



VICTIMS AND CORPORATIONS

Implementation of Directive 2012/29/EU
for victims of corporate crimes and corporate violence

Rights of Victims, Challenges for Corporations

Project's first findings

2016



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Foreword

Gabrio Forti

European Union Directive 29/2012 inaugurates a relevant **change**: it introduces a 'system' of minimum standards on the rights, support and protection for victims of crimes, and their participation to criminal proceedings, without prejudice to the rights of the offender.

Within the scope of the Directive and its definition of 'victim', though, there is a relevant group of victims who have not yet received enough consideration, and whose access to justice may be at stake. It is the **victims of corporate crimes, and particularly of corporate violence**, meaning those criminal offences committed by corporations in the course of their legitimate activities, which result in harms to natural persons' health, integrity, or life.

These victims are not a minority. The crossing of the pertinent Eurostat data demonstrates that corporate violence effects within EU are as prevalent as violent criminality. Official statistics provide ample evidence of the vast and **trans-boundary** nature of this victimisation and, moreover, the number of victims of corporate violence will grow dramatically in the future, facing increasingly complex claims for justice also due to **long latency periods** typical of exposure to toxic agents. Not to mention the million victims of financial frauds and other corporate crimes.

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Actually, within the vast area of corporate crime, our project – and therefore this report – will focus on **three main strands** of victimisation: **environmental crime, food safety violations** and **offences in the pharmaceutical industry**. This choice is due to the idea of exploring – and possibly exploiting – intersections and potential synergies between 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 compensation and reparation remedies. A strategy which, we assume, could benefit from a comparison and coordination with the *ex post facto*, victim-centered approach of the new Directive.

Victims of corporate violence appear to have an extreme need – quoting from the Directive – to «receive appropriate information, support and protection», and to be supported and made «able to participate in criminal proceedings», as they reveal themselves as a further category – together with more ‘traditional’ victims of family violence, abuses, human trafficking, terrorism etc. – of **extremely vulnerable subjects**, also (and often mostly) due to a lack of (public as well as personal) awareness about their victimisation.

Asymmetry of information and of means between individual victims and corporate offenders has heavy repercussions on **access to justice** and fair judicial decisions. **Lack of awareness among practitioners** and lack of legal attention for the position of these victims in criminal justice systems are other obstacles in accessing to justice. Also, the **long-lasting effects** on their health caused by this sort of violence may require a kind of **support** that public agencies are not currently adequately prepared to provide.

We think that the study of the needs of protection and support of these specific victims could provide **a highly revealing insight into the condition of many other kind of victims**, as the consequences victims of corporate violence suffer are made more serious and durable due to the imbalance

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of power and knowledge – we could say the imbalance in the power of knowledge – they suffer while confronting the often impressive power of huge corporations and their well equipped staffs, including legal staffs. Developing a category devised by Miranda Fricker (Fricker 2007; Brady and Fricker 2016), we could say that they are victims of a kind of «epistemic injustice». An idea – that of epistemic injustice – which itself, has been said, «is innovative to the point of initiating a conceptual shift in epistemology as it has traditionally been practiced» (Code 2008). This epistemic imbalance takes often the ‘radical’ form of victims’ inability to perceive, recognize and acknowledge their victimisation, or at least causes them to discover such condition ‘too late’, with heavy repercussions on their ability to access justice and get timely help and support and/or fair redress, as well as, quite often, on increased risks of repeat victimisation.

Due to the complex nature of the issues involved in working on a specific and effective implementation of Directive 2012/29/EU with respect to victims of corporate violence, a deep and inter-disciplinary preliminary research has preceded the more operational stages of our project – a research whose results the reader will find summarized in this Report.

Starting from an overview of the current ‘state of the art’ with respect to the *general* issue of victims’ rights, support and protection in light of the Directive (**Part I**), a thorough examination of the European, international and national (in the three countries involved in the project: i.e. Italy, Germany and Belgium: **section II.3**) legal background can be found in **Chapter II**, where specific attention has been devoted to victims’ participation in criminal proceedings (**section II.2**), as well as to possible synergies between the EU perspective and the procedural and substantial dimensions of victims under international law (**section II.4**). An analysis of the promising business and human law perspective also integrates this initial overview (**section II.5**).

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Through an analysis of the existing criminological and victimological literature on victims' vulnerability and victims' needs in general, as well as on corporate crime, its harms, and its victims, we then proceeded to a first attempt at assessing the negative consequences of these *specific* offences (i.e. environmental crimes and food and drugs safety violations) for communities and individuals, and therefore these victims' ensuing specific needs of protection and support (**Part II, Chapter III**) – a research that will be deepened in a further, empirical stage of our project, through a set of interviews and focus groups with victims of corporate violence whose results will be the object of a further report. This preliminary review of existing studies, however, already revealed some peculiar basic needs of victims of corporate violence, namely: a need for specific psychological and emotional support that is in no way lesser than the one experienced by victims of 'common' crimes and 'true' violence; an increased need for information and legal support, to deal with the greater legal and regulatory complexities implicit in these offences, as well as with the great disproportion of resources that opposes victims and offenders in this area; a need for specialized medical and social support, 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, with a specific need for preventive screening; a general need for research and advocacy with respect to a typology of crimes that remain opaque and underestimated for both the general population and public institutions; possibly, an even greater need of recognition of their 'victim status' and of the wrongs they suffered, than many victims of 'common' crimes, with an (even) greater value placed on 'moral' redress (including a reasonable assurance that no further offences, and therefore, no further victimisations, will happen) than on instrumental outcomes. How and to which extent the participation of this kind of victims in criminal proceedings, when compared to access to different remedies (i.e. civil proceedings, State-funded compensation schemes, and restorative justice programmes), appears capable of responding to their specific needs is also discussed.

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The issue of the respect and implementation of corporate violence victims' rights specifically, through the new instrument represented by the Directive and its national transpositions was then explored (**Chapter IV**), with a specific attention to synergies and complementarities between the Directive and other EU legislation in the fields of environment protection, food safety and drugs safety (**Chapter V**). It is quite revealing of the persistent need of protection and assistance of these victims, as well as of how the current criminal justice discourse seems still largely unable to adequately integrate this kind of victim's perspective, that at least two main legal documents providing for criminal penalties for infringements of environmental law, namely the 2008 Directive on the protection of the environment through criminal law (Directive 2008/99/EC) and the 2009 Directive on ship-source pollution and the introduction of penalties for infringements (Directive 2009/123/EC), appear to have scarcely paid attention to the status, position and substantive/procedural rights of victims of environmental crime. Actually, the 2008 Directive on the protection of the environment through criminal law targets unlawful conducts that cause or are likely to cause death or injury, thereby expressly punishing the endangering or harm to human life and health. However, despite dealing directly with the impact of environmental criminal offences on individuals, such Directive seems neither to devote specific attention to victims and their definition, nor to take into account the conditions making them more exposed and vulnerable to such harms.

Finally, the issues related to corporate violence victims' access to justice were also studied through a survey of a large number of judicial cases (at various stages of development and collected in all three interested countries, i.e. Italy, Germany and Belgium), where data on number and typologies of victims, their involvement in criminal proceedings (with or without the combined presence of associations, NGOs and/or victims support services), the nature of their requests, the outcomes of the proceedings and/or the presence of extra-judicial agreements, and,

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whenever possible, the prevalence and reasons for victims not participating in the proceedings were collected and analysed (**Chapter VI**).

As the aims of our project place great importance on **rising awareness of rights and specific needs of victims of corporate violence** at all social and institutional levels, and **specifically amongst law practitioners across EU**, further steps will follow, besides the already mentioned empirical research. Building on the results thereby achieved, a set of **guidelines for the individual assessment of victims protection needs in case of corporate violence** will be drafted and published, as well as a set of specific **guidelines for all kinds of professionals potentially involved in dealing with victims of corporate violence** (i.e. police officers, prosecutors, judges, lawyers, victims services, victims associations, restorative justice services, corporate legal officers and representatives). Such guidelines will also be instrumental to the **training** of said professionals – a training which, in turn, will be aimed at promptly recognizing this kind of victims and dealing with them in a sensitive way, at best assessing their peculiar needs, at effectively addressing their specific problems in accessing justice, at best supporting them. A comprehensive action plan that is conceived also to foster corporate social responsibility and reduce controversy loads, while enhancing the victims' chances of fair compensation and restorations.

Making victims' rights effective and responding to their most cherished expectation – namely, that society shows due respect to their sufferings through an active and close engagement in restoring the conditions of their safe and peaceful living, as well as protecting them from secondary victimisation and future harms to their health and the environment where they live – remains a great challenge for law makers and politicians, criminal justice and social service professionals, prosecutors and judges, lawyers and police officers, and especially corporations personnel and managements. A challenge to which this project hopes to rise to.

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For updates about the projects next steps and results please refer to our
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PART I

VICTIMS' RIGHTS, SUPPORT AND PROTECTION: AN OVERVIEW IN LIGHT OF THE DIRECTIVE 2012/29/UE



Chapter I

Victims' Rights: an Overview

Ivo Aertsen

From victims' needs to victims' rights

Since the 1950s, the western industrialised world has witnessed a re-birth of the victim (Mawby & Walklate 1994). This renewed attention for victims of crime took place within the context of a growing welfare state, where - after the era of civil and political rights achievements - a social rights movement developed. Applied to the phenomenon of violence, the feminist movement first drew attention to the fate of women and children victims of physical and sexual abuse, while new mechanisms of state compensation for victims of violent crime in general were advocated by penal reformers. In particular different types of *violent* crime, committed by juveniles in urban environments, alarmed politicians during the 1960s, first in the USA, later in the UK and the European continent. The predominant focus on issues of violence resulted in the creation of new types of services, first for particular categories of victims and later - throughout the 1970s and 1980s - for victims of crime in general. The focus on violence would also push the development of victim policies in western countries into an individualising and selective approach. The unequal distribution of attention for different groups of victims of crime, together with a clear focus on conventional types of crime, would strongly influence the

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conceptualisation and implementation of victim related initiatives both in practice and policy. Until today both in victim assistance programmes and new legal provisions in western countries victims of *violent* crimes seem to deserve much more attention than other groups of victims, in particular property (including financial and economic) crimes (who nevertheless make up for the majority of all crime victims).

To understand the growth of the victims movement and its *foci*, we have to take into account the leading role of international institutions. United Nations, Council of Europe and - more recently - European Union have been influential in this respect, even when most of the adopted policy instruments did not constitute binding law to member states.¹ Three domains related to victims' needs have been covered by a series of regulating instruments at a supra-national level: (1) the urgent need for creating state compensation schemes for victims of violent crime, (2) the strengthening of the legal position of victims in criminal justice procedures, and (3) the creation and implementation of victim assistance programmes. The work of the Council of Europe has been most instrumental in this regard: as prepared by the European Committee on Crime Problems (CDPC) and its committees of experts, numerous resolutions, recommendations and even conventions have been drafted and finally adopted, for both particular categories of victims (eg, domestic violence, terrorism) and victims of crime in general. An added value of the Council of Europe initiatives has been the call that emanates from these instruments towards society at large: not only the police, judicial authorities and specialised

¹ UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (General Assembly Resolution 40/34, 29 November 1985); European convention on the *compensation of victims of violent crimes* (Council of Europe, 24 November 1983); Council Europe Recommendation R(85)11 *on the position of the victim in the framework of criminal law and procedure*; Council of Europe Recommendation R(87)21 *on assistance to victims and the prevention of victimisation*; Council of Europe Recommendation Rec(2006)8 *on assistance to crime victims* (replacing R(87)21); European Union Council Framework Decision of 15 March 2001 *on the standing of victims in criminal proceedings*; European Union Council Directive 2004/80/EC of 29 April 2004 relating to *compensation to crime victims*; 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*.



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victim support services should take care of victims. Victim assistance has to be considered a responsibility of many actors in society, including health care, housing and employment services, insurance companies and the media, and a broad range of educational and social services.² The role of both state agencies and non-governmental organisations has been stressed in various recommendations, as well as the support that can be provided by organisations working with (well trained) volunteers.

Another dimension worth mentioning when looking at the development of victim policies in western countries, is the relationship - and tension - between victim *services* and victims' *rights*. It has often been argued that initially an important difference in victim policies between the USA and Europe related to the much stronger focus on victims' rights in the USA (as promoted by victims' and law and order lobby groups) as compared to a more distinct role of victim assistance in Europe. In other words, victim policies in the USA were from the very beginning much more driven by a legal rights approach, while Europe followed a more moderate victims' needs and services approach that was also concerned not to jeopardise offenders' rights and their social reintegration. However, we clearly have witnessed also in Europe a tendency to a more pronounced rights' approach towards the end of the 1990s and in the first decade of the new millennium. Both the 2001 Framework Decision and the 2012 Directive are illustrative for the new direction.

As a next step, we can have a closer look content wise at the emanating victims' rights in Europe. What types of rights are these, and how have these been conceived? Victims' rights have initially been developed within the context of criminal justice proceedings, although an extension of the scope became visible in a second phase. There is a remarkable and clear line of development visible on how specific rights have been identified, defined and multiplied within European countries and at the level of the European Union. For a first official adoption of victims' rights in the framework of criminal justice at the national level, we have to go back to the adoption of the Victims' Charter

² See for example Council of Europe Recommendation Rec(2006)8 on *assistance to crime victims*.





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in England/Wales in 1990, as modified in 1996. Here, under the influence of Victim Support (an independent national charity) a list of fundamental rights for victims was approved by the national government. In a later phase, this list of victims' rights would result in a Victims' Code established under the Domestic Violence, Crime and Victims Act of 2004. It was the English Victims' Charter that also inspired Victim Support Europe (VSE), when this European umbrella organisation of national and regional victim services adopted its Statement of Victims' Rights in the Process of Criminal Justice in 1996.³ There is a strong similarity in the identification and formulation of fundamental rights between the English Victims' Charter and the VSE Statement. Moreover, being aware of the role VSE has been able to play at the EU policy level in the subsequent years, it should not surprise that this accordance in formulation of victims' rights has continued in the EU Framework Decision of 2001. The Framework Decision was, in comparison to the previous Council of Europe Recommendations, no longer 'soft law', but binding legislation for EU member states containing formal rights for victims. Under the 2012 Directive, victims are even entitled to exercise their formal rights in a more direct way.

