by the judgment, surface waters and groundwater in that area had certainly been polluted since 2002, because of the verified presence of toxic substances. Public safety—rather than personal health—was alleged as damaged: therefore, no individual victim could claim for damages, because they could not be strictly considered a 'victim' according to the type of offences charged to the defendants, being premised on water poisoning rather than on water contamination. At the time of the proceeding, no personal harm—despite diseases or pathologies being known to be certainly related to the contamination—was proved such as to allow a conviction. This circumstance was due to the lack of evidence of a correlation between the exposure to toxins and the occurrence of harms to health. At the time of proceeding, no epidemiological research and no cancer register had been created, so data on disease occurrence and on the incidence of the contamination on human health were not available. Only recently, after the trial, have epidemiological findings on the incidence of the increase in cancer cases in the contaminated area contaminated become available.³⁵ In the *Train Accident of Eschede* case, no decision on damages was taken by the courts within the criminal proceeding. Compensation was not available because the case did not meet the legal preconditions (intentional crime—prosecution was for negligent

³⁵ For more details on the case, see Giavazzi 2016b.

injury and negligent killing). In the *Holzschutzmittel* case, the criminal proceeding ended without judgment, and no decision on victim compensation was taken. Before and after the trial, civil suits by victims participating and not participating in the criminal proceeding were filed, but have not been successful. The main problem for victims was, again, to establish a causation link between their illnesses and the sold product: the connection between damages and the product was not sufficiently scientifically clear.

Another order of limitations is linked to defendants' decisions not to go to trial, entering, for example, into plea agreements or other kind of settlements with public authorities which do not involve compensation for victims. In many judicial systems the plea bargain does not imply a ruling on the claim for damages, and may exclude the injured party from exercising or continuing the civil action in the criminal trial in order to obtain damages against the party who had plea-bargained. Therefore, the victim is forced to take the route of civil justice. The fact that the decision on compensation cannot be reached in criminal proceedings due to the contingent circumstance of a plea bargain appears, at the very least, to be a downsizing of the rights of the victim and engenders unfair treatment as regards those victims who may have fully exercised their right to a criminal decision. Furthermore, a victim who had already lodged a civil action in the criminal proceeding would have unnecessarily employed time, money, and energy in the criminal trial, without obtaining any advantage. The position of the victim is further complicated by the circumstance, which is entirely probable for trials concerning corporate violence, that only one or some of the accused may have accepted a plea bargain, while others may have gone to trial, with the consequence that the victim would have to act in the criminal court against some and in the civil court against others.

Finally, the right to obtain a timely decision on compensation for damages may also be severely limited by criminal court procedures which simply transfer to the civil court the responsibility to come to a decision on the exact quantification of the damage. In this case, the civil party is forced to establish a civil case in court, incurring costs in terms of times and money which may be difficult to sustain, but which are at that point unavoidable.

Of course, other judicial or extra-judicial paths (civil justice, public funds, corporations' initiatives) could constitute possible and appropriate alternatives to obtain compensation for damages. The ability to access civil or administrative justice basically depends on the legal system to which victims belong. In Italy, access to criminal

justice seems to be the preferred choice, while in Germany and Belgium civil lawsuits seem to be an option to which victims frequently revert, as an additional course of action or as an alternative to the criminal justice system. The reasons underlying such a difference in approaches are complex and cannot be investigated here, but it is a fact that bringing civil lawsuits in separate proceedings (ie not within the criminal proceeding) appears as an exception in the Italian cases reviewed, while it is more frequent in Germany and Belgium. However, victims and professionals reported doubts on the real effectiveness of this alternative option. Civil justice seems to suffer from the same or even more of the limitations as criminal justice: it does not embrace the collective dimension (because class actions are not yet available), evidence-gathering is not economically affordable by private persons, and it is more time-consuming. Empirical research has shown that victims often consider an order in a civil court as an impossibility, due to the length of the proceedings and the non viability of costs, mainly related to the almost constant need, in this type of crime, to collect information that is not available to a private subject, and to satisfy the burdens of proof through extremely complex technical investigations and scientific tests to which only criminal prosecutors could have access. Another consideration concerns the access to civil justice simultaneously with or after a criminal outcome. Once examined and then decided upon by the criminal court, facts should be relevant for a corresponding civil claim as well. This could be done through rendering binding effect to the criminal judgment—which is not, for example, provided by German law. When the two proceedings proceed together, the risks of final conflicting judgments is considerable.³⁶

The outcomes of civil proceedings do not seem, indeed, to be more favourable for victims. In the Holzschutzmittel case, for example, before and after the trial, civil suits by victims participating and not participating in the criminal proceeding were filed, but have not been successful. In the Waste Dump of Mellery case, besides the criminal law suits, civil law suits were engaged and lasted for many years. When the criminal suit ended in an acquittal of all the accused persons,

³⁶ For references, see the Italian and German country-specific sections on public sector justice in the comprehensive report of the project's empirical findings (Giavazzi, Mazzucato, and Visconti 2017, s 3.6.4; Engelhart, Hillemanns, and Schenk 2017, s 3.6.4).

the civil law suits were concluded by a ‘conciliation’. The victims’ side perceived the conciliation as a ‘bad agreement’.

As already mentioned, when the criminal proceeding does not start or does not provide for compensation, victims may address their requests to the State. This is very interesting from the victims’ perspective, as well as in an extra-judiciary context: access to national/public compensation funds may prevent victims attacking the corporation from the very beginning, or exonerate corporations from repairing the consequences of their actions. In some cases, instead of ‘encouraging’ offenders to pay compensation to victims, States play a subsidiary role in advancing alternative, *public compensation*. This is, of course, a desirable result when a convicted offender fails to provide compensation or the final judgment does not decide on the victims’ requests (see, for example, the public initiatives taken in the Thalidomide case, Gas Explosion in Ghislenghien case, and the UB Plasma case, mentioned above).³⁷ It is a less desirable result, in terms of substantial justice, when the corporation refuses or uses loopholes not to compensate and repair.

As public health and safety is always concerned, remediation activities sometimes need to be negotiated between the corporation and the public authorities. Even in this case, the ‘bargaining chip’ is the withdrawal of the public entities’ rights to participate in the criminal proceeding. In the Tamoil case, for example, the municipality and the corporation agreed on the remediation procedures which the corporation should activate; the agreement also included the Ministry for Economic Development, local administrations, and trade unions. The existence of the agreement may have influenced the choice of the municipality to give up its right to take part in the criminal proceeding. In the Eternit case, the corporation offered the Casale Monferrato Municipality sixty million Euros to repair the damages. The municipality declined the offer. The refusal of the offer was also motivated by the official assurance from the Italian government of direct economic intervention. As a matter of fact, at the end of the trial, after the Supreme Court ruling of non-prosecution due to the statute of limitations, the Italian government provided the Municipality with an amount of money almost equivalent to the corporation’s offer.

³⁷ Another notable example concerns the Poly Implant Prothèse (PIP case) where, as the defendants were not able to pay, it may ultimately be up to the French State to pay the damages awarded by the Criminal Tribunal through specific indemnity funds.

5. The Role of Corporations in Avoiding Victimisation

The Victims Directive does not apply to corporations, which, therefore, do not constitute an *immediate* target group.³⁸ But, as far as the victims of corporate violence are concerned, corporations do form a highly relevant *intermediate* target group. In fact, corporations' attitudes to victims may play a decisive role in reaching the substantive aims of the Directive: they are involved in respect of preventing primary and repeated victimisation, cooperating in avoiding secondary victimisation, and dealing with victims in an appropriate manner when a criminal proceeding takes place.

Preventing *repeated* victimisation, for example, depends essentially on the corporate commitment to take action as soon as possible to terminate, remove, or repair the source of damage. In fact, it is a common situation in cases of corporate violence that if the source of damage is not eliminated at the early stage, a single case of harmful misconduct may turn into widespread behaviour, or a specific misconduct which at the beginning affected few individuals may change into something more harmful, affecting many persons or an entire community.

Secondary victimisation, meanwhile, is strictly linked to the level of conflict between victims and corporations. A relationship—and also the conflict inherent in that relationship—between victims and corporations may obtain 'at times before' and 'in arenas other' than the criminal proceedings themselves. But the project findings report that, once the criminal proceeding begins, the conflict increases. In fact, accusation and defence strategies—often mediated by lawyers, prosecutors, and the mass media—normally prevail over any other considerations and change the perspectives, expectations, and aims of both parties. The project results reveal, for example, that when the victim is aware, informed, and assisted, access to criminal justice becomes a strategy to put pressure on the corporation to obtain compensation. At the same time, given the lack of any prior dialogue with the corporation, criminal proceedings are seen as the only option to obtain a reconstruction of facts and a recognition of responsibilities. From the corporation's perspective, instead, the attitude to dialogue and negotiation seems to depend only on 'judicial convenience', in terms of accessing incentives offered by judicial systems such as a reduction of sanctions, as well as on the chance to obtain an acquittal.

³⁸ See chapters one and three in this volume.

Certain exogenous factors contribute to feeding the conflict. In fact, the relationship between the two parties often exists and persists outside the trial, both spatially and temporally. Frequently, the corporation's activities are still ongoing despite being under investigation, often with no remediation measures having been put in place; or, frequently, products suspected of being harmful are still available on the market. Victims may continue to work or live in the relevant environment, close to the same sources of risks which caused the damage. Consumers may indeed need to continue to use products which are suspected of being harmful.

There are also endogenous factors which amplify the dimension of conflict, with a significant impact on the corporation's reputational dimension and victims' expectations. Some of these factors are related to the peculiarities of these types of criminal proceedings—and in particular to the status of these victims within the criminal proceeding—which have been underlined in the prior paragraphs. It is a matter of fact that the conflict with the corporation tends to increase inevitably until the criminal proceeding is the only possible path to reconstructing the truth, calling public attention to the case, preventing future damages, and attaining a decision on the compensation for damages. But criminal proceedings are bound up with the victims' needs and expectations also because any prior dialogue with the corporation has failed. The project findings highlight that the corporations' denegation of any dialogue or negotiation—on one side—and the victims' refusal to accept anything from the corporation—on the other—charge the criminal justice system with a role of 'mediator of conflicts', which is not one of its prerogatives.

One of the assumptions of this project is that, due to the specific characteristics of these crimes, it would be desirable as soon as possible (once harmful events or products are discovered) to establish a relationship or a channel for dialogue between the victim and the corporation (Giavazzi 2017).³⁹ A proactive dialogue might mitigate the level of conflict during the trial, and decrease the number of parties and claims for compensation that need to be adjudicated. But it must be taken into consideration that when a criminal investigation opens, the victims and the corporation are no longer the only parties involved, and many external factors or subjects influence the attitude of both parties towards cooperation and negotiation. For example, the reconstruction

³⁹ For more details on this topic, see Giavazzi 2017, c III ss 1, 4, 5.

of facts and liabilities, the identification of victims, and the determination of consequences and damages caused by the crime, are the duty of the public prosecutor. The amount and the types of damages also depend on the type of offence charged. Due to the extent of the interests in question, and at the same time the limitations of the issues at stake, the relationship is more complicated and the chances of opening a dialogue with a positive attitude are lower. It is also conceivable that, from the victim's perspective, having to establish a dialogue with all those individually accused, each with their own individual position and defence strategy, will be much more complex than having only the corporation as the sole representative. On the contrary, from the corporation's perspective, the proliferation of interlocutors—lawyers, prosecutors, and the mass media—complicates the approach and decreases the chance to understand the victims' needs and requests as addressed to the corporation. Therefore, in the context of the criminal proceeding, the dialogue is often forced into a predetermined framework, dictated by the offences charged, the judicial mechanisms, and the grounds for accusation and defence. Victims' requests are reduced to a claim for compensation for damages, while the corporations' actions and behaviours are influenced by the expectations in terms of a judicial outcome. Everything comes into the public domain.

Victims and court staff who have shared their experiences for our empirical research report that corporations usually take action vis-à-vis the victims almost exclusively after the criminal proceeding has been initiated, that is, when a trial is forecast against corporate representatives or against the corporation, specifically where this potentially involves a large number of victims or public institutions bringing a civil action against the corporation. It may be said that the existence of a criminal proceeding favours attempts to agree at least monetary compensation. Rarely, instead, corporations spontaneously take the initiative to recognise victims, and apologise or remediate the consequences of crimes. But even where recognition is present, it arrives too late, when liabilities are no longer under discussion. In the Eschede train accident Deutsche Bahn took 15 years, and in the Thalidomide case Grünenthal over five decades, to formally express their apologies.

The need first to be recognised [was] the most important one, prior to any material claim or hope, they [the company] did not even concede it [...] sometimes it would already help a lot if you just acknowledge a mistake and say we have made a mistake, we are sorry. [Wood protection agent victim]

One of the objects which almost always characterises the request from victims to corporations is, of course, the compensation for damages, which may be negotiated outside the criminal trial, through *extrajudicial agreements*. These agreements undoubtedly imply significant withdrawals of some of the victims' rights: in particular, in exchange for economic compensation, victims withdraw their right to participate in the criminal proceeding as a party, or withdraw their lawsuits as a civil party when these have already been brought. But it is also true that the early settlement of the issue tied to damages may be the only possible form of compensation, especially should the criminal trial end with a ruling dismissing the proceeding due to the crime's statute of limitations, or in a case of acquittal. When the agreement is closed in the initial stages of the proceeding, the risk of accepting an 'unfair deal' is borne by both the parties. Despite this risk, it should be in the corporation's interest to attempt to open negotiations with the victims at the investigation stage, not only to prevent a future civil action, but also in terms of protecting its reputation, as well as for defensive strategy reasons, linked for example to obtaining a plea bargain or any other bargain in its favour.

From the corporation's perspective, in fact, the decision to negotiate compensation and remediation activities may be also based on the convenience of accessing the incentives offered by the judicial systems where the criminal investigation or the criminal proceeding takes place. Many cases confirm that attempts by corporations to close extrajudicial agreements after the proceeding starts are quite frequent. Some examples of this kind of negotiation may be taken from the leading cases (Eternit case, Porto Marghera case, UB Plasma case). The vast majority of victims did consent to this agreement because of a series of legal challenges which made speedy compensation rather unlikely.⁴⁰ The data also indicate that when the victim is alone—without the intermediation or the support of an association or an experienced attorney—he/she can hardly take any kind of initiative, often even failing to identify the representatives inside the corporation with whom to establish contact. Therefore, initiatives are often an issue that specifically depend on corporations' decisions to attempt to contact victims and negotiate with them.

Victims' needs to receive appropriate support and protection also in this context must be considered one of the project's findings. In fact,

⁴⁰ For references, see Giavazzi 2016a.

in the extra-judicial negotiations individual victims are particularly vulnerable, and not only due to the asymmetry of information concerning substantially all the data which would support a critical evaluation of the proposal. Some victims reported that they perceived the acceptance of a corporation's offer as a form of dismissal of their demand for justice, or indeed as a source of shame. Therefore, victims' decisions concerning entering into negotiations, accepting a proposal, and understanding the meaning of the withdrawal of their rights, all require legal and psychological assistance.

In case a relationship never starts, if it fails, or should victims not accept any form of dialogue, the inclination of the corporation to indemnify and compensate for damages should be encouraged by the State. Accordingly, in light of the instruction in art 16, para 2 of the Victims Directive ('Member States shall promote measures to encourage offenders to provide adequate compensation to victims'), the legislator should introduce effective tools to achieve this goal.⁴¹ However, even within the limits of the discretion of the investigating authorities and the judges, and of the spaces permitted by the rules in force (which often do not impose, but do not hinder, such initiatives), there are many opportunities for law enforcement agencies to act as competent 'mediators of the conflict', favouring on the one hand, and on the other hand rewarding, forms of compensation and reparation for the crime's consequences.⁴²

Many European judicial systems, however, still contain judicial mechanisms designed to attain the goal of promoting dialogue between the victims and the corporation. In fact, it is highly likely that the company's willingness to negotiate with the victims and to compensate for the consequences of the crime will generally be greater where the corporation itself is investigated or charged (corporate criminal liability). As is well known, corporate liability has been introduced in almost all the European jurisdictions, enabling courts to sanction corporate entities for their criminal acts (Mongillo 2012; De Maglie 2005). In those countries where there is no criminal liability per se, there is quasi-criminal liability. The advantages of this model are

⁴¹ See in this volume the Annex 'Policy Recommendations for National Lawmakers and Policymakers'.