This line of development reveals the changing nature of approaching victims' needs into the direction of providing legal rights. Besides considerable although very uneven efforts that have been undertaken in various European countries in the field of victim assistance, a consensus has grown on the general acceptance of a uniform catalogue of victims' rights throughout Europe. These recurrent rights – at least in the framework of criminal justice proceedings – can be enlisted as follows: the right to respect and recognition, the right to receive information, the right to provide information, the right to legal assistance, the right to compensation, the right to protection and privacy, and the right to (social) assistance.

³ After 1996, Victim Support Europe has proclaimed victims' rights in other fields as well: The Social Rights of Victims of Crime (1998), Statement of Victims' Rights to Standards of Service (1999), and Statement on the Position of the Victim within the Process of Mediation (2004). Some of these broader rights and positions are reflected in the Victims Directive 2012/29/EU.



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Towards an effective implementation of victims' rights

When evaluating the effectiveness of legal reform and the creation of formal rights on behalf of victims of crime in the framework of criminal justice, critical victimologists in North America and Europe have pointed out the aspirational nature of victims' rights (Pemberton & Vanfraechem 2015) and have warned of a type of legislation that risks to be ineffective or is just offering 'lip service' to victims (Fattah 1999; Rock 2004). They criticised that often newly adopted victims' rights are formulated in very general or conditional terms ('to the extent possible ...') and that neither appeal procedures are foreseen nor sanctions in case the exercise of rights is hindered. Legal rights are adopted without providing additional resources or training in practice to implement the new provisions. The adoption of legal rights often takes place in the context of political responses to major events and they therefore remain limited to particular groups of victims. The selectivity of victims' rights also becomes manifest through their limitation to parties with a formal status in the criminal justice process (eg, party civil); therefore legal provisions are excluding the majority of victims. Because of their formal nature, rights are – against the background of the complex life-world of people - also restrictive and do not recognise the personal and subjective nature of a victimisation experience. Finally, the emphasis on legal rights for victims within the context of an increasing 'politicisation' of victim issues (the 'use' of victims' needs and suffering in political campaigns and programmes) creates a false opposition between victim and offender, reinforces polarising tendencies in society and increases feelings of insecurity. Even when victims' rights are being adopted with the best intentions for the wellbeing of victims, for example by imposing on the public prosecutor a legal duty to inform the victims about his decision to prosecute or not, or by offering victims more possibilities to participate in criminal proceedings, the implementation of these rights is cumbersome. One interpretation for these shortcomings at the implementation level refers to the 'Solomon' character of criminal procedure, where judicial authorities have to deal with files under time pressure and in a formalistic way leaving no mental room for integrating a thorough victim perspective in daily decision making

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work (Shapland 2000). Therefore a fundamental gap remains between the criminal justice process and the victim: the victim as *fremdkörper* is not considered to be an integral part of formal justice processes, but rather as a new problem for the system to be managed as good as possible and to whom some concessions can be done and help must be offered.

Some of the above mentioned shortcomings and limitations might have been responsible for the weak implementation of the 2001 Framework Decision in Europe as well. The 2004 and 2009 European Commission reports have pointed to an 'unsatisfactory' level of transposal into national law.⁴ Member states adopt new legislation on victims in very different ways and often legislation reflects the state of affairs as it existed already before 2001. In many countries new victim regulations are carried out through non-binding guidelines or just recommendations. The poor implementation of the 2001 Framework Decision has been attributed to factors such as a too short implementation period, not taking into account important (practical) conditions at organisational, policy or legislative level, and the very open formulation of many of its articles leaving room to a large freedom of interpretation and implementation (Groenhuijsen & Pemberton 2009; Pemberton & Groenhuijsen 2012). Even when we keep in mind the set-up of the 2012/29/EU Directive as a stronger legal instrument on victims' rights in Europe, it is good to repeat the conclusion by Groenhuijsen and Pemberton (2009: 59) when they commented on the implementation of the 2001 Framework Decision, 'that the adoption of a hard law instrument only leads to slightly different results than the soft-law instruments (...). Both types of standards provide a level of aspiration – a benchmark – on which most if not all members of the international community agree. The binding character, which often implies at least an external mechanism for monitoring compliance,

⁴ Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (COM(2004) 54 final); Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) (COM(2009) 166 final). See also van der Aa et al. (2009).



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has definitively had some added value, but this addition should not be overestimated or made absolute.'

On the basis of the above presented observations, we must conclude that making victims' rights effective – even when conceived in a legally binding way at EU level - remains a challenge. A criminal justice context on itself seems to contain important obstacles to integrate a victim's perspective. In order to make legal reform sustainable, new initiatives must be perceived by those working within the system as being in the interest of the criminal justice system itself, while clear and limited goals should be put forward and implementation should be done in phases. Other conditions for success within the criminal justice seem to be: a change of attitudes, improvement of knowledge, availability of resources and networking with external agencies (Groenhuijsen 2000). Moreover, the implementation of rights, also for victims of crime, can only be understood within a broader context of 'societal ecology', taking into account – amongst other factors – citizens' perceptions and opinions about crime and the role of the criminal justice system in society, the relationship of criminal justice processes to other types of interventions and remedies, and more broadly the social, cultural, economic and personal conditions in a given country (Biffi et al. 2016).



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Chapter II

European, International and National Legal Backgrounds

II.1.

Victims in the European Union and the Directive 2012/29/EU

Claudia Mazzucato *

Victims matter: a priority for the European Union¹

‘Victims matter’.

This apparently simple – yet not obvious, and somehow problematic and disputed – declaration stands at the very beginning of the 2011 European Commission (EC) Communication titled *Strengthening Victims Rights in the*

* Davide Amato, PhD, Paola Cavanna, PhD student, Marina Di Lello, PhD, and Biancamaria Spricigo, PhD, have contributed to general bibliographical research behind the analysis presented in this Chapter and in Chapter IV.

¹ Official links to the legal resources, summaries of the legislation, and case law, quoted and mentioned in this Chapter are available in the Appendix to this publication (*European and International Selected Legal Resources and Case Law*).



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EU² (where it is explained *why* victims do matter). This EC Communication contained a 'legislative package' of proposals 'as a step towards putting victims at the heart of the EU criminal justice agenda'. The Communication was immediately followed by the EU Council Resolution of the 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 'The 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/UE 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/UE³ stresses once again that 'The rights, support, protection and participation of victims in criminal proceedings are a European Commission priority' (DG Justice 2013: 3).

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

The path, which resulted in a comprehensive 'horizontal package of measures' (DG Justice 2013: 3) for *all* victims, is an interesting one. It shows the evolution of European law in a legally, politically, and socially 'sensitive' field; it displays a picture of the EU agenda and policies; it offers a sort of

² 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.

³ European Commission, DG Justice *Guidance Document related to the Transposition and Implementation of Directive 2012/29/UE 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 (now on DG Justice 2013).





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'thermometer' of the degrees reached in the complex process of the 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 (its 'Policies and Internal Action') the 'Area of freedom, security and justice', within which 'Judicial cooperation in criminal matters' 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 matters to the European Union. Article 82(2) TFUE 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; Mitsilegas 2015; Savy 2013: 23).

The Charter of the Fundamental Rights of the European Union and the European Convention of 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 recognized by the EU that may be violated, infringed or at stake when falling victim of a crime. This is why victims matter.

Alongside this broad and general 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 taken place (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 2005 Council's Hague Programme). In addition to the afore-mentioned Council

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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 Council's Stockholm Programme, titled *An open and secure Europe serving and protection citizens*, and its Action Plan (2010-2014).

Soft law provisions by the United Nations and the Council of Europe, through Basic Principles and various CE recommendations, have also influenced the EU legislator, who considered them when drafting normative instruments in favour of victims of crime in general (Aertsen, *supra* Chapter I; Della Morte, *infra* Chapter II.4)⁴.

At the European Union level, this 'horizontal' system of protection of *all* victims of *all* crimes, culminating in Directive 2012/29/UE, is further completed 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):

- 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) No 606/2013 of the European Parliament and of the Council of 12 June 2013 *on mutual recognition of protection measures in civil matters*.

The European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) case law¹ is also of paramount importance in understanding the reach (and the limits) of the support, protection and role of victims' rights in criminal proceedings in the EU (Gialuz 2015; Mitsilegas 2015: 329; Savy 2013: 39; Venturoli 2015: 120). Actually, in framing the Victims Directive the European lawmaker has taken into consideration the

⁴ cf also *European and International Selected Legal Resources and Case Law* in the Appendix.



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jurisprudence of the European courts. One relevant example, for the scope of this project and research, is for instance the definition in the Directive of 'victim' (only) as 'a natural person' (Article 2(1a)), thus confirming the exclusion of legal persons stated by the CJEU in *Dell'Orto* and *Eredics* (Case C-467/05 *Dell'Orto* 28 June 2007; Case C-205/09, *Eredics* – *Sápi* 21 October 2010).

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', 'more supranational', Victims Directive (Mitsilegas 2015: 318, 326) attract, as a 'side effect', the whole set of judicial competences of the EU Court of Justice (and the correspondent possibilities to resort to the Court). This will probably further inspire the European jurisprudence on victims' rights. CJEU case law, in fact, has so far been very relevant for – and sometimes has truly instructed – European law, like *Pupino* (CJEU Case C-105/03 *Pupino* 16 June 2005), but it has been centred mainly by necessity on cases concerning the sole 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 it also includes, of course, the possibility of the direct application of the Directive's self-executing provisions by national judges (Allegrezza 2015: 5; Mitsilegas 2015: 333; Pemberton and Groenhuijsen 2012).

A 1989 landmark decision of the CJEU has even anticipated the actions of the European legislator: the *Cowan* case (CJEU Case 186/87 *Cowan v Trésor* 2 February 1989) 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 UE. Still, today this issue remains one the primary concerns of European institutions, as highlighted by its placement right in the opening article of Directive 2012/29/UE (article 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

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the laws and regulations of the Member States' in order to ensure 'judicial cooperation in criminal matters', as stated by Art 82 TFUE (Mitsilegas 2015: 315). The prevention of discrimination in order to ensure freedom of movement, mutual trust regards to national criminal justice systems, and European citizens' confidence in justice are among the main reasons, together with humanitarian reasons and reasons of solidarity, of 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 are raised by scholars on whether the Victims Directive actually 'meets the legality criteria set out by Article 82(2) TFUE', 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' (Mitsilegas 2015: 325). Besides, others point out how post-Lisbon cooperation in criminal matters 'has become, compared to Article 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.

A priority in the priority: vulnerable victims and victims with 'specific protection needs'. Lights 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 (see Lauwaert, *infra* Chapter III.2; Ippolito and Iglesias Sánchez 2015). Vulnerability, though, is one of main fields in which the 2012 Victims Directive is a turning point in EU victims' legislation.

Throughout in international and European legal documents, the followings are often quoted as (abstract groups of) persons in need of



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specific protection, and therefore deserving specific attention and tailored protective actions:

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

- 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 offenses;
- victims of trafficking in human beings;
- victims of terrorism;
- victims of organized 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 the same situations, due to common protection priorities (such as the primary consideration of the best interest of the child), or due to 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 of 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 mutilations (Stockholm Programme) and victims of road traffic accidents (Victims Package: 7). Minorities who can be victims of hate crimes also receive special consideration by the international community





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and the EU⁵ (Ippolito and Iglesias Sánchez 2015). Victims of international core crimes are the focus of increased attention, and the beneficiaries of a set of international provisions, as described by Della Morte (*infra* Chapter II.4.)⁶.

Through the years, some of the above-mentioned 'specific situations' (DG Justice 2013: 3) of 'vulnerable' victims in 'areas of crime' of EU concern, now under Article 83(1) TFEU, have become the objective of *ad hoc* – 'vertical' – binding provisions and measures at the European Union level, which complement the CE Lanzarote and Istanbul European Conventions. 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*;

⁵ 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 publication: 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) Article 9: Victimisation. 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*.

⁶ de Casadevante Romani (2012: 39), while provocatively affirming 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 international humanitarian law; e) victims of enforced disappearance; f) victims of trafficking; g) victims of terrorism.





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- Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA *on combating terrorism*, which will be replaced in case of the adoption of the recent Proposal for a Directive of the European Parliament and of the Council *on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism*, COM(2015) 625 final, Brussels, 2 December 2015.

Directive 2011/36 is the first legislative initiative taken under Article 83(1) TFUE (Vervaele 2014: 44). Both Directive 2011/36 on trafficking in human beings and Directive 92/2011/UE on sexual offences against children combine a threefold objective: prevention, repression, protection. Therefore, protection of these particular victims – in terms of assistance, support, protection from secondary victimisation, on 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 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 Article 82(2) *and* Article 83(1). This combination is quite unique in the panorama of the European legislation, where either criminalisation and repression of offences *or* victims’ protection are usually set forth, as separate areas of intervention. As described by Manacorda (*infra* Chapter V), policies in the field, for instance, of environmental protection, while sometimes compelling to criminalise and to punish 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 offenses 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’ (DG Justice 2013: 7) (emphasis added). This said, the above-mentioned European Commission’s

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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' (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, stands in the jurisprudence of the European Court of Human Rights (and not without debate) (Gialuz 2012: 29). In the Strasbourg Court's decisions, criminalisation comes in combination with another affirmed obligation of Member States: that of a thorough investigation, capable of reaching, under due conditions, the disclosure of criminal facts and the conviction and punishment of the offender found guilty (Gialuz 2015: 29; Allegrezza 2012: 21). 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 Article 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 victims has withdrawn his or her consent*'. Another example of similar provisions is offered by Article 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). A proactive enforcement may be a necessity in certain areas of crime, also in order to adequately protect victims of those 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 avoided.

There is another series of decisions of the European Court of Human Rights on a parallel, yet different, topic of extreme importance for our project: it is the ECtHR case law concerning the lack (or failure) on the part of national authorities to protect fundamental rights, such as life, health,

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private and family life, under Articles 2 and 8 ECHR, in cases *inter alia* of exposure to polluted sites and industrial emissions, of 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 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.

Tracing the issue of 'vulnerability' throughout the European legislation is a fascinating task. The term ('vulnerability', 'vulnerable') appears quite early and it accompanies the whole evolution of the legislation concerning victims' rights: we find the 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/UE 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/UE (Recitals 38, 58; Art 22(1)(3)), a Directive known for its overcoming of abstract categories in favour of the notion of the '*individual assessment*' of '*specific protection needs*' of *each* victimised person (Arts 22, 23) (emphasis added) (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 2015: 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 in their Preface (2015: 5), the conception of vulnerability concerns, individually or collectively, several groups of people: from asylum seekers to the elderly in nursing homes. This aspect becomes quite significant for the scope of this project and research: Manacorda (*infra* Chapter V) recalls the many references to vulnerable population or vulnerable subjects (pregnant women, unborn, infants, workers etc), for instance, in EU product safety law. Third, victims of crime

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are not only *vulnerable*, they are ‘vulnerated’ (or *violated*) persons *already*. Speaking about ‘vulnerable victims’ is one more ‘paradox’ (Gialuz 2012: 91)⁷ of the victim condition, together with other paradoxes (ie, the need to be heard, and the risk of secondary victimisation that often stems from criminal proceedings; the need to be protected not only from the offender, but also from 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 the attention on an individualised and personalised comprehensive approach in which the *individual* ‘protection needs’ must be singularly assessed and taken into account (FRA 2014: 47, 77). This assessment must guide competent authorities (police and judicial authorities) and victims support services in dealing with victims case by case, and in offering them the most adequate and *tailored* protection, assistance, support (Rafaraci 2015: 221).

Articles 22 and 23 of the 2012 Directive open a whole new space for scientific reflection and research. The individual assessment of (each) victim’s protection needs is, in fact, still greatly unexplored by both scholars and practitioners.⁸ Its effectiveness requires a significant competence,

⁷ Stitt and Giacomassi (1993: 71) also refer to the ‘paradox of victimization’ in relation to victims of corporate harms (see *infra* Chapters III and IV).

⁸ 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.victimssupport.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); 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.victimsprotection.eu). *EVVI Guide - Evaluation 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 December 2016). On the assessment of specific groups of victims needs, see, eg, the INASC project *Make It Happen. European Toolkit to Improve needs*



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sensitivity, attention, and care on the part of the police, the judiciary and victims support organizations. 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 a tailored, active listening to the story and deposition – including what remains untold or unspeakable of it – 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... doubt) whether the criminal justice system and the victim support services are sufficiently equipped with the afore-mentioned precious, yet scarce, resources of time, attention, etc. A real fulfilment of the Victims Directive provisions, though, highly depends on the individual assessment being taken seriously by national legislators and competent authorities (see, eg, Pemberton and Groenhuijsen 2012; Artsen, *supra* Chapter I, and Lauwaert, *infra* Chapter III.2). A diffuse lack of awareness and of specialised training must still be filled, especially in those EU Member States where victims rights do not matter (yet) as much as they do for the European Union.

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 when the EU norms underline the necessity of an appropriate training in order 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)). 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

assessment and victims support in domestic violence related criminal proceedings
(www.inasc.org).



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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/UE – 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; see also Tonry 2010). Moreover, according to this analysis, individualising security fosters the 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 2012 and 2015: 334; Tonry 2010). Pleas coming from 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, emphasis added). This definition opens another set of philosophical, juridical and political questions, in which criminal law scholars have been engaged for centuries.

A comprehensive and multi-level system

Much has been written about the contents of the Victims Directive and its enrichment of the Framework Decision 2001/220/JHA it replaces. A supplement of analysis in relation to victims' participation in criminal proceedings is provided in the next Chapter II.2. Instead of focusing on a description of the single provisions, it is preferable to briefly concentrate here on a more general view of the changes in policies, culture, and practices that the adoption of the Directive triggers in addressing victims' rights.

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According to Mitsilegas (2015: 320), the Directive 2012/29/UE 'introduces a multi-level system of protection of the victim', while 'constitut(ing) 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' (DG Justice 2013: 4) system, which takes into account multiple needs of the victim (corresponding to as many 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 already articulated system, two major axes interestingly intersects. On one hand, there is a constant appeal to *tailor* and *target* each intervention on the *individual* victim's condition and needs, as mentioned above. On the other, the implementation of the Directive 2012/29/UE requires to look at 'the wider picture': that is, to combine 'legislative, administrative and practical measures', as stated in the *Guidance Document* (DG Justice 2013: 4), 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 606/2013 (mutual recognition of protection measures in civil matters). In addition, the Commission's transposition and the implementation *Guidance Document* continuously calls for a *coordination* among 'all stakeholders' (DG Justice 2013: 3): from national legislators (in the exercise of their discretion when transposing the

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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' (DG Justice 2013: 33), ending with NGOs and the civil society (DG Justice 2013: 49). The Victims Directive multi-level system has to be implemented within a wider *network* of international, European and national subjects, legal tools and actions.

Protection: the bridge between 'support' and 'justice'

Following Article 8 of the Directive 2012/29/UE, one of the primary rights of the victims is that to access confidential victims support services, and if necessary specialist support ones (Gialuz 2012: 73). These services are in charge of 'acting in the interests of victims' (Art 8(1)).

For a victim, the right to access support services is of extreme practical importance, despite it being greatly neglected by many of the EU Member States. Interestingly, access to victim support is completely parallel and independent from criminal justice, having to be ensured 'before, during and for an appropriate time after criminal proceedings', irrespective whether the victim has made a formal complaint (Art 8(1)(5)). 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* (paralleljustice.org), the idea of 'parallel obligations' towards victims and offenders is 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 punitive directions: 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.

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In the European 'horizontal' system of protection of each and all victims, as comprehensively outlined by both the EU law and the ECtHR-CJEU case law, the relationship between victims and 'justice' is multi-faceted, and not limited to criminal justice any way. It comprises, in fact, a wide range of profiles, which corresponds to as many 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 3ff of the Directive 2012/29/UE);
- an articulated series of rights set out by the Directive 2012/29/UE 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/UE in relation to victims' participation in criminal proceedings (Chapter IV 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 18ff of the Directive 2012/29/UE; Directive 2011/99/UE, Regulation 606/2013). Protection of the victims further includes measures (diverse in nature) that the State has to provide 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-border dimensions which might affect free movement and non-discrimination



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- on grounds of residence status (Directive 2012/29/UE; Directive 2011/99/UE; Directive 2004/80/CE etc);
- an interest to investigate on the part of the State, corresponding to its 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, 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 victims 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 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 them criminal, administrative or civil). In addition, some of the protection measures envisaged by the Directive take place inside criminal justice, and during criminal investigations or criminal proceedings. Finally, protection measures involve in many ways the very position of the victims in the relevant criminal proceeding. It is not by chance, perhaps, that 'one of the major achievement' of the Victims Directive (DG Justice 2013: 44) 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 concentrate.

Suspects, accused persons and offenders (must) matter too

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

The topic is thorny and questioned. 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), reasons that the European Union has decided to put 'at the heart of its criminal justice

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agenda'. Up to now, protection and respectful treatment – not repression *per se* – have been expressly 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 (Allegrezza 2012: 8, 26; Mitsilegas 2015: 313; Tonry 2010; Venturoli 2015: 117). This challenge has many pitfalls, and it therefore requires a constant attention and considerable wisdom on the part of policy makers, 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, excessive severity in punishments (Garland 2001: 11, 103). It may twist 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* (Stella 2003; Dubber 2002). According to some analyses, an excessive attention to the rights of victims may reverse the culture of human rights into a 'culture of complaint' (Huges 1993), and may run the risk of, at its extreme consequences, transforming vulnerable, defenceless, victims of crime into the 'heroes of our times' (Giglioli 2014), the '*étoiles de la scène pénale*' (Gialuz 2015: 21)⁹, 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 the respect for the rights of the suspect, of the accused and of 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, stress the need of a constant respect for both the rights and interests of the victims and the rights, interests and

⁹ Quoting literally from Wyvekens, A (1999) *L'insertion locale de la justice pénale. Aux origines de la justice de proximité* (Paris, L'Harmattan).



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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, rights of victims and rights of defendants are (sometimes) conflicting.

Due to the enormous diversity in criminal justice systems, and especially in criminal procedures, between different States, 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 CJEU also greatly contribute in designing the 'impact' of victims in criminal trials and 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 of sheltering 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 Court of Human Rights numerous case law, whereas the Luxembourg Court primarily devoted itself to defining the exact frame of the notion of 'victim' and to interpret 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 Torny (2010), the very idea to 'balance' – or 're-balance' – 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 Torny further argues, 'few will disagree that victims should be dealt with sympathetically and supportively. That implies nothing, however, about treating defendants and offenders badly' (Torny 2010: 76). Not to mention the fact that offenders, and especially imprisoned offenders, can immediately become 'vulnerable'



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subjects, if and when improper forms of authority or unjustified rights restrictions are imposed to them (the ECtHR case law is clear on this topic).

Articles 5, 6, 7 of the European Convention of Human Rights and articles 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'¹⁰ (although the balance in the scale of European priorities when it comes to rights of victims and rights of defendants is still scholarly disputed). In the period 2010-2013, three directives have been adopted with regards to procedural rights in criminal proceedings in favour of the suspects and the accused persons. They are worth mentioning:

- 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*.

Returning to the Victims Directive provisions, Recital 12 openly states that the rights of victims set out by the EU binding instrument 'are without prejudice to the rights of the offender': a necessary and due affirmation which requires some clarification.

¹⁰ European Commission webpage informing about the EU commitment to the 'rights of suspects and accused': http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm (last accessed on 15 December 2016).





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

The *procedural rights*, instead, 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 of victims and witness hearings, especially in case of vulnerable people or people with special needs of protection from secondary victimisation. 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 an ample discretion (Allegrezza: 2015; Mitsilegas 2015: 333). This topic is discussed in Chapter II.2. (see Mancuso, *infra*).

The right to *protection* and the adoption of *protection measures* or *special measures* resulting from the individual assessment of specific needs (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 Article 22(6) victims must be closely involved and their wishes should be taken into account, including their wish not to benefit from protective measures.¹¹ One

¹¹ The provisions of Art 22 (6) raise the question of whether a future shift will occur in CJEU jurisprudence from the precedent of Joined cases C-483/09 and C-1/10 *Gueye – Sanchez* 15 September 2011 (both cases resulting in the irrelevance of the victim's will to be approached by



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may argue that 'measures' (Art 18) and 'special measures' of protection (Arts 22, 23) reach the climax of the conflicting relationship between victims' rights and defendants' rights in the frame of Directive 2012/29/UE. These measures, in fact, might have a substantial impact on the defendant's procedural rights and might significantly constrain his/her freedoms, as it 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 are too subjective aspects 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 Articles 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 shows a conflicting, controversial relation between criminal justice and victims of crime: from a private, 'an eye for eye', retributive justice in the hands of those who have been harmed to victims being long 'forgotten', and only recently 're-discovered' (Forti 2000: 252). Both the 'wrong' inclusion and the 'wrong' exclusion of victims deeply affect 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 to face suffering and vulnerability. Yet, it is precisely victims' 'uncomfortable-ness' that questions criminal justice: its abstract

the offender in the frame of a judicial decision confirming an ancillary penalty enjoining a domestic violence offender not to do so).



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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 chance for criminal justice to change. It is in fact true that a wise victim-sensitive criminal justice 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 (*S v Makwanyane and Another* [1995] CCT/3/94 [88]): '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'. 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 echoes in Michael Torny'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'.

This challenge is risky, but a fascinating one.



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II.2.

Victims' Participation in Criminal Proceedings

Enrico Maria Mancuso

The Directive 2012/29/EU serves a double purpose¹: on one hand, it seeks to ensure that victims of crime receive appropriate information, support and protection regardless of the existence of an ongoing criminal investigation; on the other hand, it seeks to ensure that victims are able to participate in the criminal proceedings.

Member States should thus recognise the victim as an individual with individual needs, with a key role in the criminal proceedings, while respecting the fair trial principle and without prejudice to the rights of the offender.²

The European law-maker has laid down minimum rules that Member States may extend.³ However, the approach seems to vary depending on the objectives pursued. If the right to information and support seems to receive full recognition, we cannot say that the Directive has taken the final step and entitled victims to a 'right to a criminal trial'⁴, nor a 'right to be party to criminal trial'. In fact, the provisions concerning the victim's participation to criminal proceedings always go together with national safeguards clauses

¹ See Article 1 of the directive 2012/29/EU

² DJ Justice *Guidance Document* of 2013 related to the transposition and implementation of Directive 2012/29/EU, commenting on Art 1 of the Directive.

³ Recital 10.

⁴ For an overview: Chiavario 2001: 938; Simonato 2014: 53. On positive obligations of the ECHR: Klatt 2011: 691.





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that allow Member States, during the implementation process, to vary significantly the extent of the procedural rights of victims set out in this Directive, depending on the victims' formal role in the relevant criminal justice system. The harmonisation thus remains a mere intent destined to raise the white flag before a national scarce consideration of the role of victims in criminal proceedings.⁵

The territorial scope of application of the procedural rights, here at stake, includes criminal offences that are committed in the Union and criminal proceedings that take place in the Union, disregarding any residence status, citizenship or nationality requirement for victims. Consequently, the Directive also confers rights on victims of extra-territorial offences in relation to proceedings that take place in the Union⁶ and rights on victims that are resident of a different Member State. Many provisions oblige Member States to minimise the difficulties faced by non-native victims, particularly with regard to the organisation of the proceedings. For example, according to article 17, appropriate measures should be taken in order to ensure that victims resident in another Member State can: a) make immediately their complaints and statements to the competent authorities of the place where the offence was committed or, sometimes, before authorities of their Member State of residence (who will take care of the transmission of the complaint, without delay and if necessary, to the competent authorities) b) participate via video conferencing or telephone conference calls during the hearings. Other provisions envisage the rights to linguistic assistance to victims who cannot speak or understand the language, as illustrated below.

The approach taken in the Directive seeks to ensure the individual victim's ability to 'follow the proceedings'.⁷ For this purpose, victims are entitled, from the very first contact with competent authorities, to a set of rights to information contemplated in Chapter II. Article 3, recognising the right to understand and to be understood, represents the very essence of

⁵ Recital 20 is of utmost importance to understand the scope of application of procedural rights here set out.

⁶ Recital 10 and 13.

⁷ DJ Justice *Guidance Document* of 2013 commenting on Art 3.



the new personalised approach; it is intended for assuring victims full access to information and minimising as far as possible 'communication difficulties'. The latter notion was already contemplated in the Framework Decision⁸ but it had been interpreted by Member States as to be limited to linguistic barriers. The Directive furthermore requires that authorities pro-actively assist victims to reach a full understanding *of the procedure*, bearing in mind the personal characteristic of the victim (eg, disability, age, maturity, gender, relationship to or dependence on the offender).