⁴² See the respective national guidelines for enforcement agencies and court staff for Belgium, Germany, and Italy, resulting from the 'Victims and Corporations' project, online at www.victimsandcorporations.eu (available in Dutch, German, and Italian).

evident: on one side, the accusation may escape the bottleneck of the imputation of personal liabilities; on the other side, it may incentivise, from the investigation phase onwards, reparation and compensation activities. Promoting compensation is also favoured by those legal systems which encourage and reward corporations' remediation measures (Giavazzi 2017). Many punitive models for legal entities should have, in fact, the purpose of rewarding not just corporations that *ex ante* implement crime prevention systems, but also corporations that *ex post*—once investigated—prove their intent to remedy and repair, both in terms of internal reorganisation as well as compensation for damages. For the purpose of granting a reduced sentence, some punitive models also require not only full and effective compensation for damages, but also the elimination of the crime's harmful or dangerous consequences.⁴³

Where the attempt to negotiate fails, a victim-sensitive approach and the safeguarding of the reputational dimension both indicate that the corporation should arrange alternative forms of compensation, such as collective funds for relevant research, for the health care of the community involved, or for victims suffering from the pathology in question. The establishment of public funds or corporations' spontaneous grants implies, of course, the prior recognition of the victims' status. Again, it is often only thanks to criminal proceedings that unheard voices emerge from the silence and the case becomes one of public concern. As already underlined, States often play a subsidiary role in advancing alternative, public compensation, while only in rare cases do corporations act spontaneously or cooperate in the initiative. As examples of collaboration, it is possible to mention the Train Accident of Eschede case, where—without any legal compulsion—the corporation consented to treat victims as if the company had acted with guilt and compensated the victims accordingly; the UB Plasma case, where the public foundation established for victims was also financed by the pharmaceutical industry; and the Holzschutzmittel case, where corporations agreed to invest money into a research chair at the university.

In conclusion, a system where State and corporations do not recognise the victims' status, do not enter into dialogue with victims, nor even attempt to answer to their basic needs, increases the sense of injustice among victims and their family members. A system where the

⁴³ Restorative justice may also play a role at this regard: see chapter nine in this volume.

outcomes of criminal proceedings and decisions on the compensation for damages are linked to accidental circumstances (such as time, location, personal commitments, resources, or corporations' initiatives) increases the sense that corporations may violate the rules without consequence.

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CHAPTER VIII

VICTIM SUPPORT FOR VICTIMS OF CORPORATE CRIME AND CORPORATE VIOLENCE *by Alexandra Schenk*

CONTENTS: 1. Victim Support in the European Union and the Directive 2012/29/EU. – 1.1. The Concepts of Victims of Crime in the Different Legal Frameworks. – 1.2. Aspects of Victim Support. – 2. Victim Support Services in the European Union. – 2.1. Structural Differences in the Member States. – 2.2. International Organisations. – 2.3. Support for Specific Groups of Victims. – 3. Quality Standards. – 4. Conclusions.

1. Victim Support in the European Union and the Directive 2012/29/EU

Victims' rights have been strengthened immensely in recent years (Kilchling 2010; Kury 2010). After having played a minor role in criminal proceedings for many years, the legislation, both national and supranational, has recently acknowledged the importance of participation for victims in recovering from the consequences of victimisation. The Directive 2012/29/EU plays a significant role in promoting victims' rights on a supranational level.¹

Victim support represents an integral component to enable victims of crime to benefit from these improvements. Accordingly, the European Commission declares the right to support (arts 8 and 9) as 'one of the core rights in the Directive'.² To reduce negative

¹ The 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, pp 57–73, European Parliament and Council of the European Union).

² DG Justice Guidance Document related to the transposition and implementation of the Directive 2012/29/EU, p 24 (http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf, last accessed on 12 October 2017).

consequences for the victims and society, victim support should be available as soon as possible after the crime and irrespective of a formal complaint. The Victims Directive further requires victim support services to operate confidentially and free of charge. As a minimum, they should offer information and support concerning the rights of victims, reparation programmes, and criminal proceedings, including the preparation for participation in court. Often victims are not aware of their rights and legal options and struggle with feelings of shame and guilt, especially in cases of corporate violence.³ Furthermore, the Directive requires provision of information on specialised support services, emotional and psychological support, and consultations regarding financial and practical questions. These minimum standards should be ensured by all EU countries, throughout their territories.⁴ Generally, the Directive considers every victim as an individual with specific concerns, and asks Member States to provide support according to their needs (art 8). However, in cases of corporate violence, the victimisation typically has a collective character, either as the result of a severe accident or disaster, or due to products (such as foodstuffs or medication) being consumed by a large quantity of people. Furthermore, the general status of victims in the legal framework differs considerably from one Member State to another, which influences the approach of victim support services, on the one hand, and sets the basic condition for victims' legal options, on the other. Based on data from the project 'Victims and Corporations: Implementation of Directive 2012/29/EU for Victims of Corporate Crimes and Corporate Violence' this chapter focuses on the situation in the participating States of Italy, Belgium, and Germany.⁵

1.1. The Concepts of Victims of Crime in the Different Legal Frameworks

As laid out by the European Union Agency for Fundamental

³ Major problems for victims of corporate violence also include considerably long latencies, the difficulty of establishing a causation link between the actions (or omissions) of the corporation, and a lack of recognition. Furthermore, the persons harmed often do not even identify themselves as victims of crime. See also chapter six in this volume.

⁴ DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU, pp 24–27. See also chapters one and two in this volume.

⁵ For further information on the project, see <http://www.victimsandcorporations.eu> (last accessed on 29 October 2017).

Rights (FRA 2015), Member States, due to their own unique historical and legal development, manifest three different basic models which have emerged from their respective national legislations: the victim as witness (common law approach), a damage-focused approach exhibited by most of the States (including Belgium and Italy), and an approach emphasising the rights (violation) of the victim (for example, Germany). However, these categories are not exclusive and their practical application may not correspond entirely with the regulations. In countries where the victim is primarily a source of testimony, support focuses on the prevention of secondary victimisation and assistance in coping with the consequences of the harm done, rather than helping victims participate actively in proceedings.⁶ The second model emphasises the damage that victims have experienced and enables them to seek compensation within criminal proceedings. In this way, the role of the victim resembles that of a civil party. In such systems, supplementary forms of prosecution, alongside or instead of the public one, are available. For instance, private prosecution is an option in Belgium. The third approach combines aspects of the first two and, in addition, stresses the violation of the rights of the victim. In line with this concept, empowering the victim is crucial and victims can assume an active part in the criminal proceeding (FRA 2015).

1.2. Aspects of Victim Support

In addition to the provisions in arts 8 and 9, the Victims Directive also contains provisions regarding rights which contribute to a broad concept of victim support, such as access to legal aid, referral to the relevant institutions, and the prevention of secondary victimisation at trial. Although each State has an obligation to guarantee these rights, other actors need to be integrated into the process to ensure an effective practical implementation. The specialised knowledge and dedication of non-governmental actors are not only advantageous for the victims, but they also lighten the load on the State.

The provision of legal aid in Belgium, Germany, and Italy is shared between the State and victim support services. Legal aid, in terms of free legal advice, is available to all victims of crime in Belgium and Italy. In Germany, however, only certain categories of

⁶ In particular, Cyprus, Ireland, and the UK.

victims (for example, minors) and financially eligible victims can receive legal advice free of charge. In all three countries, free legal representation depends on various criteria such as, for instance, an economic means test. In cases of corporate violence, the victims often face economic hardship; however, the income threshold for receiving legal aid is extremely low, so few people qualify for benefit.⁷ Similar preconditions apply to receiving a pro bono lawyer. Moreover, the remuneration paid to the lawyer does not cover the in-depth consultation which most cases of corporate violence require (FRA 2015).

To prevent secondary victimisation at trial, EU Member States supply a range of rights to victims. The right to be questioned in a respectful and protected manner is guaranteed in Belgium, Germany, and Italy, as in the majority of other Member States. However, separate waiting areas for victims in court and the right to be accompanied by a support person are not as widespread and, of the three countries under discussion, only assured in Belgium and Germany but not in Italy (FRA 2015).

As discussed in the previous section, the role of the victim in criminal proceedings is built upon different legal frameworks and, therefore, this influences the range of rights guaranteed to victims.

2. Victim Support Services in the European Union

As stated above, the Victims Directive requires Member States to provide victims with support ‘in accordance to their needs’ (art 8) before, during, and after the criminal proceeding. To receive access to victim support, the filing of a formal complaint should not be mandatory. Furthermore, these services have to be confidential and free of charge. Because of the broad definition of the term ‘victim’ underlying the Directive, family members are also included in this provision.⁸ States shall facilitate the referral to victim support services

⁷ For instance, the net income in Italy has to be below €10,766 per year; in criminal cases the limit increases by €1,033 for each family member living with the applicant. Regardless of income, legal aid is always granted, eg in cases of sexual violence or sexual acts with minors. See ‘Improving Protection of Victims’ Rights: Access to Legal Aid. Research Paper on the Present Legal Framework and Best Practices’, p 54 (<http://victimsrights.eu/general-report>, last accessed on 31 October 2017).

⁸ At the same time, European Member States have the possibility to limit the

by the competent authority and foster the establishment of complementary specialised services. At the same time, the organisational structure of the services has not been determined, allowing it to be public or non-governmental in nature, and function on a professional or voluntary basis (art 8). In this way, the European Union takes into account the many diverse conditions of its Member States.

Amongst the minimum standards, art 9(1) of the Directive requires that victim services present information about the victim's rights, the options for reparation, the victim's role in the criminal proceeding, and assist victims with their preparation for and participation in the trial. Furthermore, its provisions stipulate that services offer information about specialised assistance available, provide emotional and psychological support, and counsel on financial and practical issues. Victim support services are also required to focus especially on the needs of victims suffering from the severe consequences of crime (art 9(2)), which can apply to many victims of corporate violence.

2.1. Structural Differences in Member States

Taking into consideration the diverse historical, legal, and political development of different Member States, models of generic victim support services vary substantially. With regard to the main sources of funding, governmental responsibility, regionalisation, and reliance on voluntary workers, Italy, Belgium, and Germany demonstrate very different approaches.

Whereas Italy does not offer any generic victim support service (Giavazzi, Mazzucato, and Visconti 2017: 43), and therefore fails to implement art 8 of the Directive in this respect, Belgium provides victim support almost exclusively as a State-led service. In contrast, the principal operator in Germany is a non-governmental organisation that does not extensively rely on State funding (FRA 2015).

The absence of an institutionalised network of victim support services in Italy puts victims in general, and victims of corporate violence in particular, at a high risk for repeat and secondary victimisation.⁹ Furthermore, this situation challenges the criminal

number of dependants who benefit from the rights foreseen by the Directive (recital 19).

⁹ Except local offices for minors in cases of (sexual) abuse, and public or private contact points for persons—mainly women—affected by domestic violence, stalking, etc. For the picture of status quo of victim support service in Italy, see among the 'Victims and Corporations' project outputs Mazzucato 2017: 62 ff).

justice system by demanding (social) services for the protection of victims which cannot be sufficiently provided (Giavazzi, Mazzucato, and Visconti 2017; Visconti 2017). Consequently, victims attempt to fill this gap by setting up their own victims' associations, as in the case of the Association of Families of Victims of the Mafia. Founded by relatives of mafia victims, the association functions to establish equal treatment for all victims without labelling and stigmatising them. While such organisations can help with recognition and information, a lack of funding and professional support structures limits their scope of action significantly. On a regional level, Emilia Romagna established a foundation for victims of crime,¹⁰ allowing several cities and municipalities of the region to participate in the provision of immediate support to victims who face the consequences of serious crimes. As the first foundation of its kind, the organisation offers financial support and information 'without incurring the administrative constraints of the government'.¹¹

In Belgium, no new legislation has been adopted in order to implement the Victims Directive. However, some regulations have been altered and victim support has been expanded. As the first contact point, the police provide victims with initial assistance and information. In especially challenging cases, they can also rely on the in-house victim assistance unit. On a federal level, the courts include victim reception units which are specialists in dealing with victim-related requests. For instance, they accompany affected persons to trial or offer consultation on the proceeding (Lauwaert 2017).

Apart from assistance within the criminal justice system, victims in Belgium have access to a number of generic support services: in Flanders and Brussels there are 11 general welfare centres (Centra Algemeen Welzijnswerk) each containing a division to assist victims of crime. They offer psychological, practical, and legal support for victims and their families. In the German-speaking part of the country, a non-governmental organisation provides assistance to all victims of crime. The social-psychological centre (Sozial-Psychologisches Zentrum) employs a multidisciplinary team of psychologists, therapists,

¹⁰ See <http://www.fondazionevittimereati.it> (last accessed on 13 October 2017).

¹¹ Help and Support for Victims of Crime (Italy), European Union e-Justice website, https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-IT-maximizeMS-de.do?clang=en&idSubpage=4&member=1 (last accessed on 30 October 2017).

and social workers applying an individual approach.¹² Victim support services (Service d'Aide aux Victimes—Slachtofferhulp) that provide assistance to victims of crime are also established on the regional level, as well as on the community level, in Flanders and Wallonia (FRA 2015).

In 1994, a national forum for victim support policy was established to connect the relevant State actors, as well as non-governmental organisations, involved in assisting victims of crime. Unfortunately, the productive initial collaboration has recently been declining as a result of poor funding (Lauwaert 2017). Additionally, specialised support exists for certain categories of victims, such as victims of child abuse, human trafficking, partner violence, family members of missing persons, and for victims of road traffic accidents (see section 2.3, below).

Germany explicitly implemented parts of the Victims Directive through the adoption of the Third Victims' Rights Reform Act on 21 December 2015.¹³ The bill's entry into force took place 10 days later on 31 December, with the exception of the provisions on the so-called psychosocial support, which, in turn, came into force on 1 January 2017. Improvements were made in regards to such areas as: participation in criminal proceedings, means to get in contact with victim support services, information concerning rights in criminal proceedings, and notification about steps undertaken in criminal proceedings, amongst others.¹⁴ In contrast to the mentioned amendments of existing sections of the criminal procedural code, the law on psychosocial assistance was newly introduced and goes well beyond the requirements of the Directive.¹⁵ In some German States the possibility to obtain psychosocial support for certain groups was already in practice. This possibility manifests through specialised non-legal assistance before, during, and after the main hearing for

¹² Help and Support for Victims of Crime (Belgium), European Union e-Justice website, https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-BE-maximizeMS-en.do?clang=en&idSubpage=4&member=1 (last accessed on 30 October 2017).

¹³ Gesetz zur Stärkung der Opferrechte im Strafverfahren (3. Opferrechtsreformgesetz), Act of 21.12.2015, Federal Law Gazette (Bundesgesetzblatt – BGBl.), part. I of 30.12.2015, pp 2525–2530.

¹⁴ For an overview, see Engelhart 2016.

¹⁵ Gesetz über die psychosoziale Prozessbegleitung im Strafverfahren, Act of 21.12.2015, Federal Law Gazette (Bundesgesetzblatt – BGBl.), part. I of 30.12.2015, pp 2525, 2529.

especially vulnerable victims. Furthermore, victims are provided with information and qualified support during the entire criminal proceeding with the objective of reducing strain and preventing secondary victimisation. At the same time, psychosocial support, as provided by the recently enacted law, bases itself on the principle of neutrality towards criminal proceedings, and excludes the element of consultation. Legal advice and clarification of facts are not seen to be a part of the responsibility of psychosocial support. Such assistance must not interfere with the witness or the testimony. Even though the support in general is accessible for all victims, its assignment by the court is only carried out upon request, for instance, in cases of sexual abuse or human trafficking. This assignment is free for the victim and, furthermore, obligatory in cases connected to minors. Once again, especially vulnerable victims appear to be synonymous with the ‘traditional’ victim categories. Victims of sexual violence, for instance, can frequently rely on more comprehensive support instruments (see section 2.3, below).

The main organisation providing generic victim support in Germany is the ‘Weisser Ring’, working with about 100 staff members and more than 3,000 volunteers in 420 local contact centres. Founded in 1976 as a non-profit association to help victims of crime, today the Weisser Ring has approximately 50,000 members and, moreover, is the only German victim support group operating nationwide. Its funding is made up of membership fees, donations, fines, and testamentary bequests. In this regard, it is worth noting that, in contrast, State subsidies are not utilised as a source of financing. The organisation offers telephone and online counselling, accompanies victims to court, facilitates access to legal, medical, and psychological consultation, and provides financial support. Furthermore, its members are committed to lobbying for victims’ interests and see themselves as guiding figures who help victims interact with competent authorities.¹⁶

Apart from the Weisser Ring, professional victim support services (Opferhilfe e.V.) are found in six federal States and are supplemented by volunteer structures in other parts of Germany.¹⁷ Many of those centres participate in the Working Group of Victim Support in Germany (Arbeitskreis der Opferhilfen adG), a non-governmental

¹⁶ <https://weisser-ring.de/weisser-ring/der-verein> (last accessed on 29 October 2017).

¹⁷ For the development of the professional victim support service in Germany, see Hanauer Hilfe 2009.

umbrella organisation that coordinates networking and information exchange between the different bodies (FRA 2015).