Authorities should also provide linguistic assistance by offering interpretation and translation services to those victims who do not speak or understand the language (Lupária 2014: 97). Since they may entail considerable costs and a slowdown in the conduct of proceedings, the effectiveness of these rights may largely depends on the role recognised to the victim in the relevant judicial criminal system. If, under paragraph 2 of Article 5, all victims should be provided with 'necessary linguistic assistance', only victims with a formal role in the proceedings may be provided, according to article 7, with 'interpretation' during criminal proceedings. Upon request and free of charge, victims should be provided with interpretation at least during any interviews or questioning before investigative and judicial authorities and during court hearings; information essential to the exercise of their rights should always be translated in a language that they understand (this provision is linked to information rights envisaged in articles 4 and 6). For other aspects of the criminal proceedings, interpretation and translation may depend on specific issues or the victim's role in the proceedings and need only be provided to the extent necessary for victims to exercise their rights;⁹ they could be denied if they unreasonably prolong the criminal proceedings.¹⁰ The victim may challenge the decision not to provide interpretation or translation, but the applicable

⁸ Article 5 FD requiring 'to minimise as far as possible communication difficulties'.

⁹ Recital 34. This article draws on Article 2 of the Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings ('Interpretation and Translation Directive').

¹⁰ Article 8(2).





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procedural rules depends on national law.¹¹ The victim may also submit a request for the translation of a document to be considered essential (i.e., relevant for the active participation of the victim in the proceedings),¹² but the Directive does not explain what are the criteria for the assessment nor which authority is competent for it.

A special attention is dedicated to the delicate moment of the first contact between the victim and the competent authorities. Article 4 requires that victims are offered, without unnecessary delay, of some basics information enlisted in paragraph 1, such as the type of support that they can obtain, the procedure for making complaints, the conditions of access to legal aid and to interpretation and translation services, the availability of special protection measures and contact details for communications about their case. The extent or detail of information referred to in paragraph 1 may vary depending on the specific needs and personal circumstances of the victim and the type or nature of the crime.¹³

Victims must receive at least a written acknowledgment of their formal complaint, stating the basic elements of the criminal offence concerned, such as the type of crime, the time and place, any damage or harm caused.¹⁴ A delay of reporting, due to fear of retaliation, humiliation or stigmatisation, should not result in refusing the acknowledgment.¹⁵

The information flow must be continuous throughout the proceedings to enable victims to make informed decision about their participation in proceedings. Article 6 obliges Member States to notify victims, without unnecessary delay, of their right to receive, upon request, information about their case. Such information, which can be provided orally or in writing or

¹¹ Article 7(7). Cfr the different approach of Directive 2010/64/EU as explained in Civello Conigliaro 2012: 3.

¹² Article 7(5).

¹³ Article 4(2).

¹⁴ Article 5(1) and recital 24: 'If the acknowledgment includes a file number and the time and place for reporting of the crime, it can serve as evidence that the crime has been reported'.

¹⁵ Recital 25.





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through electronic means¹⁶, must be detailed and precise. According to paragraph 1, all victims must be informed with regard to a decision not to proceed or to end an investigation or not to prosecute the offender, the time and place of the trial and the nature of the charges against the offender. According to paragraph 2, only the victims that also have a *role* in the relevant criminal justice system may also receive, upon request, information about any final judgment and the state of the proceedings.

Notably, paragraph 3 imposes an obligation to provide reasons or a brief summary of reasons for the above-mentioned decisions to end proceedings or the final judgment, except if a jury decision or the confidential nature of the reasons prevent from their disclosure as a matter of national law.¹⁷ Victims may waive this right to be informed, but they must be allowed to modify their wish at any moment.¹⁸

If provided by the national legal system¹⁹, the right to information should also include indications how to make a recourse against the release or escape from detention of the alleged offender. However, such a right could not be provided, upon a weighted decision of the authorities, if the notification could entail a tangible risk of harm for the offender.

The second set of procedural rights directly concern the victim's participation in criminal proceedings. Chapter III is articulated into several provisions aimed at recognising an active role and effective participation of the victim during the trial: the right to be heard (article 10), the right to a review of a decision not to prosecute (article 11), the right to safeguards in the context of restorative justice services (article 12), the right to legal aid

¹⁶ In exceptional cases, for example due to the high number of victims involved in a case, it should be possible to provide information through the press, through an official website of the competent authority or through a similar communication channel. See also Verges 2013: 121.

¹⁷ Recital 28.

¹⁸ Article 6(4) and recital 29.

¹⁹ The Directive does not introduce the right for victims to lodge a recourse against a decision on releasing the offender, nor the right to be heard in the decision-making process before the competent authorities. Extending victims' procedural participation in the release procedure remains a matter of national discretion.





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(article 13), the right to reimbursement of expenses (article 14), the right to return of property (article 15), the right to decision on compensation from the offender in the course of criminal proceedings (article 16) and the rights of victims resident in another Member State (article 17).

Notably, the individuation of the applicable procedural rules that should give effect to these rights is left to the discretion of Member States: since the role of the victim²⁰ in the criminal justice system and investigation rules vary among the Member States, the Directive only affirms common objectives, and national law-makers are up to decide what mechanisms can best guarantee them, in accordance to the peculiarity of the respective legal system. What matters is that the level of safeguards is effective.

The right to be heard²¹ represents an essential moment of recognition (Garapon 2004: 123) of the individual as a victim, by him/herself and by the society. The victim has the right²² to tell what happened, his or her side of the story, the pain suffered. The Directive imposes a duty to listen to the victim, but it does not determine when and before which judicial body it has to be done. It only requires that such declarations must have the value of 'elements of proof'. Ergo, the supranational indications are compatible with both inquisitorial and adversarial legal systems.

A complex set of powers is recognized to victims in case of a decision not to prosecute. The notion of 'decision' that is relevant under article 11 refers to any decision ending the criminal decision, included the prosecutor's decision to withdraw charges or discontinue proceedings.²³ Only decisions not to prosecute resulting in out-of-court settlements and in special procedures (such as those against member of parliament or government having acted in their official position) may be excluded from the scope of

²⁰ The notion 'role of the victim' determines in particular the procedural rights of victims set out in the Directive and should not be confused with the definition of 'victim' included in Article 2.

²¹ Article 10.

²² That can be waived.

²³ Recital 44.



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application of this article.²⁴ Victims are entitled with the right to a review of the decision not to prosecute (that is linked to the right to be informed about it provided by Article 6). However, the precise modalities of such a mechanism shall be determined by national law, as well as the extent of such a right in accordance with the formal role given to victims in the relevant criminal justice system. If the role of the victim is to be established only after a decision to prosecute the offender²⁵, Member States should ensure the right to a review at least to victims of 'serious crime'.²⁶ The review should be carried out by a person or authority other than whoever made the original decision, in accordance with the principle of impartiality²⁷. However, the Directive respects national procedural autonomy and does not interfere with the relations of hierarchy among authorities. The reading of recital 43 further clarifies that the right to a review cannot be interpreted as something close to the appeal's scheme: "it should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by court'.

The provisions aimed at assuring that victim's participation to proceedings is not frustrated by financial obstacles of the individual (articles 13-16), use a very different tone. But the apparent peremptory nature of the right, under article 16, to obtain a decision on compensation during the criminal proceedings, cannot be interpreted as if the Directive establishes an obligation to handle the requests for compensation in the course of criminal proceedings: national legal system may provide for such a decision to be made in other legal proceedings. Member states are also asked to

²⁴ Article 11(5). Although, the out-of-court settlement should envisage a warning or an obligation. See recital 43.

²⁵ The Guidance for example recall the question whether the victim wishes to constitute civil party.

²⁶ Article 11(2). The notion of 'serious crime' is not defined by the Directive, and shall be determined by the national interpreter, likely taking into account the existing EU criminal law legislation and the international criminal justice standards.

²⁷ Article 11(4).





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'encourage' offenders to pay compensation to victims, but the meaning of this paragraph is completely vague: it does not explain what 'encourage' means, nor does the preamble; what happens if a convicted offender lacks the means to provide compensation? Do Member States have a subsidiary responsibility or can the State advance payment to the victim? How can the victim enforce a decision on compensation?

The third set of rights aimed at safeguarding the participation of the victim is envisaged in Chapters IV. The Directive ensures to victims and their family members a wide range of protection measures during the proceedings and from the proceedings, particularly to prevent emotional distress to the victim. The measures that a State can adopt, without prejudice of the rights of the defendant, follow three main strands: avoiding secondary and repeat victimisation; shielding the victim from any intimidation and retaliation (including physical, emotional and psychological harm) and protecting the victim's dignity in particular during questioning and witnessing (Simonato 2014: 119; Parlato 2012: 381; Belluta 2012: 96). Unnecessary contacts between victim and offender should be avoided within the court's premises (article 19); during criminal investigations, interviews should be carried out without unjustified delay, only where strictly necessary for the purposes of the investigation, and also medical examination (particularly relevant in relation to sex crimes) should be kept to a minimum (article 20); privacy, personal integrity and personal data of victims should be protected and balanced with the freedom of expression and information and freedom and pluralism of media (article 21). Victims should be always treated in a respectful, professional and non-discriminatory manner by properly trained practitioners who have contact with them, in accordance with their needs.²⁸

Here, the winds of change blow once again toward an individualised approach, and suggest that Member States make individual assessments (case-by-case approach) to identify other specific protection needs and vulnerability of the relevant victim, taking into account, in particular, the

²⁸ Article 25.



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following criteria: a) personal characteristics of the victim; b) type or nature of the crime; c) the circumstances of the crime²⁹.

A special sensitivity emerges towards the most vulnerable victims such as women and children, as the Directive follows the path already traced by the European Council Conventions of Istanbul and Lanzarote. However, no victim is standardised: Member States are required to always give a personalised attention to each individual with his or her own specific needs (Simonato 2014: 108; Cassibba 2014: 5; Laxminarayan 2012: 390; Savy 2013: 78).

The major achievements of the Directive 2012/29/EU reflect a changing perception of the role of criminal law, called upon to respond to the needs of the victim as a protagonist (Allegrezza 2015: 18; Parlato 2012: 91 with reference to Hirsch 2008: 28; Lupária 2014: 615).

²⁹ Article 22.



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II.3.

The Process of Transposition and Implementation of the Directive 2012/29/UE in the Three Member States Involved in the Project

II.3.1.

Belgium

Katrien Lauwaert

The overview underneath summarises what Belgium has undertaken to implement the 2012 Victims Directive. Moreover it provides the reader with a short overview of the baselines of Belgian victim policies, victim assistance services put in place, and some of the victim policy's strengths and flaws. Doing this, the text also points out the relevant services, professionals and coordination mechanisms the Victims and Corporations project can approach to learn about their experience with victims of corporate violence. At the same time they will be the target audiences for feeding back the knowledge the project will generate on the specific group of victims of corporate violence so that these new insights can be taken into account in future policy and practice.

In Belgium *no specific new laws* were adopted in view of the implementation of the Directive. Overall victims in Belgium have well elaborated possibilities of participation in the criminal proceedings and have access to a well-established network of victim assistance and restorative justice services. An official report on the implementation of the Directive in Belgium is not available. The academic rapporteur for Belgium in a European research project about the implementation of the Directive¹ concluded – after a

¹ *Protecting victims' rights in the EU: the theory and practice of diversity of treatment during the criminal trial*, JUST/2011/JPEN/AG/2919, implemented between December 3rd, 2012 and June 2nd, 2014, by the [Centre for European Constitutional Law – Themistokles and Dimitris Tsatsos Foundation](#), in collaboration with the [Institute for Advanced Legal Studies of the University of London](#).



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thorough analysis of the themes contained in the Directive - that 'it is clear that victims in Belgium benefit from a strong position in the criminal procedure, a position that goes beyond the minimum standards found in EU legislation' (De Bondt sine dato).

Although no specific formal law was adopted as a consequence of the Directive, *some changes were introduced in victim related regulations* in the period just preceding and the period following the adoption of the Victims' Directive.

On November 12, 2012 a circular was issued by the college of prosecutors general concerning the respectful treatment of deceased victims, the announcement of their death and the organisation of a respectful moment of farewell². On the same date another circular was adopted concerning the reception of victims at the prosecution services and the courts³. Both were new versions of earlier guidelines on these topics which needed to be adapted following legislative and institutional developments and in order to take better into account the needs of victims in all stages of criminal procedure.

In a similar way and as a consequence of changes in the code of criminal procedure⁴, a circular was adopted introducing adapted rules for access to the judicial file on 13 March 2013.⁵ In view of the improvement of the quality of information provided to victims at all stages of the procedure, an adapted circular concerning the written acknowledgement of the formal

² Omzendbrief nr. 17/2012 van het college van procureurs-generaal inzake het respectvol omgaan met de overledene, de mededeling van zijn overlijden, het waardig afscheid nemen en de schoonmaak van de plaats van de feiten, in geval van tussenkomst door de gerechtelijke overheden, 12 november 2012.

³ Omzendbrief nr. 16/2012 van het college van procureurs-generaal bij de hoven van beroep betreffende het slachtofferonthaal op parketten en rechtbanken, 12 november 2012.

⁴ Wet van 27 december 2012 houdende diverse bepalingen betreffende justitie, B.S., 31 januari 2013.

⁵ Omzendbrief nr. 5/2013 van het college van procureurs-generaal bij de hoven van beroep betreffende de inzage van het strafdossier of tot verkrijgen van een afschrift ervan, 13 maart 2013.





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complaint (attesten van klachtneerlegging) and the registration of the declarations of registered victims was adopted on 13 November 2014⁶. Finally, the obligation to provide information about the possibilities for mediation was clarified in a new circular of 29 April 2014, which had been in the pipeline for several years⁷.

Policies in favour of victims of crime have developed in Belgium *since the 1980s* for general victim support and specialized victim support services *and since the 1990s* at the level of the police, public prosecution and the courts. Legislation and services came about in a context of renewed interest in victims of crime. More specifically the Belgian developments were influenced by international legislation concerning victims of crime at the level of the Council of Europa, the United Nations and the European Union. Also groups of citizens played an active role in bringing about change. One example is the pressure brought on the system by a self-help group of parents of murdered children, who requested a more adequate and humane treatment of victims by the professionals in the criminal justice system (Aertsen 1992). Some criminal cases which were widely covered in the media, provoked a shock in public opinion about the inadequate support victims received and the lack of possibilities for the victims to influence the course of criminal investigation and further proceedings. The most famous and influential one was the Dutroux case, named after the offender who was convicted for the abduction, rape and murder of several children (Lemonne, Vanfraechem and Vanneste 2010). The credibility of the criminal justice system was heavily damaged by the way the case had been handled. A protest movement – the so-called white movement - supported by a large

⁶ Omzendbrief nr. COL 5/2009 van het college van procureurs-generaal bij de hoven van beroep betreffende richtlijnen met betrekking tot de attesten van klachtneerlegging en de registratie van de verklaringen van benadeelde persoon, 13 november 2014.

⁷ Omzendbrief nr. 5/2014 van het college van procureurs-generaal bij de hoven van beroep betreffende de informatieverplichting inzake bemiddeling – artikelen 553, 554, 555 van het wetboek van strafvordering en de scharnierprocedure tussen bemiddeling in strafzaken krachtens artikel 216ter van het wetboek van strafvordering en herstellbemiddeling.



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segment of the population - lead to a parliamentary inquiry and consequently reshaping of the position of victims in criminal procedure in the 1998 Franchimont law (De Bondt sine dato).

The *main objectives and principles* of Belgian victim policy - summarised in a 2014 circular of the college of prosecutors general⁸ - resonate well with the main goals of the Directive as set out in Art 1 and recital (9).

A first objective is to offer victims the possibility to overcome the trauma incurred by the crime and to find a new balance. Secondly, victim policies aim at preventing secondary victimisation by making sure that interventions by the police, other criminal justice officials and other intervening professionals or services do not worsen the victim's trauma or do not provoke a second trauma.

In order to reach these objectives victim policy is developed according to the following principles:

1° The victim has a right to self-determination. No one should take over from the victim when decisions have to be taken and actions to be decided which concern the victim.

2° The State, and more specifically the judicial authorities, are responsible for decisions concerning prosecution, punishment and execution of sentences.

3° The victim has rights. Most important are the right to be treated correctly and carefully, the right to receive and provide information, the right to legal assistance, the right to reparation of harm, the right to assistance, the right to protection and the right to privacy.

4° Agencies work according to an integrated multi-level approach. Various aspects of victim policy depend on different agencies which belong to different levels of competence in the Belgian state (the federal state, the

⁸ These goals and principles are summarised in Omzendbrief nr. 16/2012 van het college van procureurs-generaal bij de hoven van beroep betreffende het slachtofferonthaal op parketten en rechtbanken, 12 november 2012, p. 9-10.





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three Communities, local authorities). Cooperation protocols are concluded amongst these agencies and their respective tasks are clearly defined and delineated.

5° All criminal justice professionals should, when needed, refer victims to support services organised by the Communities or to legal assistance.

Different *victim assistance services* (Art 8 and 9 Directive) have been put in place. It is the task of the police to provide initial assistance to victims by treating them respectfully and providing information. For sensitive and complicated cases they can count on the support of a specialised in-house victim assistance unit. At the courts, victim reception units provide information about the victim's case and about possibilities for support. They accompany victims, for example, to court sessions, reconstructions and consultation of the case file. Outside the criminal justice system, victims have direct access to victim support services who are part of more general welfare services. They provide for free information and short term practical, emotional and psychological support. More traumatised victims who need long term psychological help are referred to general centers for mental health. Certain categories of victims can be referred to specific support structures. This is for example the case for families of missing persons, for victims of child abuse, human trafficking, partner violence and for victims of road traffic incidents.

Mediation services (Art 12 Directive) are available nationwide for cases involving adult offenders.

Restorative mediation (Arts 553-554 Code of Criminal Procedure) is directly accessible and for free. Restorative mediation is guided by professional mediators working for an independent non-governmental organisation and no type of offences or offenders is excluded. A law from 22 June 2005 provides a solid framework for this mediation practice which runs parallel to the criminal procedure.

Mediation can also be offered by the prosecutor (Art 216 ter Code of criminal procedure). This so called penal mediation is a diversion mechanism



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to avoid less serious cases to go to court. The mediation is carried out by justice assistants, these are social workers working closely with the public prosecutor.

Since 1985 victims of violent crime and family members of deceased victims of violent crime can obtain financial support from a *State compensation fund*. This is a subsidiary mechanism which is complementary to other channels for compensation such as private insurances and legal proceedings. Over time the group of victims who can make use of the compensation fund has been broadened.

While we will not detail all the victims rights during criminal proceedings, it is noticeable that victims also have rights during the execution of the prison sentence of their offender. Victims have a right to information about and a right to be heard during the decision making processes concerning modalities of sentence execution such as conditional release.⁹

The multilevel integrative victim policy approach requires thorough and systematic coordination. Therefore *coordination mechanisms* have been set up at different levels.

At the national level intergovernmental action plans have been developed to coordinate the work concerning specific types of victims amongst all departments concerned at the federal level and the level of the three Communities and the relevant civil society organisations. These action plans exist for example for gender related violence, homophobia, transphobia and human trafficking.

Cooperation agreements have been concluded between the federal and the Communities level; the federal level being competent for the police, the

⁹ Wet van 17 mei 2006 betreffende de externe rechtspositie van de veroordeelden tot een vrijheidsstraf en de aan het slachtoffer toegekende rechten in het raam van de strafuitvoeringsmodaliteiten, B.S., 15 juni 2006.



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prosecution and the courts, and the Communities being competent for victim reception and victim support.

A national forum for victim support policy was set up already in 1994. The national forum gathered representatives of different ministries, the police, the prosecution, and several civil society organisations working with victims and was tasked to set up a dialogue amongst all these stakeholders and formulate advice concerning victim policy. Although very productive in the first years of its existence, it has more recently almost completely stopped functioning by lack of funding and staff.

The college of prosecutors general takes up a general coordination role concerning the tasks of the judicial actors towards victims of crime. It is assisted by a network of excellence on victim policy in which representatives of the prosecution services meet with representatives of the ministry of justice, the police and victims services.

At the level of the judicial district liaison magistrates focus on victim policy in their respective judicial districts. They work in collaboration with the district victim policy council, which brings together representatives of the police, criminal justice and welfare services who have all a role to play in victim assistance. Together they follow up and evaluate the implementation of victim policies.

For the Victims and Corporation project the implementation of Art 22 of the Directive on individual assessment to identify special protection needs is of special interest. As many other member states Belgium does not mention the individual needs assessment as such in its legislation. Rather, procedures, methods and directives are formulated throughout the national legislation which give guidance to the services working with victims on how to take into account specific needs victims may have according to the nature of the crime or characteristics of the victims.

An extensive referral system is put in place through which victims who come in contact with police or judicial services can or have to be referred to victim reception services at the public prosecutors offices and the courts and to the victim support services in society. These services can monitor and



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evaluate the specific needs of victims and refer them to more specialised services, self-help groups and other initiatives according to the specific problems they are dealing with.

Detailed instructions have been developed for dealing with specific categories of victims such as victims of partner violence¹⁰, child abuse, human trafficking¹¹ and hate crime¹² and for the close family of deceased victims¹³ or missing persons¹⁴. They explain how to guide these victims through the procedure, which specific services can be proposed and which specific measures can be taken.

Victims belonging to more vulnerable groups automatically benefit from specific arrangements. Victims of child abuse, for example, are automatically referred to specialist centers and victims of certain types of crime (such as victims of burglary and victims who were personally confronted with the offender) are automatically referred to victim support. Moreover, victims under the age of eighteen have the right to be accompanied by an adult of their choice during interrogation and the interview must take place in a suitable room or be done through audiovisual recording (IVOR 2016).

¹⁰ Gemeenschappelijke omzendbrief COL 18/2012 van de minister van Justitie, van de minister van Binnenlandse zaken en van het College van procureurs-generaal betreffende het tijdelijk huisverbod ingeval van huiselijk geweld, 18 december 2012.

¹¹ Omzendbrief COL 8/2008 inzake de invoering van een multidisciplinaire samenwerking met betrekking tot de slachtoffers van mensenhandel en/of van bepaalde zwaardere vormen van mensensmokkel, 7 november 2008.

¹² Gemeenschappelijke omzendbrief COL 13/2013 van de minister van Justitie, de minister van Binnenlandse Zaken en het College van Procureurs-generaal betreffende het opsporings- en vervolgingsbeleid inzake discriminatie en haatmisdrijven (met inbegrip van discriminaties op grond van het geslacht), 17 juni 2013.

¹³ Gemeenschappelijke omzendbrief COL 17/2012 van de minister van Justitie, de minister van Binnenlandse Zaken en het College van procureurs-generaal inzake het respectvol omgaan met de overledene, de mededeling van zijn overlijden, het waardig afscheid nemen en de schoonmaak van de plaats van de feiten, in geval van tussenkomst door de gerechtelijke overheden, 12 november 2012.

¹⁴ Ministeriele richtlijn COL 12/2014 - Opsporing van vermiste personen (aangepaste versie van 26 april 2014).





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The robust Belgian legislative framework for victims of crime suffers from its *complexity and from a lack of transparency*. For professionals and victims it is difficult to find their way in the labyrinth of legislation and to understand the division of tasks amongst professionals.

The complexity is first of all due to the large number of different laws which were adopted over time, and which are not brought together in one coherent legislative instrument. This would to a certain extent also not be possible as these laws and regulations are situated at different levels of competence: the federal level, the level of the three Communities and the local level. That many different actors, each with well delineated competencies, are tasked to deal with victims issues adds to the complexity. The division of tasks over all justice professionals fits however with the choice to develop a multi-level, integrated system with a low level threshold for victims. Basically each police and justice professional who comes in contact with victims should be able to deal with victims appropriately and to refer to more specialised services if needed.

Another factor which brings complexity to the situation for Belgian victims of crime is the lack of a unique and uniform definition of the 'victim'. Who qualifies as a victim varies across the legal texts. Individual laws providing rights to victims often define the scope of the term victim for that particular law. Mostly direct victims and relatives are covered. Contrary to the Directive legal persons can also qualify as victims.

Within the criminal procedure victims can opt for three different kinds of standing: mere victim, registered victim and civil party. Mere victims do not have a particular connection with the criminal procedure. They can be called as a witness or interrogated, but they have no right to be kept informed of their case. Victims who are registered have the right to be informed about the decisions in their case and they have the right to access the case file. Civil parties are parties to the proceedings and they benefit from extra rights such as the right to ask for compensation through the criminal proceedings and the right to ask for additional investigative measures.



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Despite the adoption of a rather impressive set of legislation and the development of a large network of general and specialized victim assistance services, there is still a long way to go before the multilevel, integrative approach will be working smoothly in practice and before a real change-over of the criminal justice culture will be realised in which all of its professionals regard the victim as a full-fledged stakeholder who merits the fulfillment of all the rights mentioned in the Directive.



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II.3.2. Germany

Marc Engelhart

Germany dealt with the implementation of Directive 2012/29/EU during the legislative procedure for a general revision of legislation on the rights of victims in 2014/2015. Parliament decided on the final version of the Act, the Third Victims' Rights Reform Act on 21 December 2015.¹ The bill came into force on 31 December 2015, but the provisions on so-called psychosocial support will only enter into force on 1 January 2017. The act expressly implements Directive 2012/29/EU.

A first draft of the bill by the Federal Ministry of Justice and Consumer Protection was made public on 10 September 2014. The bill took up the implementation requirements of Directive 2012/29/EU but also those of Art 31 a) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 1 July 2010. Additionally, the bill formally introduced the system of psychosocial support already practiced by some German states into federal legislation. The state Ministers of Justice had asked the federal ministry to consider federal legislation for psychosocial support at its 85th Conference of Ministers of Justice on 25-26 June 2014.

The main focus for the implementation of Directive 2012/29/EU was to strengthen the rights of the victim to be informed about procedural steps

¹ '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.



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and to improve the possibilities to participate in the proceedings as well as the means for receiving compensation and getting in contact with victim support institutions. Insofar, the bill provided for reform of sections 406i (Information as to rights in criminal proceedings), 406j (Information as to rights in non-criminal proceedings), 406k (Information as to further rights) and 406l (Rights of relatives and heirs of aggrieved persons) Code of Criminal Procedure as well as sections 158 and 406d (Notification of different steps taken in criminal proceedings) Code of Criminal Procedure. Sec. 406g Code of Criminal Procedure and a new law on psychosocial assistance (Gesetz über die psychosoziale Prozessbegleitung im Strafverfahren) provide the framework for psychosocial assistance. Several changes concern language assistance and translation for victims. Although the legislation was heavily criticized, eg, by the association of defense lawyers, as impeding the rights of the accused,² the bill passed through parliament without any substantial changes.

The 'Third Victims' Rights Reform Act' builds upon an already rather elaborate system of victim protection that has been introduced and reformed several times in the last four decades. The modern discussion of strengthening victims' rights first came up in the 1970s and led to the Crime Victims Compensation Act (Opferentschädigungsgesetz). This act provides for compensation of victims of intentional violent crimes if the victim is not able to work or is otherwise helpless because of the crime. This public compensation scheme supplements the existing system of civil damages (where the victim has to claim damages against the perpetrator) on his own risk in civil proceedings without state support). Under the act victims of violent crime receive the same compensation as war victims, eg, treatment and - in the case of permanent damage - a pension. Yet, there is no compensation for damage to property or financial loss. Insofar the

² See Deutscher Anwaltverein, Stellungnahme SN 66/14 of 17.12.2014 (Stellungnahme des Deutschen Anwaltvereins durch die Task Force 'Anwalt für Opferrechte' unter Beteiligung des DAV-Ausschusses Strafrecht zum Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Gesetzes zur Stärkung der Opferrechte im Strafverfahren (3. Opferrechtsreformgesetz)), www.anwaltverein.de/de/newsroom (as of 23 May 2016).



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government does not fully take the place of the perpetrator and is not actually subject to moral reproach.

This development and international influences such as the United Nations' Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985 have led to an increasing interest of legal academics as well as policy-makers in the situation of victims in criminal proceedings since the mid 1980s.

A major step forward was the 'First Act for the Improvement of the Standing of Aggrieved Persons in Criminal Proceedings', the so-called Victim Protection Act (Opferschutzgesetz) of 18 December 1986.³ This was followed by legislation such as the 'Act for the Protection of Witnesses in Examinations in Criminal Proceedings and for the Improvement of Victim Protection' (Witness Protection Act - Zeugenschutzgesetz) of 30 April 1998⁴ and the 'Act for the Improvement of the Rights of Aggrieved Persons in Criminal Proceedings' (Victims' Rights Reform Act - Opferrechtsreformgesetz) of 1 September 2004⁵. In 2009 the 'Act to Strengthen the Rights of Aggrieved Persons and Witnesses in Criminal Proceedings' (Second Victims' Rights Reform Act - 2. Opferrechtsreformgesetz)⁶ was the last major reform before the current 'Third Victims' Rights Reform Act'.

All these pieces of legislation concentrated on expanding victim's rights by improving the level of protection for victims and witnesses and their procedural rights. Until the Third Victims' Rights Reform Act the fundamental role of victims as well as the allocation of roles stipulated in the system of criminal proceedings remained unaffected. The proceedings were constructed around the objective prosecution by the state and the role of victims mainly as (the often most important) witness in a case. Therefore, the aim was to achieve practical improvements for victims without affecting the right of the accused to a fair trial.