2.2. *International Organisations*

On the European level, there are several umbrella organisations operating to promote and coordinate generic or specialised victim support.¹⁸ Victim Support Europe, one major representative, is an international umbrella organisation connecting 41 non-governmental victim support services from 26 different European countries.¹⁹ To fulfil membership requirements, support services have to provide a range of general services free of charge, operate on a State or national level, and should not campaign regarding the sentencing of offenders. The organisation is policy-oriented and is consulted on victim-related topics by various structures, inter alia by the European Commission.²⁰ Considering related initiatives, the World Society of Victimology and the European Forum for Restorative Justice contribute to the field of generic victim support via advancing further research and practices (FRA 2015).

Regarding the interests of specific groups of victims, there are various international organisations, such as Women Against Violence Europe (WAVE) covering 46 European countries, and the International Centre for Missing and Exploited Children (ICMEC), with a worldwide coverage including four EU Member States. La Strada International focuses on victims of human trafficking in nine European countries, four of them part of the EU. Further associations exist on a European level concentrating on the combat of racism (European Network Against Racism, ENAR), victims of road traffic accidents (European Federation of Road Traffic Victims, FERV), and victims of terrorism (Network of Associations of Victims of Terrorism, NAVT) (FRA 2015).

¹⁸ See FRA (2015) for a more detailed listing, including also organisations operating worldwide.

¹⁹ The Steunpunt Algemeen Welzijnswerk in Belgium, and the Arbeitskreis der Opferhilfen and the Weisser Ring in Germany, all hold full membership. Since Italy does not have a generic victim support service, the following organisations are only associated: Associazione Aleteia Associazione LIBRA Onlus, Associazione Rete Dafne ONLUS, I-CARE – Associazione Italiana di Supporto Vittimologico. See <https://victimsupport.eu/find-an-organisation> (last accessed on 30 October 2017).

²⁰ See, eg, DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU, p 26.

2.3. *Support for Specific Groups of Victims*

In line with the Victims Directive, particularly vulnerable victims are usually considered to be part of certain categories: ‘In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered’ (art 22(3)). To a large extent, this is due to the fact that such categories, as well as child victims, tend to experience a high rate of secondary and repeat victimisation, of intimidation, and of retaliation, as pointed out in recital 57 of the Directive.

Likewise, many support services grew up around the time of the women’s movement in the 1970s (Leuschner and Schwanengel 2015). In Italy, for instance, the National Association of Centres against Violence connects independent anti-violence centres and shelters in order to evoke cultural change in Italy regarding male violence against women. Another example is the Doppia Difesa Foundation, a non-profit foundation established in 2005, which provides legal assistance, psychological support, and protection to victims of discrimination, violence, and abuse. Moreover, the foundation attempts to raise public awareness concerning such issues. In the German-speaking part of Belgium, minors who are victims of crime, and their parents, can receive support in cases of child abuse from Jugendhilfedienst. Furthermore, in the French-speaking region, in the Flemish province, and around Brussels, the Federation of SOS Children’s Service and the Child Trust Centres provide specialised assistance for victimised children and their relatives. In Germany, the Working Group of Victim Support connects victim support offices in 10 federal States, providing assistance for victims and witnesses in general, as well as for particular categories of victims of right extremist violence, anti-homosexual violence, and for minors.²¹

3. Quality Standards

Whereas the various aspects of victim support are clarified in arts 8 and 9 of the Victims Directive, the instrument does not contain detailed provisions regarding quality standards. To a certain extent, it limits itself to the wording of recital 63, stating: ‘it is essential that reliable support services are available to victims and that competent

²¹ <https://www.opferhilfen.de/verein> (last accessed 30 October 2017).

authorities are prepared to respond to victims' reports in a respectful, sensitive, professional and non-discriminatory manner'. Exploring indicators and performance standards in Europe, the FRA (2015) found that less than half of generic victim support services in the Member States work with such indicators.

Although some Member States have begun to establish certain quality standards, for instance, Belgium and Germany, even there they do not address all aspects of the services and, furthermore, are lacking a common approach. In Belgium, victim support services have to be approved by the government in order to be recognised and receive funding. Quality requirements concern, *inter alia*, specific criteria for staff training. The Working Group of Victim Support in Germany has developed standards for professional support including good practices and key principles. In order to ensure and provide victim support services complying with the requirements of the Directive throughout the European Union, a more comprehensive regulation of this feature of victim support is necessary.

In order for the amendments to be drafted, a large body of research needs to be carried out. A starting point can be the analysis of data collected in accordance with art 28 that stipulates that Member States report on how victims have accessed the rights stated in the Directive on a regular basis.

4. Conclusions

During the past few years, numerous Member States have increased their efforts regarding victim support in order to comply with the Victims Directive.²² Nonetheless, certain shortcomings still need to be addressed and further improvements should be aimed at a comprehensive support network for *all* victims of crime throughout the Union.

Victim support plays a crucial role in facilitating access to justice and promoting recovery. Accordingly, the absence of generic victim support services in Italy and other European States²³ constitutes one of

²² Belgium, Italy, and Germany have all stressed—irrespective of the adoption of new legislation required to implement the Directive—that their existing legal framework already contains an elaborated orientation towards victims of crime, and offers them an active role in criminal proceedings (Engelhart 2016; Lauwaert 2016; Mancuso 2016).

²³ In particular, Bulgaria, Cyprus, Greece, Latvia, Lithuania, Romania, and Slovenia (FRA 2015).

the main obstacles for victims to fully enjoy their rights. As already stated, in cases of corporate crime and corporate violence, victims frequently suffer from a lack of recognition, and insufficient knowledge and information, while dealing with a wide array of severe physical, psychological, and financial consequences. This is illustrated, to some extent, by the statement of a medical doctor who expressed the need for support for victims in the case of a noxious wood protection agent: ‘Therefore with these negative impacts only someone from the outside could have helped, but by their own efforts they were not able to do more.’²⁴

In particular, victims of corporate violence, who are not considered to be part of any especially vulnerable group, suffer from the absence of a generic support network. The focus on specific categories of victims, like persons affected by sexual violence, human trafficking, or child abuse, can therefore cause unintentional side effects. Without a doubt, such victims are particularly vulnerable in some respects and, consequently, need special assistance to successfully cope with their experiences; one of the reasons for their vulnerability arises from the fact that they typically exhibit a strong dependency on their perpetrators, in an emotional, financial, physical, or other manner. Victims of corporate violence share this feature, thus also finding themselves in an especially vulnerable position. Commonly, the relationship between the corporation and the victim is characterised by an enormous imbalance of information and power (Victims and Corporations 2017). Moreover, the victim may depend on the company’s product, for example in pharmaceutical cases, may be employed by the organisation, or may live in an area which has been polluted. Defining the structured reliance on the perpetrator as a characteristic of elevated vulnerability, victims of corporate crimes deserve to be recognised amongst the categories of victims in especially vulnerable positions. Experts criticise the unequal treatment of victims, which can result in disadvantages for less visible groups such as, for instance, migrants (FRA 2015). Even within the group of victims of corporate violence, the treatment they experience differs considerably. In cases of sudden and visible events, such as disasters, victims receive a high level of public attention and consideration by institutions. This immediate recognition and the comprehensive approaches to support such victims is driven by the impression that

²⁴ Interview, 14 September 2016, Germany, translation by the author (Engelhart, Hillemanns, and Schenk 2017: 82).

society is affected as a whole. However, victims in less obvious cases are unable to count on these mechanisms, even though the personal consequences might be equally harmful. Taking into account the enormous resources companies have in contrast to their victims, empowering and comprehensive victim support is crucial to improve the situation of the latter. The extent of public attention should thereby not be the decisive factor (Victims and Corporations 2017).

Furthermore, even the existing structures frequently suffer from poor funding, which in turn affects the quality of services. As a result, professional staff are lacking with experience and training varying widely. Moreover, only a few organisations work with quality standards and performance indicators (FRA 2015). This is highly detrimental since, apart from the negative consequences for the victims themselves, victim support promotes trust in the criminal justice system and can elevate the report rate of crimes. If, instead, victims do not have access to victim support, or are not treated in a respectful manner, crimes may not be reported and trust in the justice system may decline (FRA 2015). Therefore, a well-functioning network of support institutions has also positive consequences for society as a whole. In such a network, non-governmental organisations can play a significant role assisting victims of crime when State initiatives are lacking. Likewise, voluntary work, in addition to professional services, can improve the capacity of victim support in general. International umbrella organisations promote victims' rights on a higher level and assist in creating mutual benefit for the participating organisations. At the same time, the application of shared quality standards, going beyond the provisions of the Directive, should be duly considered. On the one hand, the variety of models and structures involved in victim support might be seen as an advantage in responding to victims on an individual level. On the other, the hesitant use of quality and performance indicators could be considered alarming. Further research is needed to review how victims make use of their rights as guaranteed by the Directive, and to develop comprehensive quality standards for victim support services.

Another important point to consider is the potential negative outcomes of strengthening victims' rights. Some legal professionals are concerned that the rights of the accused may be adversely affected, or that proceedings may become prolonged and more complex. Besides, the support given during the criminal proceeding can have counterproductive repercussions: even if it helps the victim, the presence of an assisting person can weaken the position of the victim in court. The recent elevation of victims' rights may also hold 'the risk

of leading to “victim fatigue” on the part of the officials responsible for the operation of the criminal justice system’ (Groenhuijsen 2014: 31). Thus, the objective of a balance between the needs of victims of crimes, the rights of the accused, and the requirements of efficient criminal procedure, should be pursued. In cases of corporate violence, the imbalance of power between the victim and the accused makes equal treatment of the participants even more relevant.

The support of victims of corporate violence involves yet another dilemma: even though it seems that victims can rely on a diverse and well elaborated victim support network, there are no specialised victim support services for those cases to date, excluding the associations established on victims’ own initiatives.²⁵ The lack of public awareness of their situation, the difficulties which the criminal justice system has with the respective cases,²⁶ and their own struggles with often long-term health conditions further impede adequate support and leave victims of corporate violence almost invisible. Identifying such victims as a highly vulnerable group could help improve their situation. At the same time, focusing on specific categories in principle, be it victims of corporate violence or others, tends to limit the circle of recipients of assistance, which is in opposition to the Directive’s intention to employ a comprehensive approach on an individual basis. Nonetheless, this volume represents a first step towards raising the particularities of cases of corporate violence and the consequences for such victims as regards support services, the judiciary, politics, and the public. To be recognised as a victim of crime, notably by victim support services, would already present a significant improvement for most of the victims of corporate violence.

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²⁵ For instance, associations were founded regarding the Asbestos case in Belgium and Italy, and in Germany a victims’ association was established of, and for, victims of a noxious wood protection agent.

²⁶ See chapter seven in this volume.

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CHAPTER IX

**RESTORATIVE JUSTICE
FOR VICTIMS OF CORPORATE VIOLENCE**
by Ivo Aertsen

CONTENTS: 1. Dealing with Corporate Violence: Problem Statement. – 1.1. About Corporate Violence. – 1.2. Corporate Violence Victimization. – 1.3. Responding to Corporate Violence. – 2. Restorative Justice: Potential, Conditions and Challenges. – 3. Applicability of Restorative Justice to Cases of Corporate Violence. – 3.1. The Victim Dimension. – 3.2. The Offender Dimension. – 3.3. The Community Dimension. – 3.4. Participation. – 3.5. Restoration. – 4. Conclusions.

In Brussels and Turin, no feelings of revenge appeared ... In the past, felons have hung for less! I have to take care for not revolting all the time, that would be empty and in vain. In the turmoil of life it is better to take a moment to reflect on what is essential. I read somewhere about forgiveness. It is a noble idea I would like to cherish. Yet it is still too early to consider it. When I think of all dramas caused - now and in the future - by asbestos barons and their industry, it is not even certain that I once will be able to forgive. Still, forgiveness alleviates resentment and enables peace and quiet. [Eric Jonckheere (2017: 156), having lost his father, mother and two brothers through asbestosis, commenting on the criminal trials in Brussels and Turin (translation IA)]

1. Dealing with Corporate Violence: Problem Statement

1.1. About Corporate Violence

For the purpose of this publication within the context of the EU co-funded research project ‘Victims and Corporations’¹ we consider

¹ Victims and Corporations. Implementation of Directive 2012/29/EU for

‘corporate violence’ taking place ‘when corporations in the course of their legitimate activities commit criminal offences which result in harms to natural person’s health, integrity or life’.² Hence, ‘corporate violence’ is a form of ‘corporate crime’ and can be situated in a broader conceptual framework of ‘white-collar crime’. The criminological concept of ‘white-collar crime’, as initially defined by Sutherland (1940), can be split up into ‘occupational crime’ on the one hand, and ‘corporate crime’ on the other: while the first one refers to transgressions committed by individuals or small groups in relation with their professional activities, the second deals with corporations (and public and non-profit organisations) or their employees committing offences in line with the objectives of the organisation (Clinard 2007).³ As a next useful distinction, ‘corporate crime’ can, according to its type of activities, first relate to abuse of power, fraud or economic exploitation (oriented to a variety of possible targets including citizens, consumers, competitors and creditors) and, second, to ‘corporative violence’ (Friedrichs 2007). Target groups of ‘corporative violence’ can consist of the public, consumers and employees, and has been defined in literature as ‘any non-accidental behaviours committed for organizational gain within a non-criminal purpose organization that participates in, condones, or demonstrates wilful ignorance of a governmentally punishable act within that organization that risks physical harm to human beings’ (Green and Shou 2015: 59).

As referred to in the literature (Clarke 1990; Croall 1992) and largely demonstrated within the ‘Victims and Corporations’ project on the basis of research in Belgium, Germany and Italy, corporate crime has, in comparison with other types of crime, a number of specific characteristics that to a large extent makes effective responses more complicated. These include: low visibility of the crime and the harm,

victims of corporate crimes and corporate violence, co-funded by the conjunct programme “Rights, Equality and Citizenship” and “Justice” of the European Union (Agreement number - JUST/2014/JACC/AG/VICT/7417) (project website www.victimsandcorporations.eu).

² See chapter six in this volume.

³ Another useful definition of corporate crime is this one: ‘Corporate crimes are actions by corporate persons that create avoidable harms to persons or property that involve a violation of private or public trust. These corporate actions are intended to provide financial advantage to the corporate person (i.e., the chartered organization and its management hierarchy) or maintain or extend its power and privilege. By this definition such actions are rational, harmful, and *not* limited to violations of established law.’ (Russell and Gilbert 1999: 61)

high degree of complexity of the offence, unclear distribution of responsibilities and diversity of types of victimisation.

The type of cases of corporate violence dealt with in the 'Victims and Corporations' project mainly concerned environmental crime, food safety violations and offences in the pharmaceutical industry.

1.2. Corporate Violence Victimisation

Victimological research has convincingly pointed to the contingent nature of victims' identities and attributes (Fattah 1994; Sebba 2000; Dignan 2005). With the emergence and the growth of the victims movement since the 1960s, a stereotypical image of 'the ideal victim' has come to the fore (Christie 1986). This is the image of the individual victim affected by conventional crime: predatory offences against persons, including property, physical violence and sexual abuse crimes. They are the types of offences that are most easily recognised not only by the victims themselves, but also by the police, legal professionals, victim support workers and restorative justice service providers. In responses to victimisation, there is an 'over-emphasis on such types of criminal behaviour where there is an easily identified individual victim' (Anttila 1974).

The empirical reality greatly differs from this ideal-typical picture, with many types of victimisation largely under-reported and thus remaining under the radar, the phenomenon of blurring and overlapping categories of victims and offenders, and large concentrations of victims in particular populations. Which groups of harmed persons are recognised as victims and receive a victim status depends on social processes of identification and definition, not seldom determined by vested cultural, political or economic interests (Green 2007; Strobl 2010). Therefore, manifestations of wrongdoing in many instances may not be unambiguously recognised by the public as 'criminal', and also not by the criminal justice system. Moreover, victims, for example of corporate fraud, are not always aware that they have been victimised, or they may find it hard to admit that they have been cheated (Dignan 2005: 21).

More recently however, both research and practice reveal a growing attention to previously 'hidden' forms of victimisation and to neglected and emergent experiences (Spalek 2006). New themes include victims of fraud, money laundering, internet/cyber crime, environmental crime, conflict and post-conflict crime and sex trafficking (Goodey 2005: 218-224). But these fields remain difficult

to study as far as it concerns the impact on victims. These crimes often evoke an abstract victim. Even when we are confronted with cases of individual suffering and countries deploying a growing criminalisation and penalisation of these types of crime, the final meaning and impact on people, institutions and society at large is not known sufficiently and therefore also not responded to adequately. For example, understanding and responding to environmental crime requires a restoration of the 'loss of social thinking' and a re-conceptualisation of ideas of social responsibility to each other and to the environment (Goodey 2005: 222).

Victims' experiences are often looked at through the separate *effects* the crime has on the victim: financial/economic consequences, physical injuries, psychological harm and social/relational/professional consequences. However, the overall consequences cannot be adequately understood if we do not place the victimisation experience in its dynamic context. Therefore, we must also look at the *impact* of a crime as distinguished from its effects: the impact refers to the product of the perceived seriousness or intensity of the effects and their duration from the victim's own perspective (Dignan 2005: 23-25). Significance and subjective meaning are decisive. In the aftermath of the crime, meaning making will then be an important element of the recovery process, in which the experience and recognition of wrongfulness become key in the person's perception of justice (Pemberton and Vanfraechem 2015).

In this approach, typical features of victimisation appear in the case of corporate violence, as also observed in the 'Victim and Corporations' project (Visconti 2017). These specific characteristics relate to: (1) the severity and pervasive impact of the harm, (2) the collective nature and dimension of the victimisation, (3) the complexity of corporate victimisation and vulnerability of victims, (4) the deceitful nature of corporate violence, and (5) the persistence of time of corporate violence. As for other types of victimisation, the harm caused by corporate violence is diverse and impacts different areas of life. The complexity of the consequences becomes clear when listening to personal life stories. Harm caused by corporate violence often takes years to manifest. Physical harm (death, disability and disease) can be an immediate effect of the event, but in many cases there are long term consequences, of which the causal relationship with the transgressions might remain unclear. Financial or economic harm often results indirectly, through permanent or temporary disability of the victim, from costs of medical care and revalidation, and loss of income. Psychological harm can result from uncertainty of the

consequences, lack of clarity and transparency with regard to responsibilities and accountability, and the prolonged absence of financial compensation. Social consequences are experienced with respect to implications on the victim's employment, changed relationships and social stigmatisation or isolation.

Victims' *needs* in cases of corporate violence are often intertwined and reflect the need for recognition, protection, information and support (Victims and Corporations 2017).⁴ Public recognition of the wrongful behaviour is a central need of victims. The need for protection varies from protection against retaliation and intimidation at the individual level (fear of dismissal by the corporation) to protection from threats of relocating the company resulting in loss of collective employment. Additionally, preventive protection by public institutions and protection against repeat victimisation must be provided. With respect to the latter, continuous exposure to harmful effects has been reported in the project's findings, for example in the cases of asbestos or Thalidomide, where harmful products were still distributed many years after the effects were known by the companies.⁵ Indifference and inactivity by public institutions has been reported as a form of secondary victimisation. The need for adequate information relates to the status of the personal health situation and prognosis, but also to matters about accountability and understanding of the background and reasons of the incident(s), the legal and procedural options, and available mechanisms of financial compensation. Support is needed to address the medical harm, as well as the social, psychological, legal and economic consequences of the crime. The role of the media is important, and can range from negative and sensational to supportive in terms of public recognition and action. Most importantly, if there is one need in common, it is that 'all victims want to talk to the corporation'.

1.3. Responding to Corporate Violence

How does society respond to corporate violence, taking into account the specific nature of the effects, impact and meaning of this type of offence to the life-world of victims, their families and their communities? So far, in international literature much attention is given

⁴ See also chapters one and six in this volume.

⁵ See chapter seven in this volume.

to legal responses and their challenges: ‘If the criminal justice system has a general problem with addressing victims’ needs, this problem is intensified and multiplied when it comes to white-collar crime’ (Gabbay 2007: 432). Awareness of the massive impact of white-collar crime, and of corporate crime in particular, has increased significantly in the USA since the wave of corporate scandals beginning with the Enron case in 2001. Corporate executive misconduct led not only to bankruptcy of big corporations, but also to billions of harm to creditors, to the State, to infrastructure and to families. The many large-scale corporate crimes also took an enormous toll on the criminal justice system, often perceived by the public as not being able to treat victims adequately, to reduce this type of crime and to fulfil public expectations of fairness and justice (Gabbay 2007). Even without clear indications of a real increase of corporate crime during last decades, US governmental policies changed dramatically after 2001, resulting in a substantial increase in indictments of high-level corporate executives, who were then given long prison sentences by (mainly) federal courts. Prior to 2001, many white-collar offences were not addressed at all, or were dealt with by civil and administrative law. If offenders were charged and convicted by criminal law, their sentences were often fines, probation or community service. However, it is generally recognised that in the post-Watergate era, punitive attitudes to white-collar crime have increased, with research showing ‘a serious confidence gap’ between public demand for justice and the system’s ‘ability or willingness to administer adequate punishment’ (Gabbay 2007: 433-437). Because of the complexity of collecting evidence in such criminal investigations, the system relies heavily on inside information and testimonies (against colleagues) which are obtained thanks to ‘whistleblowing’ or through plea bargaining. This in turn results, from the victims’ perspective, in disparities in outcome and injustice. Even though US federal criminal law encourages financial compensation, many victims will never receive restitution in reality, while civil law procedures in such cases put a large and long-lasting burden on the victims. Furthermore, long prison sentences or other forms of incapacitation will often negatively affect the capacity of corporate offenders to make amends to society or to their victims.

Also Chiste (2008) wonders why—in (some) common law jurisdictions—white-collar crime, in contrast to conventional crime, is often discussed within a strong retributive rhetoric. Additionally, the focus is on the behaviour of *individuals* within organisations, leaving out other, non-individual responsible actors. An inverse shift occurred in European countries around the turn of the century, from a purely

punitive approach to one of prevention and direct or indirect structural intervention (Heine 1999 as cited by Löschnig-Gspandl 2003: 151). Corporate punishment might then entail fines or other monetary sanctions, restrictions on business activities or exclusion from advantages, as well as various orders and conditions including corporate probation focusing, for example, on a mandatory re-organisation of the enterprise. Therefore, sanctions on corporations can have a reactive, preventive or proactive character. However, in European countries restorative elements can hardly be identified in criminal sanctions (Löschnig-Gspandl 2003). A major problem might be that in the majority of the cases the victims of corporate crime are either an anonymous group of people that cannot precisely be defined, or even the general public. Damages in terms of financial costs cannot easily be quantified, although this does not exclude symbolic restitution.

Business ethics reveal different approaches in dealing with crime: from an individualistic standpoint, orienting accusation to an individual CEO, to a more communitarian approach, where the moral community's responsibilities are addressed. In cases of corporate harm, the role of different managerial styles and organisational climates has been stressed as well. Sullivan and Tifft (2010: 136-140) report various examples of 'managerial violence' in the US from the 1970s onwards in which a company's officials knowingly withhold information about serious threats for the health and even life of employees, thereby causing preventable and avoidable harm. One of the cases studied was an asbestos manufacturing plant in which workers had contracted asbestosis.

White-collar offenders in criminal investigations of this nature often deny responsibility, and an admission of 'guilt' is reached largely in a forced way using a plea bargaining procedure. Crimes are therefore 'objectivated' and abstracted from the social context in which they took place (Cooley 2002, cited by Chiste 2008: 96); though the social costs (the 'externalities') may be the most damaging, they are also unlikely to be addressed by criminal justice processes. Criminal law and other public responses 'are often substantively unrelated to the nature of the social harm and non-responsive to the nature of the larger structural and cultural contexts within which the decision to harm others was made' (Sullivan and Tifft 2010: 146). Where research has indicated that the attitudes of white-collar criminals tend towards irresponsibility, undependability, disregard for social rules and norms and a segregation of their private and professional environment in terms of social empathy and commitment, these personal traits are not

challenged by a retributive criminal justice approach. In a milieu of social distrust and resentment, a criminal law process does not offer victims of white-collar crimes tools to better understand what happened within the corporation, including the personal role of a CEO.⁶ All of these elements make clear that a broader approach than an individualising or interpersonal one must be developed and that responses must be offered in a more inclusive way in order to cope with this type of crime adequately. Civil or administrative law alone is not sufficient to recognise the wrongfulness of the harm or to achieve general or individual prevention; at the same time, within a criminal law context, punishment must be seen as the *ultima ratio* (Löschnig-Gespanndl 2003). According to Chiste (2008), corporate crime in particular lends itself to innovative forms of comprehensive restorative action (*infra*).

2. Restorative Justice: Potential, Conditions and Challenges

Against the background of the problem statement sketched above—related to the nature of corporate crime and corporate violence, aspects of victimisation and existing criminal law responses—the question arises whether, how and to what extent restorative justice could offer a more inclusive, encompassing and effective approach. Until recently, restorative justice has been criticised because of its exclusive focus on interpersonal, conventional types of crime. Although the predominant focus in European countries is on relatively minor crimes for which mainly victim-offender mediation applies (Dünkel et al 2015), there is a gradual shift and broadening of the scope into the direction of developing restorative justice for different types of (more serious) crime and in a variety of settings. A series of European and other projects testifies to the enlargement of the perspective to large-scale violent conflict (Aertsen et al 2008), domestic violence (Drost et al 2015), sexual violence (Zinsstag and Keenan 2017), child victims (Gal 2011), historical institutional abuse (Keenan 2014) and terrorism (Letschert et al 2010; Pascual Rodriguez 2013; Bertagna et al 2015). Restorative justice in prison settings has become a popular topic (Lummer et al 2015; Barabas and Fellegi 2014; Johnstone 2014), and European studies have been set up on models of conferencing (Zinsstag and Vanfraechem 2012) and peacemaking

⁶ See chapter seven in this volume.

circles (Weitekamp 2015). Moreover, the relationship between transitional justice and restorative justice mechanisms has been analysed (Clamp 2016). However, the applicability of restorative justice to issues of financial, economic, fiscal and corporate crime remains largely understudied in Europe and other regions.

One of the challenges when exploring the relevance of restorative justice in cases of corporate crime relates to what extent restorative justice practices are able to surmount stereotypical and ideal-typical images of victims, offenders and notions of restoration (Dignan 2005: 167-178; Bolivar 2010; Aertsen 2017; Maglione 2017). On the basis of what is observed above, it is clear that in order to make restorative justice suited to corporate crime, its concepts of offenders, victims, harm, crime and community have to be modified and models have to be adopted in order to involve all stakeholders in practice (see eg Mazzucato 2017).

There may be many limitations to restorative justice, just as there are many opportunities (Cunneen and Hoyle 2010; McGeer and Pettit 2015). We consider restorative justice as a field of ongoing development, both in theory and practice, which does not need one uniform definition of its approach that is applicable worldwide and for all types of crime.⁷ We rather believe that restorative justice represents a set of values and principles that are able to fundamentally guide daily practice within a variety of responses to crime. Therefore, restorative justice cannot be reduced to its well-known models of victim-offender mediation, conferencing and peacemaking circles. Effective guiding principles of restorative justice can be found in international standards and regulations, such as UN ECOSOC Resolution 2002/12⁸ and Council of Europe Recommendation R(99)19.⁹ These, together with standards from national restorative justice services, offer a valid basis for restorative justice practices in cases of corporate crime as well.

⁷ Nevertheless, from a policy making point of view, disposing of a workable definition of restorative justice might be necessary in a given context. For EU Member States, the 2012 Victims Directive in its art 2 provides such a definition, completely inspired by a previous definition by the Council of Europe: “Restorative justice” means any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party’.

⁸ UN ECOSOC Resolution 2002/12 on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

⁹ Recommendation N R(99)19 of the Committee of Ministers to Member States concerning Mediation in Penal Matters.

Safeguards from the perspective of the victim are provided by the European Union Directive 2012/29/EU.¹⁰ For cases of corporate violence specifically, where health and physical integrity of victims are at risk, the Victims Directive's safeguards and protection mechanisms must be emphasised. For the Directive, family members of deceased victims are equally considered as victims. With respect to restorative justice, art 12 of the Directive stipulates that Member States must take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and retaliation when providing restorative justice services. The following conditions apply: (a) restorative justice should only to be used if in the interest of the victim; (b) the victim must be provided with full and unbiased information about the process and the potential outcomes and about the procedures for supervising the implementation of any agreement; (c) the offender must accept the basic facts of the case; (d) agreements must be reached at voluntary and may be taken into account in proceedings; (e) confidentiality must be respected. The Directive also obliges Member States to facilitate the referral of cases appropriate to restorative justice services, but it does not formally oblige Member States to introduce or to generalise the availability of restorative justice services (Lauwaert 2013).

Some of the main restorative justice principles and values can be described as follows: (a) Restorative justice is a model of doing justice that is rooted in an immediate connection to the personal and social life-world of people and that aims at restoring the harm resulting from the crime as completely as possible; (b) Restorative justice seeks to balance the needs of all involved. This inclusive approach entails bringing together the victim, the offender, the community and other actors in a common response where the 'justice needs' of all stakeholders are addressed; (c) Parties in restorative justice are considered moral subjects able to participate in a process of dialogue and to encounter the other, on the condition that there is a mutually respectful environment created and an appropriate space and support provided for the encounter.

Within the context of exploring new fields of application for restorative justice, the categories of values as listed by Braithwaite (2002a) might offer guidance as well. He distinguishes between

¹⁰ Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

constraining values (such as respectful listening, non-domination by one party, empowerment and equal concern, respect for fundamental human rights), maximising values (including restoration of human dignity, property loss, safety/injury/health and environment, emotional restoration, a sense of duty as citizen and prevention of further injustice) and emergent values (such as remorse, apology, mercy).

Let us now return to the field of corporate crime in order to explore the possible role of restorative justice.

3. Applicability of Restorative Justice to Cases of Corporate Violence

When considering the possibilities of restorative justice for corporate crime, we enter into a world of systemic injustices, extreme power imbalances and high victim vulnerability. Victimisation in these cases often has a collective and community dimension, and accountability for the crime cannot be personalised easily. To deal with these forms of ‘faceless’ crimes, we must adopt another mind-set, a move from the micro-level to the macro-level when looking at causes, consequences and reactions. Therefore, restorative justice responses to these manifestations of man-made harm must also relate to social justice (Price Lofton 2004).

Reflecting about the possible role of restorative justice in cases of corporate crime results in a recognition of its limits for the one, and a belief in its potential for the other. Authors such as Chiste (2008) argue that corporate crimes specifically—more than white-collar crime in general—are a good fit for restorative justice because the corporation can be clearly identified as the offender. Gabbay (2007: 440-441) demonstrates that adding a restorative justice intervention to the public response ‘is not only appropriate and theoretically justified but technically possible and pragmatically useful as well’; as a matter of principle, ‘it promotes justice in a more complete way’. For him, restorative justice in these cases is an additional form of punishment, not an alternative *to* punishment. On the one hand, he argues, restorative interventions can be combined with retributive punishment, where the restorative component must be taken into consideration in the overall determination of the offender’s deserved sentence. On the other hand, a restorative intervention can additionally reinforce the utilitarian function of punishment in terms of deterrence: research on corporate crime has shown that a general and specific deterrent effect of criminal sanctioning occurs when it is accompanied by informal

sanctions, such as social censure, shame and loss of respect (Gabbay 2007: 448-449).

In what follows, we will discuss how in cases of corporate crime—with a special attention for corporate violence as defined above—restorative justice's constitutive elements (may) appear. We will briefly refer to more general conceptual frameworks which may underpin a restorative justice construction for corporate crime. In international literature, the conceptual exercise to apply restorative justice has mainly been done in the field of environmental crime.

3.1. The Victim Dimension

Who are the victims in cases of corporate violence, and how can their needs be understood and met? For corporate crime in general, the distinction can be made between victims internal to the company, and external victims. Internal stakeholders are employees and their personal circles, but possibly also shareholders and investors. External stakeholders are harmed people with no personal relationship to the company, as well as institutions, other corporations or governmental or public bodies. The broad scope of victimisation becomes clear when the distinction is made between primary (direct victims), secondary (relatives and first responders) and tertiary (or vicarious) victims. The latter represents all members of society who experience indirect or direct harm caused by the crime.

In cases of corporate crime, there may not always be an identifiable victim or a tangible harm. Corporate crime can be amorphous, and its harms more diffuse and aggregative than in the case of conventional crime; therefore harm may also be more difficult to measure. In some cases, as already mentioned, victims are even unaware of their victimisation (Gabbay 2007: 461). This problem exists to a lesser extent—also in terms of applying restorative justice—in cases of corporate violence, where harm on personal victims may be more evident. A complicating factor, however, is the long latency period which often occurs with corporate violence: the harmful effects on health or life only become visible many years after the events. Collecting evidence about the causal link between the initial event and long-lasting effects is therefore extremely difficult. In other cases, the statute of limitations may preclude criminal prosecution. To remedy this, autonomous restorative justice mechanisms should be put in place, based on the moral obligations and

commitments of corporations, possibly to be enhanced by social pressure (*infra*).