³ Federal Law Gazette (Bundesgesetzblatt – BGBl.) 1986, part. I, p. 2496.

⁴ Federal Law Gazette (Bundesgesetzblatt – BGBl.) 1998, part. I, p. 820.

⁵ Federal Law Gazette (Bundesgesetzblatt – BGBl.) 2004, part. I, p. 1354.

⁶ Federal Law Gazette (Bundesgesetzblatt – BGBl.) 2009, part. I, p. 2280.





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One of the main aspects was to improve the right to information about the case and the participation during the proceedings. These rights now include: The crime victim has the status of a witness before the investigation is closed. As such the victim can apply for information regarding whether the suspect is in custody. Moreover the victim has under certain circumstances he/she has also the right to inspect the files or to obtain information from the files and the right to involve a lawyer that may also represent the victim in court. As a witness, the victim will be informed of the day of the hearing. He/she has the right to be accompanied and to be represented by a lawyer. Some expenses are reimbursed if claimed within three months after questioning: travel costs, expenses incurred, loss of time, disadvantages in housekeeping or loss of earnings. After giving testimony, the witness is also allowed to be present during the proceedings even if they are not public (eg, proceedings against juvenile offenders).

In some cases victims or their relatives can join the proceedings as a private accessory prosecutor as soon as the public prosecutor has sent the indictment to the court. The possibility to join the proceedings as private accessory prosecutors is mainly restricted to victims of certain criminal offences against a person, such as sexual violence, bodily injury, trafficking in humans, stalking and attempted homicide, but also open to the victims of all types of criminal offences who suffered serious consequences (Sec. 395 Code of Criminal Procedure). If the victim of a crime is entitled to act as a private accessory prosecutor, a lawyer may already be assigned at public expense during the investigation proceedings. In any case, victims may be supported and represented by a lawyer during the court proceedings. With the status as a private accessory prosecutor the victim can actively join the proceedings with rights similar to that of the prosecution. As there is no time-limit for joining proceedings victims can do so even after the judgment was rendered if they want to appeal it.

Victims also have the right to file a civil suit against the accused within the criminal proceedings in order to claim compensation for damages sustained. This is possible only if the victim has not claimed damages from the offender



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before another court. Within the criminal proceedings, the court will decide on the claim as part of the judgment on the accused's guilt.

Another aspect besides information and participation is victim protection. The Federal Act for the Protection against Violence⁷, in force since 2002, enables courts to pass orders of restraint. This includes barring the perpetrator from access to the victim's place of abode, from trespassing beyond a certain diameter around the victim's place of abode, and/or from coming near the victim or from contacting the victim in any way. Such orders of restraint are not limited to cases of domestic violence but may also be invoked to prevent a perpetrator from stalking another person.

There are special protection mechanisms in place for witnesses. If the confrontation with the accused or the questioning of the witness in the presence of him or his lawyer would cause imminent risk of serious harm the questioning can take place in a different room and can be broadcast into the courtroom. The victim can also be examined in the courtroom without the accused being present; in this case the examination will generally be broadcast to the accused who then can ask questions via telephone or computer. Under certain circumstances, if the testimony is essential and there is a special threat to the victim, the victim and his relatives can be included in a witness protection programme (with eg, the possibility to receive a new identity).

Insofar, the German system offers a number of participation rights mainly in the court proceedings whereas participation in an earlier stage is limited to a very small number of cases. This means, a victim can participate quite actively if a trial takes place. Yet, in the vast number of cases that do not reach the trial stage because the case is dropped for various reasons (eg, a kind of settlement between the prosecution and the accused), the victim is only scarcely involved in the proceedings.

⁷ Gesetz zum zivilrechtlichen Schutz vor Gewalttaten und Nachstellungen (Gewaltschutzgesetz - GewSchG), Federal Law Gazette (Bundesgesetzblatt – BGBl.) 2001, part. I, p. 3513.



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II.3.3.

Italy

Enrico Maria Mancuso

Italy has transposed the directive 2012/29/EU into its domestic system by adopting the Leg. Decree No. 212 of December 15, 2015 '*implementing 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*', which was published in the OJ on January 5, 2016 and entered into force on January 20, 2016.¹ The Italian lawmaker has chosen the transposition technique of amending the existing Criminal Procedure Code (from now on, CPC). In particular, the Leg. Decree No. 212/2015 has amended eight existing articles and has introduced four new articles plus two implementing provisions (from now on, impl. prov. CPC). Notably, the National Implementing Measures adopted by Italy are very scant, but the Ministerial Report explains that: 'Italian law is already strongly oriented towards the recognition of rights, support and protection for victims of a crime; based on a detailed analysis, we deem our legislation to be substantially consistent with the European standards and already including some of the provisions indicated by the Directive'².

Unhappily, it looks like a set of fundamental safeguards was completely left out: signally, the right to access victim support services (Article 8), the kind of assistance offered by the support services (Article 9) and some obligations included in the right to protection of victims with specific protection needs during criminal proceedings (Article 23). In other words, the Decree has not implemented such safeguards nor they were already provided for by the Italian justice system, irrespective of their utmost importance to the European institutions.³

¹ After a short delay: the transposition's deadline was 16 November 2015.

² http://www.governo.it/sites/governo.it/files/REL_ILL.pdf, p. 1.

³ Article 29 Directive requires the Commission to submit a report, by November 2016, assessing the extent of national implementation measures taken including, in particular, the actions taken under article 8, 9 and 23.



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Under this respect, the Leg. Decree No. 212/2015 is a 'missed opportunity' (Bouchard 2016). It is limited to the integration of few, spotted, procedural and formalistic amendments notwithstanding the European standards demand for an all-embracing, substantial protection and care about victims' individual needs in connection with criminal proceedings. Likely, this is due to the peculiarities of the Italian criminal justice system and the complicated role played in it by the victim. First of all, the Italian legislation never say the word, commonly used in the international community, 'victim', which is instead referred as 'person *offended* by the crime', 'person *harmed* by the crime' or 'civil party'⁴ with different meanings and roles. In brief, only the person offended by a crime that has also been harmed can become a *party* in the proceedings, if he or she wishes so. Otherwise, the 'victim' is merely considered as a person involved in criminal proceedings with less powers and rights, without any legal status of a party (Luparia 2012 and 2013; Vassalli 2001). The core provision has to be found in Article 90 CPC, that essentially entitles the person offended by the crime to some rights to be found in the code (for example the right to legal assistance, the right to make a complaint, the right to attend hearings and to be heard in some circumstances, a limited right to challenge a decision to end proceedings and so on) and the right to present written statements and to provide evidence. It is only with the Decree No. 93 of 2013, converted into Law No. 119 of 2013, aimed at combating gender-based violence, that Italy has started to guarantee victims some rights to information⁵.

⁴ In Italian, respectively: 'persona offesa dal reato', 'danneggiato', 'parte civile'. The victim can also play the role of 'complainant' ('querelante').

⁵ A duty has been imposed, for the public prosecution and the judicial police, when acknowledging the *notitia criminis*, to inform the person offended by the crime of his or her right to appoint a defence council and the conditions for the access to legal aid from the State (Art101 CPC); the decree No. 93 also introduced the duty to notify the defence council, or, in case of failure, directly the person offended by the crime, with the notice of conclusion of the preliminary investigations, but only if the investigations were in connection with crimes of repeated domestic violence and stalking (Art 415-*bis* CPC). This first implementation of the victims' right to information however did not sufficiently cover the objectives pursued under Articles 4 and 6 of the Directive.



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Relevance of mediation tools could only be found in the proceedings before the Italian Justice of the Peace (Scalfati 2001)⁶, who can promote the reconciliation between the victim and the offender when the crime is to be prosecuted only upon complaint of the victim. If deemed useful, the Judge can postpone the hearing to this purpose and he can also refer the parties to public and private mediation structures if available. Other relevant provisions are those providing the acquittal for irrelevance of the misconduct (Article 34, Leg. Decree No. 274/2000) and the acquittal following restorative conducts (Article 35 Leg. Decree No. 274/2000).

The recent Law No. 67 of 2014, introducing a new tool already applied by juvenile courts, a singular kind of 'probation' for adults, represents another important step of the Italian criminal justice system in upgrading the role played by victims: the application submitted by the defendant cannot be approved if it does not include, among others, commitments to promote mediation⁷ with the victim (Mannozi 2003; Patanè 2014).

The Leg. Decree No. 212/2015 has implemented the existing regulations with the provisions illustrated below.

First of all, the legislator has amended Article 90 CPC with the further statement that, where the age of the victim is uncertain, the victim shall, in relation to favourable provisions, be presumed to be child (in accordance with Article 24 paragraph 2). Moreover, in case of death of the victim, powers and rights recognised to the spouse have been extended to the person living with him or her in an intimate relationship and on a stable basis, in accordance with Article 2 paragraph 1 letter b) (definition of 'family members').

The decree has also added three new articles to the CPC's section expressly dedicated to the 'person offended by the crime'.

Article 90-*bis* CPC has widened the victims' right to receive information from the first contact with competent authorities and during the proceedings, in order to be able to make informed decision about their participation

⁶ Legislative Decree No. 274 of 28 August 2000.

⁷ It is the first time the term 'mediation' enters the Italian Code of Criminal Procedure.





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(Allegrezza 2012: 1). It substantially reflects the provisions set out in Articles 4 and 6 of the Directive and creates a general right to information.

According to the Decree No. 93/2013, the Prosecutor is now required to inform the person offended by violent crimes about the conclusion of the preliminary investigations and about the request for the dismissal of the proceedings (please note that such rights to information are ordinarily assured only when the person offended has previously asked the Prosecution to be informed).

As a matter of fact, the risk is that Article 90-*bis* will not meet the real expectations created by the Directive for the recognition of a substantial right to understand and to be understood, but will rather result in formal paperwork.

Article 90-*ter* implements Article 6 paragraph 5 of the Directive, recognising the right to be informed in case of escape or release from detention in connection with violent crimes against the person. The text leaves some uncertainties, for Italian practitioners, about the interpretation of the term 'release' (*scarcerazione*), as underlined by the Supreme *Corte di Cassazione*.⁸

Article 90-*quater* is of fundamental importance for our purpose, since it announces the *Leitmotiv* inspiring the core body of innovation introduced by the Leg. Decree No. 212: 'the condition of particular vulnerability' of the victim. The particular vulnerability shall be deduced by the age, the mental conditions, the type and circumstances of the crime; the assessment shall take into account, in particular, if the crime is committed with violence to the person or racial hate or discriminatory motives, if it is related to organised crime, domestic or international terrorism, human traffic, or if the victim is sentimentally, psychologically or economically dependent on the offender. Nonetheless, these requirements seem quite indefinite as well as the identification of who will make the assessment. Since it is unspecified, likely the task will be assigned to the judge, or the prosecutor, without any

⁸ Cfr Corte suprema di Cassazione, Report of 2 February 2016, *Novità legislative: d.lgs. 15 dicembre 2015, n. 212*, p. 11-17.



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involvement of social care services. Such a provision also fails to meet the standards set by Article 23 Directive at the level of particular attention to the *concrete* dimension of the victim's specific needs.

On the basis of article 90-*quater*, the following procedural rules have been added/amended in order to ensure particularly vulnerable victims a special protection during and from the proceedings, in particular from the risk of 'repeated victimisation': Article 134 paragraph 4 CPC now postulates that video recording of the interview of a particular vulnerable victim is *always* permitted, even if it is not absolutely indispensable; and Article 190-*bis* CPC has a new paragraph 1-*bis* stating that the repetition of the interview of a particular vulnerable victim during Court proceedings is admissible only with regard to different facts or circumstances from previous statements made during another hearing, in order to keep the number of interviews to a minimum; during investigative questioning of a particular vulnerable victim, the judicial police must be helped by an expert in psychology appointed by the Prosecution (Articles 351 paragraph 1-*ter* and 362 paragraph 1-*bis* CPC); in order to save the victim from the distress of trial, the Prosecution, pursuant to article 392 paragraph 1-*bis* CPC, can now anticipate the interview of the victim during a special evidentiary hearing (so called *incidente probatorio*), that may take place with protected modalities and outside the Court premises, for example within specialist support structures, if any, or at the house of the interviewed (Article 398 paragraph 5-*ter*); finally, during the examination and cross-examination of a particularly vulnerable victim, the judge can order the adoption of suitable protection measures.

With regard to the right to interpretation and translation (Article 7 Directive), the Leg. Decree No. 212/2015 has introduced within the CPC Article 143-*bis* that provides, free of charge and without prejudice to the rights of the defendant, interpretation - even via distance communication technologies, if possible - for the victim that cannot speak or understand the Italian language, and translation of information useful to the exercise of his/her rights (an oral translation or oral summary may be provided without prejudice to the victim's rights). Moreover, the new Article 107-*ter* impl.

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prov. CPC, ensures the victim who wish to make a complaint, to do so in a language that he or she understands or by receiving linguistic assistance, and the right to receive the translation of the written acknowledgment in a language that he or she understand⁹, but only if the complaint is submitted before Prosecution offices. Article 108-ter impl. prov. CPC implements the indication of Article 17 paragraph 3 Directive and disciplines the transmission of the complaint between competent authorities.

Practitioners might face some difficulties since the Decree does not discipline the procedural consequences resulting from the violation of the new provisions.

Even if the efforts progressively made by the Italian legislator, during the last years, to put in line our judicial criminal system with the supranational standards of protection and recognition of the role of victims in criminal proceedings¹⁰ are commendable, it must be underlined that such efforts have always resulted in targeted intervention in connection with specific crimes¹¹.

The Leg. Decree No. 212/2015, implementing the Directive 2012/29/EU which is widely considered as 'the Statute of victims' rights', has not introduced substantial changes into the Italian criminal justice system and was limited to few, scarcely significant, procedural amendments. The Italian legislator looks unwilling to welcome 'the full procedural emancipation of who holds the stakes offended by the crime, in open contrast with the European aspirations pointed out by the road maps' (Tavassi 2016). In fact, not even after this Directive the Italian law recognises to the victim him/herself the legal status as *party* to the proceedings¹².

⁹ In accordance with Art 5 para 2 and 3 Directive.

¹⁰ Set by the Lanzarote for the protection of children victims, the Istanbul Convention on combating gender and domestic violence, the framework decision 2001/220/JHA on the standing of victims in criminal proceedings, the directive 2011/36/EU on human traffic, the directive 2011/92/EU on combating sexual abuse and sexual exploitation of children and child pornography, the directive 2011/99/EU on the European protection order.