In the case of corporate violence, restorative justice mechanisms can address the needs of both internal victims (employees and their relatives) and external victims (bystanders or witnesses, and citizens who have experienced harm as consumer or otherwise). All these categories should be able to receive recognition from the company for the harm suffered, information on the causes, circumstances and responsibilities around the harmful events, and financial compensation or restitution *in natura* for material and non-material harm. A central need for victims is to be heard and to tell their story. Within the 'Victims and Corporations' project we have indeed observed how important it is for victims of being able 'to talk to the company'. While many of these services to victims must be offered at the individual level, and require a personalised approach including direct or indirect dialogue, some of them can also be performed at a group level. Finally, victimless crimes should also be dealt with restoratively; for example, in the case of harm to the natural environment, delegates of interest groups or public bodies can represent the victim.

3.2. *The Offender Dimension*

The biggest challenge for restorative justice in terms of the offender may be the creation of a space for open, non-defensive communication so that the disconnection between harmer and harmed is lifted, and the corporation's representatives can begin considering their responsibilities as a corporation. As is the case for restorative justice practices at the individual level, acknowledging the basic facts of the crime should not be automatically considered as a legal admission of guilt or as evidence in criminal proceedings. This may be unrealistic in some cases, such as those in which the corporation fears considerable financial claims through judicial procedures.¹¹

In many cases, social or judicial pressure will be needed to bring the corporation to the table. Their motivation will be different from an individual offender's, although in both cases self-interest may increase willingness to participate. Financially advantageous deals through negotiation with the victim(s) may be attractive, but most authors

¹¹ See chapter seven in this volume.

argue that the company's reputation and public image is the most important motivational factor (Boyd 2008; Braithwaite 2002b).

For Chiste (2008: 112), the idea that corporate crime (more than white-collar crime in general) and restorative justice have a 'natural affinity' has to do with the fact that 'corporations have every reason to maintain trust and right relation with their specific consumer bases and with the societies can contain and enrich them'. A 'proactive approach to corporate social responsibility and the voluntary imposition of high standards' upon themselves supports a positive relationship with governmental bodies. In other words, cases of corporate crime seem to lend themselves to a combination of intrinsic and extrinsic types of motivation in a particular way (see also Walgrave 2008: 68-100 for the role of common self-interest and the socio-ethical foundation for restorative justice in general).

Looking at the process and possible outcomes for a corporate offender through participation in restorative justice interventions, the role of shame as deterrent comes to the fore. Barnard (1999) analysed the role of shaming in (American) corporate sentencing processes, and she stressed the importance of the personal appearance of the CEO in the courtroom. She describes the social environment of leading executives and points to their high susceptibility to shaming rituals and their sensitiveness to the opinions of their peers.

Gabbay (2007: 450) refers to research showing the preventive effect of shaming in cases of white-collar crime, 'by way of publicizing the identity of the offender and the details of the offence'. One of the findings revealed that self-imposed shame is often viewed as more certain and more severe than State-imposed punishment. 'Embarrassment', as a socially imposed punishment, can also be an effective deterrent. At the practical level, it is mainly restorative justice interventions such as group conferences and circles that seem to foster these deterrents. Here, and in particular in cases of victimless corporate crime, shaming operates through the active and deliberate involvement of *external* stakeholders, by preference peers or representatives of the close (professional or social) community of the offender (the 'small town' of corporate executives). It is in particular the concept of 'reintegrative shaming' that offers a theoretical basis for effective sanctioning through restorative interventions, in the case of corporate crime and, more generally, with regulatory offences (Braithwaite 1989, 2002b, 2003). An important factor that makes a sanction effective is its social embeddedness: expressions of community disapproval take place, followed by gestures of reacceptance in the community of law-abiding citizens. External stakeholders should be selected in such a

way that they are able to induce a real feeling of shame. Indeed, disapproval by judicial or public authorities is often less effective than 'naming and shaming' by those the offender deeply respects or when he fears for a serious impact on his personal environment. It goes without saying that a process of personal shaming can also be induced in a powerful way when the company's representatives are confronted with the personal suffering of the *internal* victims of corporate violence, such as victim-employees, their families and local community members.

Finally, as we have also learnt from experiences working with victims of (historical) institutional violence, spokespersons of the offender's organisation who participate in restorative justice encounters can represent the company in order to show their respect on behalf of the corporation to the victims or harmed community. They should hold a position high enough to take decisions, including concluding agreements, and to exercise control and follow-up of commitments (Löschnig-Gspandl 2003).

3.3. *The Community Dimension*

With environmental crime in particular, there is a community dimension that appears in many shapes (Preston 2011). Elements of the community that can be harmed are: communal natural resources (private or public propriety, communal propriety such as air, water and forests, and unowned propriety such as light), public infrastructure, heritage, environmental meaning (sense and use of the environment by a community) and future generations. On the basis of the well-known assumptions, Preston (2011) conceptually investigates objectives and principles of restorative justice in literature, and how these diverse elements of the community (as well as the personal victims and the offenders) can participate, or be represented, in restorative justice processes. The community is often embodied by representatives of communities or interest groups, or by surrogate victims or governmental representatives. A specific emphasis and approach might be needed; for example, in cases of non-human victimisation (environmental harm), the surrogate victim needs to be able to bring an 'ecocentric' rather than an 'anthropocentric' perspective to the restorative process.

Again with regard to environmental crimes, Boyd (2008) investigates the relevance of the frameworks of therapeutic jurisprudence and restorative justice. From a restorative justice point of view, she introduces 'sentencing circles' and 'community impact panels' as

potential practical tools for active community participation. Sentencing circles are open to all members of the community who feel affected in one way or another, and in consultation with public prosecutor or judge, a sentence can be proposed. A community impact panel consists of the offender(s), community representatives, a trained facilitator and possibly a police officer. Boyd (2008) also warns of possible problems with these approaches when applied to cases of environmental crime. These can include power imbalances in the group, an insufficient or incomplete assessment of the environmental impact by individual community members, a lack of uniformity in sentencing and the risk of double jeopardy.

By engaging all stakeholders, restorative justice practices can also be considered a way for a community to develop its social capital, its social networks and civic interconnectedness. Restorative justice offers opportunities for social participation, norm clarification and political debate (Dzur 2011). This society activating approach might also apply to dealings with corporate violence. What is much less possible by prosecution in these cases may be offered by restorative justice through its participatory processes: an opportunity for citizens to explore and to challenge ‘the morality of commerce, or socioeconomic inequity, or the temptations of great wealth, or the responsibilities of the powerful, or what “represents the law of the land”, in a purposeful and meaningful way’ (Chiste 2008: 99-100). Together with this social-emancipatory potential, restorative justice processes may also offer an opportunity for restoration of public trust in business.

3.4. Participation

Participation of all stakeholders is crucial in restorative justice. In cases of corporate violence, however, there may be a plurality of stakeholders, and therefore the common models of restorative justice such as victim-offender mediation, group conferencing or circles are not easily applied, or else will have to be adapted considerably. In order to do so, Gabbay (2007) finds inspiration in the model of the South African Truth and Reconciliation Commission, which has several important advantages: its innovative public character, the transparency of the process, the possibility to exercise censure and public condemnation (and shaming), the ability to deal with large numbers of victims and offenders and to include peers and members of the community, and finally the possibility to provide different types of restoration depending on the needs (for example, social housing or educational services). The

elements of story-telling and truth as a pre-condition for reconciliation and healing may also be relevant for our case: truth not only to be considered in its legal and factual sense, but also in a narrative, relational and dialogical context (Aertsen et al 2008).

Luedtke (2014) also refers to existing community-based and traditional justice mechanisms when exploring the applicability of restorative justice for white-collar crime. He develops a theoretical model based on the six elementary questions listed by Zehr and Gohar (2003) in their practical blueprint for initiating a restorative justice process: Who has been hurt? What are their needs? Whose obligations are these? What are the causes? Who has a stake in this situation? What is the appropriate process to involve stakeholders in an effort to address causes and put things right? After a look at the possible benefits and drawbacks of restorative justice in cases of white-collar crime, he presents a three-stage proposal, allocating decision-making authority equally amongst the courts, victims, offenders, and communities: (1) a decision on the participants and harms to be included, (2) the type of restorative justice programme to be offered, and (3) the establishment of its relationship to criminal justice.

Umbreit, Geske and Lewis voice a practical concern when applying restorative justice to cases of crime by multinational corporations (2015). As a response to an earlier proposed restorative justice model for extra-territorial white-collar crime, they urge adding 'empowered dialogue' between parties and draw attention to practical questions such as: Who facilitates the discussions, and how are they structured?

3.5. Restoration

In general, victims strongly prefer compensation directly by the offender (Strang 2008). While a voluntarily accepted agreement by the offender on financial or non-financial reparation has an important psychological value for the victim, imposed restorative sanctions should not be excluded in the case of corporate crime. Many such practices exist internationally. In terms of environmental crime, White (2017) develops a model of 'reparative justice' focusing on restorative sanctions imposed by the court. Because of the regularly changing positions of senior managers, a personalised restorative justice approach would be less effective. White bases his model on the problem-solving jurisprudence by the New South Wales Land and Environment Court (Australia), where sanctions and orders are issued

to corporations creatively on an ad hoc basis, combining punitive and reparative elements. Orders may include an obligation for the offending company to publicise the offence and its consequences, to carry out specified projects for restoration or the enhancement of the environment, to pay a specified amount to the Environmental Trust, or to organise a training course for its employees.

The opportunities for restorative justice as a ‘new form of environmental criminal justice’ are discussed by Pain, Pepper, McCreath and Zorzetto (2016), who compare legislation and jurisprudence in New Zealand and the States of Victoria and New South Wales in Australia—three jurisdictions where restorative justice for environmental crime is possible as part of a sentencing process or separate from the criminal justice system. They find the New Zealand framework the most comprehensive, where courts have adopted restorative justice processes to a large extent. Community conferences offer ‘the opportunity to the offender to directly apologise to victims, understand how his or her actions have affected the lives and livelihoods of the victims, and commit to targeted actions to redress this harm’. Besides the educational possibilities, conferences also enforce—ideally speaking—the importance of compliance with environmental law and reduce the likelihood of recidivism.

Special attention is given to the process of restorative justice in cases of environmental crime, for example in the form of conferences, in Scotland by Croall (2017). She argues for the involvement of ‘appropriate community and environmental groups along with enforcers and prosecutors’. Outcomes of such restorative justice processes may be, for example, that firms breaching health and safety regulations are asked to conduct research into safety issues as well as improving safety procedures. In the case of food crime, food manufacturers and supermarket executives could be directly confronted with the physical consequences for people, and could be asked to compensate damages and to contribute to food banks, amongst other forms of reparation.

In restorative approaches that leave room for non-material elements and which focus on communication between the stakeholders, an apology or statement of regret may be an important additional, or sometimes the only, way to accommodate the victims. Distinctions have been made between different categories of apologies, as also made clear by corporate offenders in the USA: tactical apologies (for example in the context of a plea bargaining procedure), explanation apologies (justifying his behaviour without admitting wrong), formalistic apologies (without remorse, under the demand and pressure

of an authority figure), and happy-ending apologies (where responsibility is accepted and remorse expressed). Apologies, issued by high profile individuals, commercial ventures or religious institutions, have been described as a ‘growth phenomenon’, and reference is made to a trend in legislation in the USA, Australia and Canada to pass ‘Apology Acts’ which allow for apologies without having to admit legal liability (Macleod 2007 as cited in Chiste 2008: 109-111). In order to avoid secondary victimisation, it is clear that the process of offering apologies should not become a routine or automatism, or a justification for a lenient sanction. Apologies must also be accepted, and this process requires an appropriate forum, which restorative justice may be able to offer (Gabbay 2007: 422).

4. Conclusions

This chapter explored the possibilities to apply restorative justice processes in cases of corporate violence. This was done in the framework of the EU co-funded project on ‘Victims and Corporations’, focusing on different types of corporate violence in three European countries. We first looked at the phenomenon of corporate violence, its typical victimisation processes and the challenges to offer inclusive responses. We then briefly introduced restorative justice and some of its leading principles and values, in order to inquire its applicability to cases of corporate violence, or, more generally, corporate crime. For this, a conceptual exercise was undertaken examining five of restorative justice’s constitutive elements as they may appear in corporate violence cases: the dimensions of victim, offender and community, and the prospects of participation and restoration. This chapter did not aim at developing an encompassing theoretical framework, nor a uniform model that could be applied in practice. However, taking into account the characteristics of the phenomenon and its devastating impact on large groups of people over a longer period of time, we can learn from restorative justice models in adjacent domains. Promising practices and realistic perspectives exist worldwide (Wright 2017). Restorative justice theory and principles offer conclusive arguments to bring ideas into practice also in complex cases of corporate violence. A distinct socio-ethical orientation should allow for re-thinking corporate responsibility. What we now need, is more advanced test cases (and proper evaluation) where victims and their organisations, together with public authorities and corporations courageously explore new avenues.

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ANNEX

RECOMMENDATIONS FOR NATIONAL LAWMAKERS AND POLICYMAKERS

CONTENTS: 1. Introduction. – 2. Recommendations of General Interest. – 3. Recommendations for Belgian Lawmakers and Policymakers. – 4. Recommendations for German Lawmakers and Policymakers. – 5. Recommendations for Italian Lawmakers and Policymakers. – 6. Summary of the Recommendations.

1. Introduction

We here summarise some of the policy recommendations for national lawmakers arising from the two-year project ‘Victims and Corporations’, which has been a complex and multifaceted research exercise on the practical implementation of Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime.

Corporate crimes and corporate violence have been a subject of both academic and political interest for some time, yet the focus on the victim at the international, EU, and national levels is something new, especially in these fields, as is the recognition of victims’ rights: the topic therefore calls for further reflection, and our understanding of how to deal with this particular form of victimisation needs to be deepened.

We make no pretence to have covered all the possible elements still requiring implementation or improvement in the three countries examined—ie Belgium, Germany, and Italy—nor would our observations necessarily be valid in respect to other EU Member States. Yet, considering the low visibility, and consequent low priority, generally characterising corporate violence victimisation (as has emerged from the analysis in the previous chapters), it would not seem far-fetched that several of the following recommendations could be straightforwardly extended beyond the countries of focus, and could even open the way for a broader consideration of ‘atypical’ victims in

general—which, as previously stated, is one of the purposes, as well as one of the most innovative features, of the Victims Directive.

In the first section of this Annex we summarise the most general suggestions, which appear applicable to all three States here considered (and possibly, as just remarked, to several other countries). These policy recommendations are aimed primarily at national lawmakers, who are in the best position to make the structural, organic, and systematic reforms needed for better protection and support for victims of crime in general, and of corporate violence in particular. This, of course, does not exclude that, in respect to some specific issues (such as, for instance, that of compensation funds), a commitment by European Union institutions would also be extremely relevant in facilitating desirable reforms and/or their uniform implementation through national legal systems. Nor should national policymakers be considered the only target of these recommendations, considering how important a raising of public awareness would be for a more effective implementation of the Victims Directive in general, and specifically for its application to victims of corporate violence. As we have seen in the previous chapters, victims' associations, NGOs, local experimental programmes for victim protection and victim support, etc, remain important in triggering and pushing for improvements in policies aimed at asserting in principle, and granting in practice, rights for the victims of crime and standards for their assistance and protection; therefore, we also consider these associations, NGOs, and local programmes to be powerful potential actors in the development of new strategies to better the condition of victims of corporate violence.

The later sections of this Annex are devoted to more specific recommendations aimed respectively at Belgian, German, and Italian lawmakers, building on the direct experience gathered in the course of the project through interviews and focus groups with victims of corporate violence and with experts and professionals in law enforcement, victim support, victim advocacy, legal aid, mediation and restorative justice, etc, as well as from the training sessions and dissemination activities carried out in the three countries. Some of these recommendations are specifications of the more general ones set out in the first section, tailored and adapted to national features and problems; others are more strictly related to each country's specific features.

2. Recommendations of General Interest

2.1. Invest, at all levels, in public awareness and sensitisation regarding corporate violence victimisation

Currently, victims of corporate violence are rarely considered in public policy, and even less frequently is their specific vulnerability taken into account. This often appears to lead to forms of secondary victimisation, as well as to an increased risk of (at the very minimum) repeat victimisation. In the main this can be traced back to a widespread lack of knowledge, as well as the structurally low visibility and indeed opacity of the phenomenon itself. Hence a commitment to broadening and deepening the research on corporate violence, including an appropriate investment of resources, appears urgently needed; such research would aim to gather the necessary information to make reasoned and effective reforms to prevent, as far as possible, this kind of victimisation, and to support and protect present and future victims.

A better knowledge of the features and scope of corporate violence victimisation also appears indispensable to lay the foundations for effective public awareness campaigns, which, in turn, would be pivotal in supporting legal reforms and the work of law enforcement agencies and victim support services.

These agencies and services, in turn, appear to be in stark need of information and training on how to deal effectively with such victims—particularly because the latter tend to fall ‘below the radar’, and on the occasions when they do emerge into wider consciousness, find that services are not well prepared to receive them.

Awareness raising is necessary also in order to help ripen the political and academic debate with regard to victims of corporate violence, and to contribute to research, education programmes, exchange of best practices, and the creation of European networks, as recommended by art 26 of the Directive.

2.2. Recognise the special protection needs of the victims of corporate violence, and introduce ad hoc legal measures of protection, without prejudice to the rights of the accused and the defence

The fulfilment of the obligations deriving from arts 18–24 of the Victims Directive in cases of corporate crimes, and especially of corporate violence, is particularly complex, and seems to require ad hoc policies, advanced training programmes, specialist and targeted

support services, and particular adaptations in both carrying out the individual assessment of the protection needs and in implementing adequate protection measures.

The timely and individual assessment of specific protection needs (art 22) of victims of corporate violence is particularly difficult and calls on all those concerned to exercise particular skill and care. This difficulty arises notably from the complexity of corporate victimisation, the scientific uncertainty which often accompanies it, the potentially high number of victims concerned, the frequent imbalances of power between the victim(s) and the corporation, the dependence of the victim on the corporation, etc. A general recommendation here is to approach victims of corporate violence with *no less* accuracy, sensibility, respect, and non-discrimination than ‘typical’ vulnerable victims with special protection needs.

As regards protection measures, legal systems in the EU have generally introduced provisions concerning ‘typical’ vulnerable victims with special protection needs: yet these provisions (such as protection orders against family violence) are of little or no use in cases of corporate violence, and there seems to be a lack of specific and tailored measures aimed at avoiding repeat and future victimisation by corporate activities for, say, consumers or inhabitants of polluted areas, who can number in the hundreds or thousands. Since protection measures of this kind may impact on the rights and safeguards of the accused and of the corporation, national lawmakers are recommended to take into due consideration the introduction, with all the necessary guarantees, of ad hoc legal provisions regulating measures to be adopted under judiciary scrutiny with the aim of protecting actual, potential, or future victims from repeat victimisation or primary victimisation from the same dangerous source. Measures of this kind might be, for instance: the provisional stopping or reduction of production; the provisional closure of plants; the delivery of thorough information to consumers regarding the risks or toxicity of a product, and the way to avoid or reduce such risks or harms; the obligation to provide medical assistance to the exposed population; the obligation to deepen the scientific knowledge regarding the risks of a certain substance and the obligation to publicly disclose the results, etc.

2.3. Tackle the collective dimension of corporate violence victimisation

As stated throughout this volume, corporate violence almost invariably has a collective dimension, which can extend to hundreds or

even thousands of victims, who may also be scattered across different countries. National legal systems and law enforcement agencies appear in general poorly prepared to deal with the issues raised by this collective feature, which concern virtually all of the victims' rights, from respect to private life and individual dignity, to effective access to justice, from the right to get proper assistance and support, to that of achieving a decision on compensation in a reasonable time, etc.

The large numbers of victims affected by each single episode of corporate violence place a huge stress on the resources and organisation of police forces, judicial authorities, support and mediation services, etc; and these services, as remarked above, appear to be neither accustomed nor adequately trained to deal with the particular features of this kind of victimisation.

Building on the experience which the majority of national systems already have in the management of collective emergencies and disasters, as well as on the practices developed locally by police units and judicial offices which have experience of proceedings involving large numbers of victims, and, finally, on the information and expertise which victims' associations can provide, national policymakers should consider systematising (and adequately funding) protocols and best practices to tackle the practical, organisational, and logistical problems arising from the collective impact of corporate violence.

2.4. Adopt a preventive strategy, recognising risks in a timely fashion by paying due attention to every warning sign

The complexity of corporate violence, and the specific character of the harm it engenders, calls for the adoption of a preventive strategy, EU-wide and nationwide, whose ingredients would in brief be grounded on the capacity of all the relevant public and private actors to recognise risks, especially unknown ones. This would involve paying due attention to every warning sign, whether arising from epidemiological studies and other scientific findings, the investigations of enforcement agencies and regulatory agencies, or recurrent judicial judgments in commercial, civil, labour matters, and criminal convictions. Important warning signs might come also from citizens and local communities, and these must not be neglected. Faced with suspected adverse events, NGOs, trade unions, and advocacy entities also play an important role in 'blowing the whistle' and in catching the attention of the inspecting and controlling authorities and of enforcement agencies.

The reporting of administrative violations and/or of minor

criminal offences is of signal importance in preventing small issues escalating into cases of corporate violence that result in harms to life, health, and safety.

Omissions in crime reporting on the part of public officials or any other subjects tasked with so reporting must be stigmatised and, when the law provides, prosecuted.

Investigative and judicial attention to ‘warning crimes’ (such as bribery in public procurement, corruption, money laundering, financial crimes, etc) is also of paramount relevance in addressing corporate violence at an early stage, and in avoiding more severe harms and consequences.

Lack of investigations, incomplete investigations, or delays in reporting and in prosecuting or proceeding, may result in a violation on the part of the State of its positive duty under the ECHR to protect life and major human rights.

2.5. Implement an integrated and cooperative multi-level network involving all the relevant institutions and agencies, and encourage all the subjects concerned to take responsibility

The complexity and harmful nature of corporate violence calls for the implementation of a multi-level system, at least nationwide, based on an efficient network which involves regulatory agencies, inspecting authorities, enforcement agencies, and the judiciary, together with the health system, the welfare state, etc, in collaboration with the scientific community, trade unions, corporations’ representatives and associations, NGOs, victims’ associations and other advocacy organisations. These stakeholders shall work together before and after a corporate violent crime is committed in order to, for instance: circulate relevant information, exchange experiences and practices, create databases and registries, report violations, report crimes, exchange the findings from criminal or administrative investigations, and aid the quick identification and recognition of actual victims and potential or future victims.

National policymakers and lawmakers shall support the implementation of the network and promote its efficiency and efficacy, adopting the necessary policies and taking appropriate financial and organisational measures. Where necessary, they should pass laws to encourage the disclosure and the exchange of information; create synergies between the various actors; support ‘whistleblowing’ (and protect ‘whistleblowers’); promote crime reporting; and incentivise the taking of responsibility by all the relevant actors, including public control agencies, putting prevention strategies, compliance programmes, the correction of

organisational errors, and reparation and remediation at the core of the strategy to protect actual and potential victims.

In such a strategy, criminalisation and punishment are left in the background, so as to allow prevention and protection to take centre stage.

2.6. Facilitate and encourage compensation for victims of corporate violence

Related to the issue of the collective dimension of corporate violence victimisation is the difficulty for victims to ‘obtain a decision on compensation by the offender, within a reasonable time’ (art 16). The large number of parties involved generally lengthens the (civil or criminal) proceedings; furthermore, not all national legal systems allow for collective actions, which are the only means to reduce the usually high disproportion of resources and information between the individual victims and the corporate offenders. In addition, due to issues of time limitations, long latency periods, difficulties in establishing evidence of causal relations, etc, as well as the frequent occurrence that the corporation itself ceases activity (due to bankruptcy, relocation, etc), it can be almost impossible for the victims to get any kind of redress for the harm they have suffered.

To improve this situation, which severely affects the quality of life of victims of corporate crime on both practical and emotional levels, national lawmakers should consider, on the one hand, introducing a system for effective collective actions for compensation (or improving such systems as are already in place), and on the other, introducing collective compensation funds for victims of corporate violence (or systematising those which already exist). The latter would be implemented, for instance, by the States’ right of subrogation to the rights of the victims against the offenders, as well as by way of mandatory contributions by the industrial sectors concerned. In this respect, due attention should be paid to the principle according to which, if compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to some groups of victims (which include ‘victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes’, as well as ‘the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimisation’), also providing for ‘national funds for compensation to victims’ where needed. This principle is also endorsed by the 1985 UN declaration of basic principles of justice for victims of crime and abuse of power (see arts 12 and 13).

2.7. Enhance corporate social responsibility and explore alternative dispute resolution models

Given the complexity of technical issues often involved in cases of corporate violence, as well as the huge disparity in knowledge and resources between corporations and potential or actual victims (and also, often, between corporations and law enforcement agencies), the best chance for protecting this kind of victim from repeat victimisation (including retaliation or intimidation) and enabling them to get compensation would be through integrating policies of respect for victims' rights into corporate ethical codes and corporate social responsibility programmes, as well as into their compliance models in so far as different national legal systems allow.

This, in turn, will require a commitment of national policymakers to provide both positive and negative incentives to encourage corporations in following this path of victim-awareness and victim-sensitivity. Negative incentives could for instance consist of broadening criminal or quasi-criminal corporate liability (when present in the legal system) to cover all offences which may qualify as corporate violence, or introducing such liability where non-existent. Positive incentives could encompass punishment mitigation (or even full diversion) in exchange for remedial and compensatory actions beneficial to victims. The reaching of agreements actually providing effective protection and redress for victims of corporate violence could also be eased by a possible integration of alternative dispute resolution models into the legal system. Given the aforementioned disparity in power and resources, such openings should be enacted with great caution; yet the use, in particular, of restorative justice programmes to tackle harms and conflicts arising from episodes of corporate violence appears particularly promising, and national lawmakers should take this into due consideration.

2.8. Increase public investments in educational resources aimed at improving expert knowledge and skills within public administrations and communities

Art 26, para 2 of the Victims Directive requires Member States to take appropriate action aimed at 'reducing the risk of victimisation, and minimising the negative impact of crime and the risks of secondary and repeat victimisation', by targeting, in particular, the groups at risk. Art 26 further states that such action may include, among others, 'research and education programmes, where appropriate in cooperation

with relevant civil society organisations and other stakeholders'. In the field of corporate violence this action has unique features, and due attention should be paid to the way educational resources and media engagement can contribute to awakening and reinforcing a social awareness of the problem of corporate violence victimisation, as well as of the risks stemming from unduly profit-seeking approaches in corporate management.

Many high schools and universities already run courses which accommodate legal, ethical, and scientific knowledge related to industrial risks, and in which the prevention of corporate violence could be further discussed. For this task the educational institutions could avail themselves of the contribution of magistrates, investigators, technicians, and professional and public officials who have scientific expertise and operational experience in the field, including members of specialist authorities that have been set up in recent years—provided they have a record of total independence from corporate influence.

3. Recommendations for Belgian Lawmakers and Policymakers

3.1. Extend the recognition of victims of corporate violence, especially beyond the specific case of disasters

There is an appalling difference in the way Belgian law and policy treat the victims of disasters (and other situations of visible, sudden, and massive victimisation) on the one hand, and the victims of other less visible, less sudden, and less massive situations of corporate violence on the other. Although the handling of disasters in Belgian law is in general far from perfect, victims of disasters can count on fast recognition, a great deal of (political) goodwill and flexibility, and firm action. Meanwhile, other victims of corporate violence struggle for recognition. They fall largely under the radar of the regular services offered to all victims of crime, such as victim support, mediation, and compensation, and encounter many problems accessing justice through civil or criminal legal proceedings. Work needs to be done with these different sectors to raise awareness about the existence and needs of corporate violence victims, as well as to discuss how this group fits into their fields of work, and to collaborate with them in order to address the many obstacles such victims encounter.

3.2. Improve judicial management of collective victimisation

In Belgium there is a need to think through and adapt both legal frameworks and professional practice to situations of collective victimisation. Except for the situation of disasters, the collective nature of corporate violence victimisation is addressed very poorly. Specific approaches are required in order to respond to the phenomenon adequately, be it at the level of legislation and legal proceedings, or of social services. In all these fields, specific types of intervention are at present only embryonic.

In a criminal justice context, collective victimisation raises practical problems such as the organisation of adequate information provision to many victims (or eventually to the victims as a group), the organisation of official registration for big groups as injured persons or civil parties, and managing the presence of many victims at the trial. At present there is a total lack of adaptation to these problems. Although ad hoc solutions have been organised in the past in the case of disasters, in other cases of corporate violence these issues have not been addressed adequately at all. This can be interpreted as a lack of recognition on the part of the justice system for the particular situation of this group of victims, which is very painful for those concerned. This situation requires action at policy level, and it is also at policy level that structural solutions can be framed. Besides the practical problems, changes in the legal context are also necessary to address the collective nature of corporate violence.

At present for many victims it is financially risky if not impossible to initiate legal proceedings. The cost of launching the proceedings in civil cases, which has to be done by each individual victim, is beyond the financial capacity of vulnerable victims. The costs of legal assistance in corporate violence cases are often high, as the cases are complex and last a long time, requiring a high level of expertise and the long-term involvement of legal counsels. These problems could be at least partially addressed by allowing collective legal action, in line with the class action suits which are possible in some other countries. Although victims can choose the same lawyer to represent them, in the present legal context this lawyer has to represent each individual victim separately.

3.3. Improve and systematise collective compensation funds for corporate violence victimisation

Several compensation funds co-exist in Belgium, such as the fund

for victims of intentional violence, the fund for professional diseases and labour accidents, a fund specifically for victims of asbestos, and funds created ad hoc for specific disasters; some employers have even their own compensation funds. There is little to no communication between these funds, and for victims this is a complex situation. The development of this field has mainly proceeded ad hoc, in the absence of any comprehensive, coordinated policy development. This poses questions of equality between categories of victims.

In this regard, there is an urgent need for an integrated vision, especially as it has become clear that individual attempts to obtain compensation through civil and criminal proceedings are hazardous and often unsuccessful. Access to and transparency about compensation funds should be increased. Moreover, a frank public discussion needs to take place about where the money for compensation funds should come from. The asbestos fund, for example, is financed through small contributions by all Belgian companies, not mainly by the sector causing the harm. Moreover, victims making use of the asbestos fund are not allowed to file additional legal proceedings. This immunity rule is difficult to understand from a victim's perspective, and again triggers the question of to which extent we want corporations to be responsible for the harm they cause.

3.4. Improve knowledge and effective application of corporate criminal responsibility

In Belgium there is a general lack of knowledge and expertise related to the idea that an offender can be a corporation. The consequences of the adoption of criminal responsibility for corporations has clearly not yet trickled down to all parts of the criminal justice system, nor to the work of the various support services; this implies, in turn, a particularly severe need for information and training on this specific topic.

3.5. Consider strategic changes to the criminal law legislation in order to facilitate access to justice by victims of corporate violence

Cases of corporate violence often raise technical problems in criminal proceedings, and these need to be addressed at policy level. One of the major issues is the often delayed effects of the activities, where harms can appear many years later. The long latency period may cause the extinction of the criminal or civil procedure due to statutes of

limitations. This problem should be addressed in legislation by extending the limitation period or redefining its starting point. Another problem relates to a lack of substantive criminal law categories which specifically address corporate violence. Where the harmful behaviour has had lethal effects, the legal category often used in Belgium is involuntary manslaughter, since proving that the harm was intentional is most of the time nearly impossible. One option here might be to propose specific aggravating circumstances or a separate criminal offence for certain situations of corporate violence.

3.6. Adapt and improve the organisation of victim support services and mediation services and provide training to institutions and professionals

In the field of victim assistance and victim support, work with groups of victims is not yet well developed: individual work with victims and offenders is still the norm. However, those who work on victim assistance and victim support can build on their experience with disasters in terms of organising crisis intervention and managing effective collaboration between responding teams. They can also learn from other situations in which they encounter collective victimisation, such as robberies of banks and shops. Alongside collective briefings and information sessions, other methodologies for working with groups should be developed and structurally integrated into working practice, while taking into account the limited available financial means and the often maladapted criminal justice context.

Greater collaboration between victims' associations and the official services charged with victim assistance and support would be productive. Notably, victims' associations, with their more activist profile, have a particular role to play as regards activities aimed at gaining recognition and developing counter-power against the dominant position of the corporation. Such associations are particularly good at identifying fellow sufferers and forming a group, bringing out their fate in the media, gathering information, and collectively exerting public pressure when legal cases are not taken forward.

Victim-offender mediation in Belgium is another sector where working with individual victims is the dominant method in daily practice. This does not mean that there is no experience at all with organising dialogue with a group of victims, however. Mediators can build on and learn from the occasional use they make of peace-making circles or conversation groups between victims and offenders concerning non-related criminal facts; from the mediation practice

specifically developed for the case of historical abuse in the church and in institutions such as boarding schools; and from the neighbourhood mediation used for dealing with conflicts between groups of citizens or between groups of citizens and the local authorities.

If there is to be such collective work by victim assistance and support services and mediation professionals, however, support at policy level will be crucial. Only if the relevant authorities clearly communicate that dealing with groups of victims should be an integral part of the support services' work, and only if this is adequately reflected in the mission and financing mechanisms of the organisations concerned, can we expect real developments.