¹¹ See Corte di Cassazione Report, cit., p. 3; De Martino 2013; Cassibba 2014.

¹² However, the Directive did not require such a conclusion.





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Thus, the Leg. Decree No. 212/2015 has essentially confirmed the original system.

Regrettably, not enough attention has been paid to the indications about restorative justice and the creation of adequate victims' support services. In so far in Italy, such offices or structures specifically addressed to the support of victims' needs have not been instituted yet. During the examination of the draft proposal, the Commission for Justice did suggest¹³ to include a provision aimed at creating, within every Court's premises, an '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 Government because of its financial and bureaucratic impact.

We cannot definitely affirm that the Leg. Decree No. 212/2015 has effectively implemented all the goals set by the Directive 2012/29/EU. This fact could trigger disputes against the Italian State, especially by non-resident victims who cannot rely on the minimum standards of protection offered by the Directive or granted to them in their Member State of residence.

Does Italy lay itself open to a new infringement procedure?¹⁴

¹³ The opinion expressed by the II Commission for Justice on 27 October 2015 can be found here:

<http://documenti.camera.it/leg17/resoconti/commissioni/bollettini/pdf/2015/10/27/leg.17.bol0529.data20151027.com02.pdf>.

¹⁴ In October, 2014, the European Commission has already referred Italy to the ECJ for the alleged failure to implement directive 2004/80/EC relating to compensation to crime victims.





II.4.

Victims in International Law: an Overview

Gabriele Della Morte

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 direct to the relation among States, not individual².

Nonetheless, there are instruments from which it is possible to detect the elements that allow to recognise a victim under international law.

We are referring to two instruments, 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 *Serious* Violation of International Humanitarian Law’, adopted by the General Assembly on 16 December 2005 (*emphasis added*)³.

¹ For an introduction to the subject, see generally: Clapham 2006; de Greiff 2006; Droedge, 2006; Shelton 2005; Stoitchkova 2010.

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

³ It is worth to be mentioned that ‘serious violations’ are different from ‘grave breaches’ in international law. In fact, the first terms indicate 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’ is referred to severe violations of humanitarian law accomplished in a context of international armed conflict.



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 victimisation'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.

Different components could be gathered by these principles.

- i) A person is a victim because he or she suffered physical or mental injury, or even an emotional suffering or an economic loss or a substantial impairment of their fundamental rights;
- ii) There are direct victims as well as indirect victims (such as family members or dependant of the victims);
- iii) A person could be 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).

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





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Moreover, even though neither of those two instruments is referred to legal person 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 the Rule 85 of Procedure and Evidence of the International Criminal Court clearly stated that victims may also include organisations or institutions that have sustained harm to some of their properties dedicated to religion, education, art, etc.⁸

The procedural and substantial dimension of victims under international law

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

A) The procedural dimension

Starting from the procedural dimension, it is worth to be noted that articles from 4 to 7 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) as well as articles from 12 to 14 of the Basic Principles and Guidelines (2005) specifies 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 international conventions and declarations adopted at universal level⁹ as well as at regional one¹⁰.

⁸ See International Criminal Court, Rules of Procedure and Evidence, Section III ('Victims and witnesses'), Subsection 1 ('Definition and general principle relating to victims'), Rule 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'.

⁹ See, eg, Article 3 of the The Hague Convention concerning the Laws and Custom of War on Land (1907); article 8 of the Universal Declaration of Human Rights (1948); Art 91 of the



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To summarize, what a victim can do is entitled in the section of the documents dedicated to the '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 judicial as administrative, should be established 'where necessary' to obtain redress¹³, and include formal and informal process¹⁴. This process should be facilitated by: '(a) Informing victims of their role and the scope, timing and progress of the proceedings

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 (always as 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 Like mediation, arbitration and customary justice or indigenous practices. *ibid* Art 7.



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...; (b) Allowing the views and concerns of victims to be presented ...; (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures 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, '[o]bligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws'¹⁶. For 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.

B) The substantial dimension

With regard to the duty to provide redress, the topic of reparation is articulated into different categories that include: (a) restitution, (b) compensation, (c) rehabilitation, (d) satisfaction and, if that is the case, (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

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.





laws to consider restitution as an available sentencing option in criminal cases²⁰. In addition, 'in cases of substantial harm to the environment', restitution consists of into '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 capacity' the victims will be entitled to receive restitution directly from the State²².

The principle concerning the (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: '(i) 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 victimisation'²⁴. Finally, for that purpose, 'national funds for compensation to victims' are encouraged²⁵.

Concerning the (c) rehabilitation, this 'should include medical and psychological care as well as legal and social services'²⁶.

Regarding the (d) satisfaction, this takes into account a large amount of

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

²¹ '[W]hensoever such harm results in the dislocation of a community', *ibid*, Art 10.

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.

²⁶ Basic Principles and Guidelines (2005), Art 21.





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hypothesis, from the 'Effective measures aimed at the cessation of continuing violations'²⁷ to the 'Verification of the facts and full and public disclosure of the truth'²⁸; from the search of the disappeared²⁹, to the official declaration or a judicial decision restoring the reputation of the victim³⁰; from the 'public apology'³¹ to the '[j]udicial and administrative sanctions against persons liable for the violations'³²; from the '[c]ommemorations and tributes to the victims'³³, until the '[i]nclusion of an accurate account of the violations ... training and in educational material at all levels'³⁴.

Lastly, the (e) guarantee of non-repetition are expressly provided – 'where applicable' – in the Basic Principles and Guidelines (2005)³⁵. The measures include: ensuring civilian control of military forces³⁶; ensuring international standards of due process³⁷; strengthening the independence of the judiciary³⁸; protecting in particular some categories such as legal, medical or media, and human rights defenders³⁹; consolidating human rights and international humanitarian law education in all sectors of society⁴⁰; endorsing the observance of codes of conduct and promoting mechanisms for preventing and monitoring social conflicts and their resolution⁴¹; and strengthening for legislative reform that can contribute to fight against gross

²⁷ *Ibid*, (2005), Art 22(a).

²⁸ *Ibid*, Art 22(b).

²⁹ *Ibid*, Art 22(c).

³⁰ *Ibid*, Art 22(d).

³¹ *Ibid*, Art 22(e).

³² *Ibid*, Art 22(f).

³³ *Ibid*, Art 22(g).

³⁴ *Ibid*, Art 22(h).

³⁵ *Ibid*, Art 23.

³⁶ *Ibid*, Art 23(a).

³⁷ *Ibid*, Art 23(b).

³⁸ *Ibid*, Art 23(c).

³⁹ *Ibid*, Art 23(d).

⁴⁰ *Ibid*, Art 23(e).

⁴¹ *Ibid*, Art 23(f-g).



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violations of international human rights law and serious violations of international humanitarian law⁴².

The right to redress and reparation

In general terms, a large number of human rights bodies, as well judicial as quasi-judicial, envisage the possibility for the victim to make a claim. It is sufficient to recall the Human Rights Committee⁴³, the Committee on the Elimination of Racial Discrimination⁴⁴, the Committee against Torture⁴⁵, the Committee on the Elimination of Discrimination against Women⁴⁶.

In any case, the most important contribution to the progress of the definition of the concept of 'victims' – apart from the European Union Directive on Victim, which is the subject of the present research – derive 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 organs as such as Inter-American Court of Human Rights and finally to the African Commission of Human Rights.

Starting with the European Court of Human Rights, the definition of 'victim' elaborated by the judges sitting in Strasbourg has recognized several stages of evolution that will be examined in the following steps of the present project. One of the topics directly connected to the subject of the research is, for example, the attitude of the European Court of Human Rights on patients who had been contaminated through blood transfusions. We are

⁴² *Ibid*, Art 23(h).

⁴³ Under the First Optional Protocol of the International Covenant on Civil and Political Rights (1966).

⁴⁴ Is the body of 18 independent experts that monitor the implementation of the Convention on the Elimination of All Forms of Racial Discrimination (1965).

⁴⁵ Is the body of 10 independent experts that monitor the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

⁴⁶ Is the body of 23 independent experts that monitor the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979).





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referring, eg, to *G. N. and others v Italy*, a judgement delivered by the Court on 1 December 2009⁴⁷. The case, concerning the discriminatory treatment in contaminated cases, concerns Italian nationals that have been sick by viruses – such as HIV – because of the transfusion of infected blood during medical treatment. Moreover, there is a rich jurisprudence of the European Court of Human Rights on the environmental risk taken by the States⁴⁸. A large number of these cases concerns the responsibility of the State to have allowed the establishment of some companies on their territories. These companies did not pay attention to the environment, as they should have. As a consequence, they caused health trouble to the local population and the European Court condemned States that had lacked vigilance or that had not provided effective remedies.

The Inter-American system of protection of Human Rights, as well the Commission as the Court have developed an interesting and rich practice on the subject, especially in relation to the rights of the indigenous people⁴⁹.

Finally, it is to be noted that also in the African system of protection of human rights there is a growing attention to this kind of problems. It is sufficient to quote – as an example – a case in which the African Commission on Human and Peoples' Rights found that the Nigerian military government had exploited oil reserves through its relationship with Shell Petroleum Development Corporation with no regard for the health or environment of

⁴⁷ *G. N. and others v Italy* (App No 43134/05) ECHR 1 December 2009.

⁴⁸ See, as an example, *Guerra v Italy* (App No 14967/89) ECHR 19 February 1998. The case regards the effect of toxic emissions on applicants and their right to respect their private and family life; more specifically, it regards the failure to provide the local population with information about the risk and how to proceed in case of accidents nearby the chemical factory. The Court holds that Italy did not fulfil its obligation to secure the applicants' right to respect their private and family life, in breach of Article 8 of the Convention, and there has been a violation of that provision.

⁴⁹ Moreover, in 1990 the Commission has established a special *Rapporteur* on the Rights of Indigenous Peoples with the mandate to coordinate the actions in this regard.





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the *Ogoni People*⁵⁰.

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 the judges' power to order a convicted person to pay compensation at the end of the trial. The victims that will take advantage of this compensation could be individual or collective, depending on the Court. Reparations may include both monetary compensation and non monetary (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 the reparation, in the case that the convicted person does not have sufficient resource to do so, States Parties to the ICC Treaty have established a special fund (the: 'Trust Fund for Victims'⁵¹).

Conclusion

As it is stated into 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

⁵⁰ See *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*. In a decision on the merits, the Commission has stated that Nigeria had violated the African Charter on Human and Peoples' Rights and called to cease The Nigeria attacks against Ogoni people. See African Commission on Human & People Rights (ACHPR/COMM/A044/1 *Communication 155/96*) 27 May 2002.

⁵¹ Under Art 79, para 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 para 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 experience of this kind in the global struggle to end impunity for the most serious crimes.



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victims, survivors and future human generations and reaffirms international law in the field’.

Today, we are observing an increasing recognition of the rights of victims in international law. This increasing recognition is represented by the approach of the human rights judicial, and quasi-judicial body, that are enlarging the protection offered to the victims, especially in the field of gross violation of human rights and in the field of the serious violation of humanitarian law. Moreover, even if the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the Basic Principles and Guidelines (2005) represent soft law instruments that are not formally binding for the States, the principle enhanced in those instruments are orienting the practice of the States.



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II.5.

The 'Business and Human Rights' Perspective

Marc Engelhart

In recent years, the perception of victims of criminal acts has changed. Victims are usually considered to be a small part of the criminal justice system, but they become the main focus if one views them from a human rights perspective. Among possible human rights violations, the ones due to criminal acts are considered particularly serious, especially if they have severe consequences for the victims. Special attention is being paid to the victims of corporate wrongdoing and has led to various measures being taken mainly on the international level. This development has several grounds:

The first reason is the far-reaching recognition of human rights since WWII. Human rights are now considered to be universal and to provide a person with an inherent right because he is a human being. Insofar, this inherent right is independent of recognition by a state and also applies in circumstances in which a state is not able or willing to enforce human rights. It follows that human rights must nonetheless be respected by other countries than that of the person's origin, regardless of the situation at hand. The types of human rights recognized by international law are not undisputed. Those that are well recognized are the rights of the first generation (civil and political rights) developed from the time of Enlightenment, including the main rights against state power. More disputed are the rights of the second generation that include economic, social, and cultural rights (right to subsistence) and those of the third generation that

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include solidarity rights (right to peace, right to a clean environment). The rights of the second and third generations are very important in the context of economic activities and are the driving factor behind the development of holding corporations responsible (see below).

Whereas the above-mentioned rights as such are of universal nature, the mechanisms to enforce them are not. Especially the possibility for affected individuals to claim a violation in court or in a similar proceeding very much depends on where the person lives, whether the respective state is party to an enforcement mechanism (eg, the European Convention of Human Rights with the European Court of Human Rights), and last but not least on the right in question. International law, which traditionally only considered states to be possible addressees, is still developing with regard to granting rights to individuals as well as creating obligations for them.

The second reason is the increasing importance of corporations and their transnational activities. Globalization has made transnational trade and business activities in foreign countries commonplace. Multinational companies with enormous economic power and employing large numbers of people in different jurisdictions dominate many markets. Some of these companies have budgets exceeding entire state budgets in smaller and not so developed countries. Insofar, transnational business activities have become the main feature of the world economy.

The third reason, ultimately, is the growing awareness of the consequences if companies make use of the possibility to produce cost-effectively in states where wages are lower than those in the state of origin. This is not problematic per se but becomes a problem if working conditions and the legal environment are weaker than the standards of the state of origin and if the companies exploit these conditions for their profit. A special problem that is no less serious concerns investments, manufacturing, and business connections in areas of conflict (eg, mining in civil war regions). Very often, the conflict is between companies from industrialized nations doing business in developing countries. The major abuse of corporate power is in the area of human rights violations, eg, with regard to labor law, environmental protection, and health.



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These developments led to a movement to prevent corporate harm that began primarily in the 1970s. It was influenced by economic developments like the 'New International Economic Order' improving the terms of trade between industrialized and developing countries,¹ but also by the emerging discussion on business ethics and compliance. The latter two had a great influence on the establishment of preventive measures by companies and led increasingly to legal requirements for companies to take up compliance measures in recent years.

In the beginning, the improvement process was ambitious but only partly successful. The Draft United Nations Code of Conduct on Transnational Corporations was never officially passed.² This was not only due to the opposition of many industrialized countries fearing restrictions on foreign investments as well as to that of developing countries fearing the loss of sovereignty over natural resources. It was also due the fact that the Code provided for mandatory requirements as well as voluntary guidelines. The binding nature for companies was not seen as a proportionate measure fitting into international law and was instead regarded as being too 'tough' on corporations.