Finally, victim support workers and mediators are not well acquainted with the legal context of corporate offending and criminal responsibility of legal persons. And the challenge of involving corporations or their representatives in their daily work requires that they rethink their practice. Who is the corporation? How should they approach a legal entity? Who should represent the corporation in its contact with victims? Their unfamiliarity with this new field makes support services hesitant to engage with corporate violence cases—and this is in sharp contrast to the need of corporate violence victims to be approached proactively. Training is needed to better acquaint victim support and mediation professionals with the specific context of corporate violence; and the sharing of experience will help them learn how to adapt the practice context to this specific situation. Moreover, in order to reach this target group, the victims of corporate violence should be explicitly mentioned in folders, on websites, and in public campaigns.

Working 'with or around' the power of corporations is another challenge faced not only by victims but also by the professionals who work with them. 'Out-of-the-box' thinking is needed to help professionals join forces to tackle this challenge. One possibility is the creation of interdisciplinary fora to which corporate violence cases can be referred, and where information can be exchanged and action coordinated. The cases we have studied demonstrate especially that socially vulnerable people who become victims of corporate violence end up in absolutely dreadful situations. Only with external help of engaged lawyers, medical doctors, social workers, victims' associations, and the media are they able to bring about any change in their difficult situations. Networks of professionals are thus needed, working in an emancipatory way, and tackling not only the individual situation of the victims but also more structural issues.

3.7. Improve the involvement of the businesses concerned through development of corporate social responsibility and transparency

A major challenge at policy level concerns the work to be done with the businesses concerned. How can policymakers work around the fact that businesses rarely seem ready to take responsibility? Is it possible to find a win-win? Public image and fear of criminal trials seem to be important incentives for a company to do something for its victims. Is it possible to engage in discussions that go beyond this level and also tackle issues of social responsibility and social justice? Together with, or additional to, criminal proceedings (if any), awareness-building and discussions should be engaged in as regards the moral responsibility of companies to victims and communities.

Professional employers' organisations and/or their supporting structures should be encouraged to develop appropriate ethical guidelines within their sectors (as, for example, private insurance companies are doing concerning the treatment of road traffic victims). Finally, companies could be asked, or legally obliged, to integrate practical and ethical guidelines (to be applied in case of victimisation) into their prevention and health programmes, which thus far are only oriented internally, to the needs of their own employees.

In cases where victims are concentrated in a certain geographical area, action should be undertaken by companies and (local) public authorities to restore the relationship between the company and the local community after collective or serious forms of victimisation have happened. In Belgium, examples exist of memorialisation initiatives, but these are rather scarce. Repairing the relationship between the corporation(s) and the local community, for example by offering special services or support, can be of huge symbolic significance for victims, but there is very little experience in this field.

Finally, a special dimension of corporate violence concerns the intertwined interests of local and national politicians and corporations. It seems that public authorities have difficulty striking a balance between the economic well-being of a region and providing for sufficient protection of the citizens. It may be time, however, to consider corporations as fully fledged members of society, which—just like natural persons—have an obligation to act responsibly and take into account the long-term consequences of their behaviour. This will

require a change of mentality on the parts of citizens, politicians, authorities, and the corporate world itself.

4. Recommendations for German Lawmakers and Policymakers

4.1. Invest in awareness-building programmes and training on corporate violence

In Germany, victims of corporate violence are not seen as groups of vulnerable victims; this fact exacerbates their plight and leads to secondary victimisation.

Neither police officers, nor professionals in the judicial sector (judges, prosecutors, and lawyers), nor professionals working in the area of victim support are aware of the phenomenon of corporate violence or the broad range of needs and challenges that characterise its victims.

Thus, we strongly recommend further investment in awareness-building programs and training of all stakeholders. Since our endeavours have clearly showed that voluntary participation only yields marginal participation, we recommend including the topic of corporate violence as a mandatory part of the training curricula for the stakeholders concerned, or else massively enhancing the attractiveness of participation in those training sessions which already exist, eg by offering credits.

4.2. Invest in capacity building and specialisation for law enforcement agencies and inspection and regulation authorities

The resources of the German police are clearly stretched, and they do not have the personnel nor the expertise to deal with such factually and legally complex cases. Although the police forces in the various *Bundesländer* are soon to be enlarged, we know of no plans to restructure the police in order to deal effectively with cases of corporate violence.

Therefore, we recommend the creation of specialised task forces in each *Bundesland*, properly trained and equipped to tackle cases of corporate violence. These task forces should build up expertise, databases, and procedures to deal with and effectively process these cases and to offer resources to the police departments involved in the respective cases.

The same holds true for the judiciary, ie prosecutors and judges,

where again there is a lack of personnel and expertise. A massive investment in capacity-building is needed. The number of positions within the judiciary will have to be significantly increased at all levels and in all *Bundesländer* as soon as possible. There is a heavy investment backlog, which has led to an overburdened justice system. Moreover, we recommend creating so-called *Schwerpunktstaatsanwaltschaften*, ie prosecutor's offices, which will be charged with addressing cases of corporate violence in order to build up expertise in this area.

Inspection authorities and regulatory agencies will also have to be better equipped and trained to enable them to live up to their obligations, including comprehensive and long-term data collection, eg of emissions into the environment. Stronger control mechanisms will have to be put in place, and, especially in small communities, political and economic dependencies on strong corporations will have to be made more visible and transparent.

Therefore, we recommend strengthening the relevant authorities, and encouraging affected communities to engage in an open and frank dialogue with their populations and with the corporation concerned on how to best tackle the problem at hand.

4.3. Set up specific training for victim support services

Victim support organisations in Germany deal exclusively with victims of common violent crime. An informal internal inquiry by one of the major German victim support organisations revealed that none of the member organisations had dealt with victims of corporate violence. This is congruent with our observation that victims of corporate violence tend to organise themselves, and do not seek help from the normal victim support organisations. Given their very limited financial and personal capacities and structures, the victim support organisations are not well suited to deal with this very different sort of crime.

We recommend creating focus points in each *Oberlandesgerichtsbezirk* (regional appellate court), mandated to direct victims of all sorts of crime including corporate violence to the services needed in each case.

4.4. Explore new compensation models and alternative dispute resolution models

The German justice system is only barely able to deal effectively with cases of corporate violence, due to their factual and legal

complexity. Further inquiries will have to be made as regards how best to address such cases, not only in the criminal justice system but also in other branches of the law, possibly also considering and strengthening alternative dispute resolution models.

The challenges detected (such as collective victimisation and a corresponding high number of victims who wish to participate in the proceedings, long latency periods and lack of reliable data, unequal power of actors, disjuncture between the management and control structures in large multinational corporations, international dimension of certain corporations vs national justice systems, etc) will need to be better accommodated in civil and criminal proceedings. Further strengthening of the participation rights of victims in criminal trials has been seen rather critically as raising false expectations on the victims' side and often running counter to an effective criminal trial. Therefore, we recommend initiating a dialogue on how best to address cases of corporate violence in Germany, including through inquiry commissions, ombudspersons, and compensation models, which are detached from the outcome of legal trials but which could better serve the immediate and long-term needs of victims.

4.5. Introduce the rights of victims of corporate violence into the debate on corporate social responsibility, and foster its actual implementation

Corporations, and especially large ones, are aware of and have taken part in recent debates on corporate social responsibility, good governance, and compliance programs at international, European, and national levels. We recommend capitalising on this momentum by including and laying emphasis on the rights and needs of victims of corporate violence, and the challenges evoked thereby; a broader dialogue in this policy debate should thus be initiated, including relevant ministries, chambers of commerce, employers' associations, trade unions, and victims' support organisations. Victims' rights should be brought to the forefront when developing new soft and hard law instruments.

5. Recommendations for Italian Lawmakers and Policymakers

5.1. Establish a definition of 'victim' under national law, and overcome the present legal gaps

In Italian criminal law and the criminal justice system there is no

such notion as ‘victim’: rather, the legally binding notion is that of *persona offesa* (literally: ‘person harmed/offended by the crime’). The term ‘victim’ appears only very rarely—and incoherently—in the criminal procedure code, alongside that of *persona offesa* (eg art 498 Criminal Procedure Code). A general notion of ‘victim’ is used, however, in the territorial legislative provisions issued by the *Regioni* with regard to access to welfare services and/or specific local funds or educational programmes.

The strict legal term *persona offesa* refers (only) to the actual holder of interests protected by the criminal provision. The legal term does, though, include both physical persons and legal entities. Therefore, the EU definition of ‘victim’ according to art 2 of the Victims Directive and the Italian legal definition of *persona offesa* do not coincide, the former being at the same time broader and narrower than the latter. When transposing Directive 2012/29/EU with d lgs 15 December 2015 n 212, the Italian legislature chose merely to amend the existing Criminal Procedure Code by introducing provisions mainly concerning information and procedural rights, and a few provisions ensuring protection rights to ‘particularly vulnerable’ subjects (art 90-*quarter* Criminal Procedure Code): these rights are recognised, and granted, to the *persona offesa* only. This raises a set of legal problems concerning, on the one hand, the actual fulfilment by the Italian State of the obligations deriving from the Directive and, on the other, the correct identification of those who can actually benefit from the new participatory and procedural rights, also in light of the exclusion of legal persons from the definition of ‘victims’ set out by the Directive, following the ECJ rulings under the Council Framework Decision 2001/220/JHA (ECJ, Case C-205/09 *Eredics and Sápi* [2010]; ECJ, Case C-467/05 *Dell’Orto* [2007]).

A clarification of the use of the terms ‘victim’ and *persona offesa* within the Italian legal system is therefore needed. The EU definition of ‘victim’ must be correctly transposed, regardless of the actual linguistic choice the Italian lawmaker makes in naming, and defining, the ‘person’ whose rights and protection are to be incorporated into the national criminal justice and welfare systems. For the sake of the victims and for the safeguarding of the accused, no doubts should exist with regard to the beneficiaries of the rights set out by the Directive 2012/29/UE.

5.2. Introduce structured, uniformly distributed, and adequately funded territorial victim support services

The current situation for victim support in Italy does not appear to

be compliant with the Victims Directive. Although specific support programmes and services—particularly for victims of domestic violence, children, and in some instances victims of organised crime—do exist, and in some cases have developed very effective protocols and practices, they are basically the result of local initiatives and temporary funding; as a result they are unsystematically scattered throughout the Italian territory, and are often precarious in their ability to provide long-term assistance. This means that Italy currently appears to be non-compliant with both the requirement to introduce provisions to ‘allow all victims’ adequate access to support ‘from the moment the competent authorities are aware of the victim and throughout criminal proceedings and for an appropriate time after such proceedings’, and the requirement to ensure ‘sufficient geographical distribution across the Member State’ of said support (recital 37; arts 8 and 9).

This, of course, also affects the victims of corporate violence who, due to the peculiarities of their victimisation, never match the targets even of the existing victim support programmes. They therefore have to manage on their own (or, when they are lucky, with the aid only of victims’ associations), faced with huge informational and bureaucratic difficulties, in seeking assistance from the plurality of social services who may be competent. These services range from social security to the national healthcare system, and from the regulatory agencies competent for inspections and control over eg work safety or environmental violations, to those providing legal information and assistance (the latter almost never accessible free of charge), etc.

Therefore, to the basic and general need to introduce structured, uniformly distributed, and stable victim support services, a further need is added, namely for specific units and/or programmes aimed at assisting victims of corporate violence with their complex needs of protection, information, and support.

5.3. Foster awareness of and sensitisation to corporate violence victimisation

Italy shares in the general problem of the lack of knowledge and awareness about the phenomenon of corporate violence victimisation. Although some judicial districts have had to develop experience and organisation in dealing with huge episodes of collective victimisation from corporate violence, these remain isolated practices or practical solutions stemming from the personnel’s ‘good will’ rather than being guided by any overarching theory or institutionalised regulation. In addition, small judicial and police districts also face a more general

lack of personnel, resources, training, and specialisation, even while it is not infrequent that major corporate violence episodes occur within these smaller jurisdictions. Existing social and medical services—which, as stated above, currently are the only, scattered sources of support for victims of corporate violence in Italy—are in turn not accustomed to dealing with this form of collective victimisation, and in general not prepared for the specific, complex needs of such victims. The more general lack of public and political awareness about the phenomenon leads to these victims feeling isolated, abandoned, and unrecognised, and therefore to high risks of secondary victimisation.

It therefore appears particularly urgent to invest in awareness-building programmes for all those institutions and professionals potentially involved with victims of corporate violence, as well as in training to provide them with basic knowledge and competences to respond to these victims' specific needs for protection, information, and support.

5.4. Improve organisation and specialisation of law enforcement agencies

Besides general sensitisation to the features of corporate violence, the efficacy of law enforcement agencies in the identification and protection of victims of corporate violence would most definitely benefit from improved specialisation and organisation.

While much could be done autonomously by the judicial offices themselves—as we have proposed in the *Linee guida nazionali per la polizia giudiziaria, le Procure della Repubblica e i magistrati giudicanti* (Italian national guidelines for law enforcement agencies, available online)—it is undeniable that a more systematic and general reorganisation of competences could be helpful, especially with cases of corporate violence which involve very large numbers of victims (eg fifty or more). Such cases are hard for smaller local offices to manage, and could therefore benefit greatly from the relevant competence being mandatorily assigned to the district courts and prosecutors, which generally possess more personnel (thus susceptible of being organised in specialised units), larger structures (also better suited to organise the participation of considerable numbers of victims in the proceedings), and quite often have previous specific experience.

The development of shared databases on corporate violence cases should also be systematically encouraged, as should the circulation of information and best practice.

5.5. Recognise the special protection needs of the victims of corporate violence, and legally introduce ad hoc measures of protection

In Italy as in other legal systems, provisions concerning the recognition of protection needs and measures for protection from secondary and repeat victimisation are tailored to ‘typical’ vulnerable victims (ie victims of gender or domestic violence, stalking, sexual crimes, human trafficking and modern slavery, etc, alongside children, women, the elderly, people with disabilities, etc).

As mentioned above, victims of corporate crimes, and especially of corporate violence, do not fit into these ‘groups’; and yet they also are vulnerable, having very special and highly complex protection needs. Their protection requires the adoption of ad hoc social policies which should be integrated and coordinated, based on legal provisions, with national and/or local systems of health, welfare, social insurance, etc.

In particular, for the fulfilment of the obligations deriving from arts 22 (individual assessment of specific protection needs) and 23 (protection from secondary victimisation of victims with specific protection needs), specialist support services should be put in place, together with the recruitment and training of personnel.

In order to fulfil the obligations deriving from art 18, and especially for the purpose of protecting victims of corporate violence from repeat victimisation, the Italian lawmakers should: (a) expressly add the purpose of the protection of corporate violence victims to the scope of already existing pre-trial, pre-conviction, or post-conviction measures (*misure precautelari, misure cautelari, misure interdittive*), or (b) carefully enrich, where appropriate, the provisions of the Criminal Procedure Code and of d lgs 231/2001 with a set of new ad hoc measures, similarly to what was done against domestic violence. Such provisions would better comply with the principle of legality and therefore limit judicial discretion; such provisions, of course, should also carefully ensure the rights of the defence and of the accused or the convicted physical or legal person, and not be aimed at intensifying the criminal justice system against them.

The national lawmaker should integrate a system of measures of protection from repeat victimisation into the preventive, proactive, and responsive approach to corporate liability outlined by d lgs 231/2001, thus resulting in forms of diversion, aversion from conviction, and reduction of sanctions better able to ‘reconcile’ the victims’ protection and the corporation’s interests and defence.

5.6. Extend corporate responsibility to all offences of corporate violence

Currently, the catalogue of criminal offences which, according to lgs 8 June 2001 n 231, can give rise to administrative corporate liability basically only covers environmental crimes and personal injuries and deaths due to violations of work safety rules. But, as we have seen in this volume, these offences are not the only ones which qualify as corporate violence. In order to improve the victims' chances of being protected from repeat victimisation, from intimidation and from retaliation, we propose it would be helpful to extend corporate quasi-penal responsibility to all personal injuries and deaths due to violations of safety rules in the production and commercialisation of any product (*in primis* drugs and medical devices, and foodstuffs). This, in turn, would encourage corporations to introduce protocols for the prevention of these kinds of offences into their compliance models, including channels for safe reporting on the part of employees, and (should an actual alleged offence occur) procedures for taking remedial and compensatory actions, beneficial to corporate violence victims, to avoid precautionary interdictive measures and mitigate possible punishment.

Alongside the relevance of corporate liability in cases of corporate violence, a normative reconsideration by the Italian lawmakers of the role of the 'victims' (according to the EU legal definition) in proceedings against a corporation could be useful: this would finally resolve a long-lasting national debate, and would also perhaps, in light of the Victims Directive, push a step forward the ruling of the ECJ in the *Giovanardi* case under the Council Framework Decision 2001/220/JHA (ECJ, Case C-19/11 [2012]).

5.7. Reinforce judicial mechanisms to attain the goal of promoting reparation by corporations

The inclination of the corporation to indemnify and compensate for damage should be encouraged. Accordingly, in light of the cited instruction in art 16, para 2 of the Directive (on which we provide further details below), the legislature is best placed to introduce effective tools to achieve this goal.

A corporation's willingness to negotiate with victims and to compensate for the consequences of the crime is generally greater where the corporation itself is being investigated or charged.

The preventive, proactive, and responsive dynamics designed by d

lgs 231/2001 should be used as a model to encourage and reward corporations' remediation measures. Corporate liability models that require, for the purpose of granting a reduced sentence, not only full and effective compensation for damage, but also the elimination of the crime's harmful or dangerous consequences, are certainly more effective. To this aim, the lawmakers should enhance the implementation of the Decree. The rules currently in force do not clearly require the prosecutors to investigate and charge corporations on the basis of Decree 231. A legislative reform, introducing mandatory action against the corporation each time the conditions provided by Decree 231 are present, should be seriously considered. This reform would also favour a more uniform application of d lgs 231/2001 by different local prosecutors' offices.

On the side of the responses *ex post* to criminal offences, policies and strategies concerning prevention of and reparation for harm should be integrated in the laws as a form of *normative compliance* (such as the recent law on the disclosure of non-financial information to consumers and stakeholders). All these measures, when effectively implemented, should be recognised and valorised by the law as the best standard to prevent corporate crimes, as well to repair their negative consequences.

Laws and regulations concerning health and safety in the workplace, as well as environmental, food, and drug safety, all incentivise corporations to prevent corporate violence and repair its consequences whenever they include, as a form of hard compliance (mandatory obligations), the adoption of the best standards of prevention and reparation. Such a model is already in force in the Italian legislation on health and safety in the workplace (d lgs 81/2008), and it should be extended to other sectors (such as environmental laws, and food and drug safety laws).

In addition, the proactive and responsive dynamics designed by d lgs 231/2001 could be integrated with the formal recognition and valorisation, as a form of normative compliance, of all the corporate policies that have been adopted to implement the international standards of corporate social responsibility, including the respect of business and human rights.

Such recognition and the other incentives, within the context of d lgs 231/2001, should be introduced also with reference to the internal investigations process, as well as all those initiatives spontaneously adopted by corporations to reconstruct the facts and disclose information about causes, liabilities, and consequences of their actions or omissions.

5.8. Improve the chances of obtaining a decision on compensation for victims of corporate violence

The chances of Italian victims of corporate violence receiving ‘a decision on compensation by the offender, within a reasonable time’ (art 16) currently appear particularly poor. Although the Italian legal system allows them the alternative to seek redress within the criminal proceedings or through a separate civil action, neither of these solutions appears very effective. On the one hand, civil proceedings in Italy are especially long and costly for victims, who, particularly in complex cases of corporate violence, have to shoulder the huge costs associated with the multiple and complex forms of expertise required to support their claim, as well as the difficulties in gathering enough evidence on their own—also considering that the model of collective action available to them in the Italian legal system is a far cry from a proper ‘class action’, and does not allow for major improvements on the length and costs of this kind of proceedings. On the other hand, if the civil action is undertaken within criminal proceedings, victims are faced with a more stringent burden of proof (often impossible to satisfy in these cases, especially in respect to issues of causal relation), compelling time limitations (which, due to the complexity of these kinds of cases, often run out before a final decision can be achieved), and specific problems whenever the proceedings are defined through a plea bargain, as compensation is generally not considered a condition of such a form of agreement being made available. All these difficulties add to those arising from the inability to identify an individual offender (frequently due to the long time lag between the offence and the manifestation of its harmful consequences), or to involve the allegedly responsible corporation in the proceedings (due to bankruptcy, relocation, etc), neither of which are infrequent occurrences.

To improve the chances of compensation for victims of corporate violence, the Italian lawmakers should consider, on the one hand, changing the current two-stage structure of ‘collective’ civil actions, as well as broadening the (currently too strict) income thresholds to access publicly funded legal aid. On the other hand, the current situation of collective compensation funds appears inadequate to deal with this kind of widespread and very harmful victimisation, and should be reformed and systematised. In Italy there are only a few such funds, aimed only at victims of specific episodes of corporate violence (ie asbestos, Thalidomide, infected blood and haemoderivative drugs), generally enacted only after decades-long struggles by victims’

associations, and often implemented in a way that is desultory, ineffective, and unfair (to the victims). The system should be rethought, providing systematic and sustainable access to compensation for all victims of corporate violence.

5.9. Invest in educational resources

In recent years the Italian public administration has suffered from a huge decay of the skills and expert knowledge which are needed—as stated in the ‘Recommendations of general interest’, section 2 above—in order to recognise risks, especially unknown ones, and thus to pay due attention to every warning sign thereof. Such technical capabilities are even more necessary for regulators and public agencies, who must exercise dynamic and constant vigilance over the corporations involved in risky activities. Such vigilance is dependent upon their ability to maintain continuous interaction with corporations, so as to enable a timely prevention of violations while also channelling corporate activities into good practices that are duly respectful of human rights and attentive to potential victimisation. But any interaction of this kind is doomed whenever the knowledge gap between regulators and regulated organisations is too large. There is therefore an urgent need for public agencies, as well as private philanthropic organisations with an interest in human rights, to invest in the educational resources needed to redress the epistemic asymmetry between the public sector and large corporations.

6. Summary of the Recommendations

Recommendations of General Interest

1. Invest, at all levels, in public awareness and sensitisation regarding corporate violence victimisation.
2. Recognise the special protection needs of the victims of corporate violence, and introduce ad hoc legal measures of protection, without prejudice to the rights of the accused and the defence.
3. Tackle the collective dimension of corporate violence victimisation.
4. Adopt a preventive strategy, recognising risks in a timely fashion by paying due attention to every warning sign.
5. Implement an integrated and cooperative multi-level network

involving all the relevant institutions and agencies, and encourage all the subjects concerned to take responsibility.

6. Facilitate and encourage compensation for victims of corporate violence.
7. Enhance corporate social responsibility and explore alternative dispute resolution models.
8. Increase public investments in educational resources aimed at improving expert knowledge and skills within public administrations and communities.

Recommendations for Belgian Lawmakers and Policymakers

1. Extend the recognition of victims of corporate violence, especially beyond the specific case of disasters.
2. Improve judicial management of collective victimisation.
3. Improve and systematise collective compensation funds for corporate violence victimisation.
4. Improve knowledge and effective application of corporate criminal responsibility.
5. Consider strategic changes to the criminal law legislation in order to facilitate access to justice by victims of corporate violence.
6. Adapt and improve the organisation of victim support services and mediation services and provide training to institutions and professionals.
7. Improve the involvement of the businesses concerned through development of corporate social responsibility and transparency.

Recommendations for German Lawmakers and Policymakers

1. Invest in awareness-building programmes and training on corporate violence.
2. Invest in capacity building and specialisation for law enforcement agencies and inspection and regulation authorities.
3. Set up specific training for victim support services.
4. Explore new compensation models and alternative dispute resolution models.
5. Introduce the rights of victims of corporate violence into the debate on corporate social responsibility, and foster its actual implementation.

Recommendations for Italian Lawmakers and Policymakers

1. Establish a definition of ‘victim’ under national law, and overcome the present legal gaps.
2. Introduce structured, uniformly distributed, and adequately funded territorial victim support services.
3. Foster awareness of and sensitisation to corporate violence victimisation.
4. Improve organisation and specialisation of law enforcement agencies.
5. Recognise the special protection needs of the victims of corporate violence, and legally introduce ad hoc measures of protection.
6. Extend corporate responsibility to all offences of corporate violence.
7. Reinforce judicial mechanisms to attain the goal of promoting reparation by corporations.
8. Improve the chances of obtaining a decision on compensation for victims of corporate violence.
9. Invest in educational resources.

THE 'VICTIMS AND CORPORATIONS' PROJECT

**VICTIMS AND CORPORATIONS
IN A NUTSHELL**
by Alexandra Schenk



Implementation of Directive 2012/29/EU for victims of corporate crimes and corporate violence

OBJECTIVE

Implementation of Directive 2012/29/EU 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. In particular considering cases in the areas of **environmental crime, product safety, occupational safety** and offences in the **pharmaceutical industry**.

Corporate violence takes place when corporations in the course of their legitimate activities commit criminal offences which result in harms to natural persons' health, integrity or life.

RESULTS

Aspects of corporate violence

- Collective victimization
- Serious and long-term consequences
- Unequal power distribution
- Complex proceedings
- raising awareness of justice professionals, enforcement agencies, victim support and the public

ACTIVITIES

- Empirical, theoretical and legal background
- Conducting interviews and focus groups
- Development of guidelines tailored to relevant professional groups
- Training sessions for professionals

Main Problems

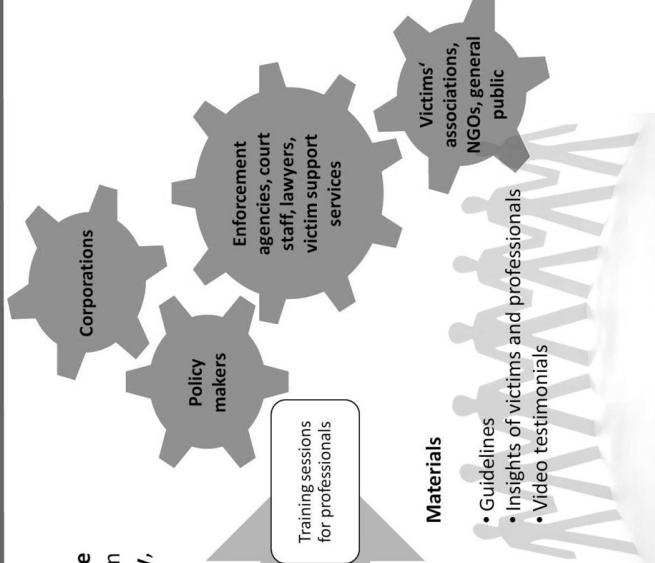
- Long latencies
- Often unspecific symptoms
- Lack of scientific knowledge
- Causality difficult to establish
- Victims are not seen as victims of crime

Main Needs

- Recognition
- Information
- Support (incl. financial)
- Apology or assuming responsibility by the corporation

Materials

- Guidelines
- Insights of victims and professionals
- Video testimonials



CSGP
| Centro Studi "Federico Stella"
| sulla Giustizia penale e la Pubblica criminale



Max-Planck-Institut für ausländisches und internationales Strafrecht



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VICTIMS AND CORPORATIONS PROJECT PUBLICATIONS AND TOOLS

The following publications and tools are amongst the outcomes of the project *Victims and Corporations: Implementation of Directive 2012/29/EU for victims of corporate crimes and corporate violence*. These publications and tools mainly adopt a practical approach, and are directed at specific professional and national categories. They are listed accordingly.

All the documents cited below are freely available from the project's website, at www.victimsandcorporations.eu.

Victims and Corporations: An Overview

Victims and Corporations. Data Collection on Leading Cases, English, May 2016.

Victims and Corporations. Rights of Victims, Challenges for Corporations. Project's First Findings. Mid-Term Report, English, December 2016.

European and International Selected Legal Resources and Case Law. Appendix to Mid-Term Report, English, December 2016, updated July 2017.

Empirical Research

Needs of Victims of Corporate Violence: Empirical Findings. Comprehensive Report, English, March 2017-December 2017.

Needs of Victims of Corporate Violence: Empirical Findings. National Report: Italy, English (Italian translation available), March 2017.

Individual Assessment of Victims' Needs

Individual Assessment of Corporate Violence Victims' Needs: A Practical Guide, English, April 2017.

Linee guida per la valutazione individuale dei bisogni delle vittime di corporate violence, Italian, May 2017.

Die Berücksichtigung individueller Opferinteressen in Fällen von Corporate Violence. Ein Leitfaden, German, August 2017.

Strafbaar gedrag van bedrijven en schending van fysieke integriteit: ervaringen en noden van slachtoffers. Een praktijkgids, Dutch, November 2017.

Guidelines for Professionals

a) Enforcement Agencies and the Judiciary

Implementazione della Direttiva 2012/29/UE per le vittime di corporate crime e corporate violence. Linee guida nazionali per la polizia giudiziaria, le Procure della Repubblica e i magistrati giudicanti, Italian, July 2017.

Strafbaar gedrag van bedrijven en schending van fysieke integriteit. Richtlijnen voor politie en magistratuur, Dutch, November 2017.

Umsetzung der Richtlinie 2012/29/EU Im Hinblick auf Opfer von Unternehmensstraftaten und Corporate Violence. Ein Leitfaden für Polizei, Staatsanwaltschaft, Richterschaft und GerichtsmitarbeiterInnen, German, November 2017.

b) Victim Support Services, Restorative Justice Services, Social Services

Implementazione della Direttiva 2012/29/UE per le vittime di corporate crime e corporate violence. Linee guida nazionali per i servizi sociali, le organizzazioni che offrono assistenza alle vittime e i centri di giustizia riparativa, Italian, September 2017.

Strafbaar gedrag van bedrijven en schending van fysieke integriteit. Richtlijnen voor slachtofferzorg en diensten herstelrecht en bemiddeling, Dutch, November 2017.

Umsetzung der Richtlinie 2012/29/EU Im Hinblick auf Opfer von Unternehmensstraftaten und Corporate Violence. Leitfaden für Opferunterstützungsdienste, German, November 2017.

c) Lawyers

Implementazione della Direttiva 2012/29/UE per le vittime di corporate crime e corporate violence. Linee guida nazionali per gli avvocati, Italian, September 2017.

Strafbaar gedrag van bedrijven en schending van fysieke integriteit. Richtlijnen voor advocaten, Dutch, November 2017.

Umsetzung der Richtlinie 2012/29/EU Im Hinblick auf Opfer von Unternehmensstraftaten und Corporate Violence. Leitfaden für die Rechtsanwaltschaft, German, November 2017.

d) Corporations

Implementation of Directive 2012/29/EU for Victims of Corporate Crimes and Corporate Violence. Guidelines for Corporations: Preventing Victimisation and Dealing with Victims of Corporate Violence, English, November 2017.

Digital Stories

Victims and Corporations. Digital Stories, video testimonies, Dutch-German-Italian with English subtitles, November 2017.

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CSGPCentro Studi "Federico Stella"
sulla Giustizia penale e la Politica criminale

Centro Studi 'Federico Stella' sulla Giustizia penale e la Politica criminale—CSGP ('Federico Stella' Centre for Research on Criminal Justice and Policy), Università Cattolica del Sacro Cuore, Milan, Italy

The coordinating organisation for the project, the CSGP, is a research centre on criminal law and criminal policy, committed to promoting theoretical and applied interdisciplinary research aimed at improving the criminal justice system. Its activities, projects, and expertise cover a wide range of themes, including business criminal law, corporate liability, criminal law reform, restorative justice and victim support, environmental law, law and the humanities, and law and the sciences. An Advisory Committee of prominent scholars, judges, and leading experts in juridical, economic, philosophical, and psychological disciplines coordinates its scientific activities. Since November 2017 CSGP has become Alta Scuola 'Federico Stella' sulla Giustizia Penale (ASGP), the school for high studies in criminal law and criminal justice of the Università Cattolica del Sacro Cuore.



Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), Leuven, Belgium

The University of Leuven is charter member of the League of European Research Universities; European surveys rank it among the top ten European universities in terms of its scholarly output. The Leuven Institute of Criminology (LINC) is composed of about seventy professors and researchers involved in criminological research and teaching. LINC continues the Leuven tradition of combining solid research with a deep commitment to society, a goal achieved through fundamental as well as policy-oriented research. LINC consists of

eight ‘research lines’, one of which is on ‘Restorative justice and victimology’.



Max-Planck-Institut
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Max-Planck-Institut für ausländisches und internationales Strafrecht (Max Planck Institute for Foreign and International Criminal Law – MPICC), Freiburg i.Br., Germany

The research projects undertaken at MPICC are comparative, international, and interdisciplinary in nature, focusing on empirical studies of criminal law, crime, crime control, and crime victims. Research also encompasses: harmonization and assimilation of criminal law and criminal procedure in EU Member States; and development of criminal law based on insights into existing legal solutions to social problems, and functional criminal and extra-criminal law alternatives.

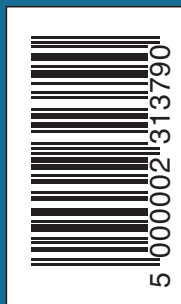
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