Pure soft law measures were more successful as they merely provided guidelines for companies as to what rights to respect and how to behave ethically. In the 1970s, the Organisation for Economic Cooperation and Development (OECD) adopted the Guidelines for Multinational Enterprises (21 June 1976). Several revisions have taken place, most recently in 2000. It includes a general obligation on multinational enterprises to 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.' It also provides for a supervisory mechanism if states promote the implementation of the guidelines. This mechanism is of no binding nature but nonetheless helpful in creating public awareness and a certain amount of pressure. Also in the

¹ See, eg, the Declaration for the Establishment of a New International Economic Order by the United Nations General Assembly (1 May 1974, UN Doc. A/RES/S-6/3201)

² U.N. Code of Conduct on Transnational Corporations, 23 I.L.M. 626 (1984).



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1970s and similar in nature, the International Labor Organisation adopted a non-binding instrument, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.³

It was not until the end of the 1990s that the question was posed in light of the far-reaching effects of economic globalization as to whether some more binding mechanism were needed in order to promote the human rights accountability of transnational corporations. At the 1999 Davos World Economic Forum, UN Secretary General Kofi Annan initiated the Global Compact Initiative in the areas of human rights, labor, the environment (and, since 2004, corruption). The ten principles included are based on the Universal Declaration of Human Rights, the International Labour Organization's declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption. Participation is voluntary, but positive publicity is part of the concept and has led to a multitude of state and corporate actions.

The UN did not stop at this point, but kept the topic on its agenda in order to develop further compliance mechanisms. In 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights (within the UN Commission on Human Rights) adopted a resolution on the 'Norms on the Human Rights Responsibilities of Transnational Corporations and other Business Enterprises.'⁴ Although received with some scepticism, the topic was on the official agenda and, in 2005, the UN Secretary General, on the suggestion of the UN Commission on Human Rights, appointed John Ruggie as its Special Representative on the issue of human rights and transnational corporations. After in-depth research and consultations with many stakeholders, John Ruggie presented a new approach that did not build on the 'norms.' He relied instead on a three-tier strategy for business and human rights: protect (responsibility of states), respect (responsibility of

³ Adopted by the Governing Body of the International Labour organisation at its 204th Session (November 1977), it was revised at the 279th Session (November 2000).

⁴ Resolution 2003/16 (14 August 2003), U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003).



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companies), and remedy (effective possibilities to remedy damages, etc. suffered by victims of human rights violations).⁵ The Human Rights Council unanimously welcomed this framework in 2008 and provided the first authoritative recognition of it.⁶ It also extended the mandate of John Ruggie to further develop the framework. In 2011, John Ruggie presented his final concept.⁷ The Human Rights Council adopted the framework in June 2011 and established a Working Group on the issue of human rights and transnational corporations and other business enterprises.⁸ The Council also decided to create a multi-stakeholder Forum on Business and Human Rights, to be held annually under the guidance of the Working Group.⁹ Part of the concept is to promote and implement the principles with national action plans.¹⁰ National action plans include information, stakeholder consultation, assessments and evaluations, all with the aim of improving state and corporate activities with regard to the protection of human rights. One aspect, eg, is supply chain management: how can companies in Europe prevent human rights violations by their contractors in foreign (especially developing) countries?

⁵ See 'Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, U.N. Doc. A/HRC/8/5 (7 April 2008).

⁶ Human Rights Council, Resolution 8/7 (18 June 2008).

⁷ Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, U.N. Doc. A/HRC/17/31 (21 March 2011).

⁸ Resolution of 16 June 2011, U.N. Doc. A/HRC/Res/17/4 (6 July 2011). For the Working Group see

<http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>.

⁹ See the website of the forum

<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx>.

¹⁰ For an overview, see

<http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.





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With the currently existing UN framework, the issues of human rights, business activities, and preventive measures (such as compliance concepts) have been merged. The main responsibility rests with the states, especially in creating new legal obligations. The framework does not generate new legal obligations for companies. Yet, with the states tasked to care for and implement human rights protection measures, the pressure is now very much also on the companies. Evaluations, enhanced scrutiny, and public attention provide enough incentives for companies to take up action. For the victims, this development not only shifts the focus to their individual rights and the violations of such rights by companies but also combines it with the question of adequate remedies. This is a major incentive for legal systems to critically analyze their existing measures, eg, for victims of corporate violence.



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PART II

VICTIMS OF CORPORATE VIOLENCE

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Chapter III

Corporate Violence's Impact on Victims: the State of the Art

III.1.

An Overview of Criminological and Victimological Literature on Harms and Needs

*Arianna Visconti**

Corporate violence: a challenge

The fact that 'managers murder and corporations kill' (Punch 2000) has been acknowledged by 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 in the course of the legitimate business activity of such economic organizations, 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

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





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productions or waste disposal (Clinard 1990; Punch 1996; Stretesky and Lynch 1999; Friedrichs 2007; Tombs 2010). 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 harms to natural persons' health, physical integrity, or life.

Such definition, albeit apparently simple, conceals a wide range of problems which have affected and still affect attempts at studying, methodically and in depth, such phenomenon, as well as its human costs, and which also account for the scarcity of victimological data that also our project had to deal with. This paragraph 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 about the very 'criminal' status of such behaviours, on one hand, as well as about their fitness to be qualified 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 debate, the usual 'pulverisation' of corporate crimes and corporate harms, their basic 'everyday incidence' in less apparent forms (Tombs and Whyte 2015: 37) contributes 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 psychological impact on the affected people.

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 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



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under the law (which does not always happen), are often qualified as mere administrative or civil offences, or, if criminal, as misdemeanours, or are drafted as *mala quia prohibita* (i.e. 'artificial', 'regulatory' offences) very complex to understand for the general public, or have been criminalized just recently, or are not uniformly criminalized under different national legislations, or – in many cases – are not actually enforced and thus non-existent to 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; Moore and Mills 1990; Stitt and Giacomassi 1993; Croall 2001; Tombs and Whyte 2006; Friedrichs 2007; Croall 2009; Hall 2013; Skinner 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 harms – to life, health, and physical integrity – that 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, organized crime and terrorism (Stretesky and Lynch 1999; Punch 2000; Friedrichs 2007; Tombs 2007; Bisschop and Vande Walle 2013; Pemberton 2014; Walters 2014; Lynch and Barrett 2015). This is basically due to the structural traits of this specific kind of violence. Firstly, it is generally indirect, as it does not result from interpersonal aggressions, but, instead, from complex organizational policies, decisions and actions, undertaken on behalf of the corporation and in the course of its legitimate business activity, which just indirectly result in the exposure of people to harmful consequences. This also means that such harmful consequences are quite often removed in time (and, in some cases, this temporal distance can amount to years or even decades, as it 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



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so insuperable that it leads to the failure, or even the abandon, of criminal prosecutions. This same organizational 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 harm to 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. Decisions which, as said, arise from complex corporate hierarchies and procedures that also often make almost impossible to attach responsibility to just one or few clearly identifiable individuals, as it is instead the rule with 'common' violence. A complexity and opacity that can be even more greatly increased by the ever growing globalization of production and distribution, where complex inter-organizational relationships are now the rule, leading for instance to long and transnational supply chains where pressures from the top corporate actors to keep costs low impose ever tighter margins down the chain itself, thus at the same time increasing criminogenic pushes on actors lower in the chain and passing down 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. On one hand, some of the 'structural' traits of these crimes also affect their reporting and thus the availability of official statistics, as well as 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 put it in relationship with its causes, or to recognize its relevance under criminal law (when provided for), any attempt at studying the phenomenon will be severely affected by a huge dark figure. This, in turn, contributes to accounting for the comparatively scarce criminological and victimological literature that was available to us, for the purposes of extracting useful data on victims' needs with specific respect to corporate violence. Finally, the lack

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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, and by themselves – which, in turn, affects propensity to report and, as we will see, the scope and features of the suffered harms and of the victims' consequent needs.

Corporate violence harmful effects

Harms arising from corporate violence can be basically connected with three main fields of corporate activity, and can be classified under three different typologies according to the consequences of such activities – consequences which, in turn, can take different forms for different kinds of corporate violence.

Firstly, we have harms 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 (Donohoe 2003; Tombs and Hillyard 2004; Friedrichs 2007; Rosoff, Pontell and Tillman 2007; Hall 2013; Skinnider 2013; Walters 2014; Lynch and Barrett, 2015; Tombs and Whyte 2015). Of course, environmental harm does not arise only from corporate actions (individual behaviours, small farming, State-run facilities, etc., also account for a fair share of global pollution), nor does it encompass only harms to humans. However, for the purposes of our project, 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, contamination of waters and/or of soil.

The main common feature of the harms related to these offences rests on their particularly large extent and duration. Such contaminations, both when due to long-term industrial activities (such as in the asbestos cases mentioned further on in this report; see also Clinard 1990; Rosoff, Pontell and Tillman 2007), and when due to sudden and devastating 'accidents'



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(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 populations; indirectly, the contamination has a tendency to enter the food chain and thus 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 illnesses have long latency periods (as it happens, for instance, with asbestos-related mesotheliomas), or may even present themselves in further 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 which, of course, in many cases makes even more difficult to relate 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, 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 (Clinard 1990; Croall 2001; Friedrichs 2007; Rosoff, Pontell and Tillman 2007; Croall 2008; Croall 2009; Croall 2012; Steinzor 2015; Tombs and Whyte 2015). Almost any kind of product can be affected, from motor vehicles (as with the notorious Ford Pinto case: Becker, Jipson and Bruce 2000; Rosoff, Pontell and Tillman 2007) to children toys, from household products to cosmetics, etc.; for the reasons already stated in the Introduction, we will mainly focus on food products as well as drugs and medical devices.

Illegal practices related to food manipulation and commercialization do not always imply risks for human health, of course: many criminal (or civil, or administrative) offences in this field are related to frauds on the origin,



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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 if they are related to harmful consequences to people's wellbeing, we will not take specifically 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), lacking adequate controls on the respect of legal limits for each dangerous substance, or it may stem from intentional adulteration with the purpose of rising 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 the aliments.

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), besides generally involving a plurality of consumers, can be both immediate, as it is generally the case with severe food poisoning due to bacteria or other very toxic contaminants, and deferred, as it is more common with chemicals and some biological elements (such as, for instance, mycotoxins: Wild and Gong 2010), sometimes requiring 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 illnesses 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 (Clinard 1990; Punch 1996; Croall 2001; Friedrichs 2007; Rosoff, Pontell and Tillman 2007; Dodge 2009; Steinzor 2015; Tombs and Whyte 2015), harms to patients' health can originate, once again, from unsafe production procedures (such



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as in the case of haemoderivative drugs discussed further on in this report), as well as from concealment or downplaying of dangerous side effects or flaws (such as in the notorious Thalidomide and mechanic heart valves cases: Clinard 1990; Punch 1996; Rosoff, Pontell and Tillman 2007), and even, in some cases, from downright fraud (such as in the notorious and recent case of breast implants filled with industrial silicone instead than approved medical one: 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 time, once again cases of long-delayed – and, often, of long-lasting – harms are frequent, occasionally (as in the aforementioned Thalidomide case, where the drug produced severe foetal deformities) even affecting further 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 to achieve a declaration of criminal responsibility by any court of law.

Finally, harms to life and health of workers (in the form of both accidents and work-related illnesses), as a consequence of corporate policies, often result from violations of health and safety regulations on the workplace, due to negligence on the employer's part and/or cost-cutting policies (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, Bohle, Quinlan, Kimber, Ngo, Finney Lamb and Mok 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 victims of unsafe working conditions has also been taken into account, as many of the physical, economical and psychological consequences suffered by these victims share common features with those suffered by victims of corporate violence in general.

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 as 'violence' – of course relates to physical 'costs',



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i.e. personal injuries, illnesses, and loss of life (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; Tombs 2014; Lynch and Barrett 2015; Steinzor 2015; Tombs and Whyte 2015). As already stated, these physical harms can vary in magnitude from transient, mild, short-term illnesses to life-long, often disabling, diseases 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 transmission of toxic substances to infants through mother's milk.

Any attempt at measuring the scope of physical costs related to corporate violence is undermined by the aforementioned dark figure, as well as by the underlying problems in reconstructing causal relations 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 deceases yearly due to the same cause in the UK only (Tombs and Whyte 2009; Croall 2010), and an estimate of from 13.200 up to 34.000 yearly premature deaths due (just) to coal fired power plants small particle in the US (Lynch and Barrett 2015); yet 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 harms (or, at least, of the direct and immediate ones): for instance, the already mentioned industrial 'accident' of Bhopal, which occurred on December 3rd 1984, caused, through the release of a toxic cloud of metyl 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

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require medical care are generally recorded, even if lesser (and, likely, more frequent) intoxications generally fail to be reported to the authorities, and/or to be connected to hazardous corporate behaviours (Croall 2010; Tombs and Whyte 2015). Work-related deaths, injuries and illnesses are generally recorded, at least for social security purposes; but, once again, it is often difficult to discern between actual fatalities and harms which are instead the result of health and safety law violations. A comparison provided by Poveda (1994) between work days lost in the USA, 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 lost days, for the latter. Once again, it is all but impossible to extract from such data the exact amount of harms 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 (Tombs and Whyte 2015), causes a far larger amount of deaths, injuries and illnesses than common crime (Tombs 2007).

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 2014; Matthews, Bohle, Quinlan, Kimber, Ngo, Finney Lamb and Mok 2016). Such economic harms are in no way easier to measure than physical ones, both because they are not generally accounted for in corporate balance sheets, being usually conceptualized as 'externalities' (Tombs and Whyte 2015), and because they encompass both direct and indirect costs (Friedrichs 2007). The former are typically defined in terms of the victims' monetary losses, and are usually reckoned in relation with frauds, financial crimes, antitrust violations, tax evasion, and the like. Even if, also with respect to this kind of harms, 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: another comparison provided by Poveda (1994) give us an example of such disproportion, by matching the five billion dollar losses due to conventional crime in the USA



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in the year 1990, against the 200 billion dollar losses due to the (sole) Savings & Loans scandal in the same period (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 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 of at least €329 billion and possibly of up to €1.053 billion), comprehensive of the negative economic impact of a number of harmful air pollution consequences which include 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 one tenth of such costs, its impact would dwarf that of all indirect costs of street crime.

Finally, 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, Bohle, Quinlan, Kimber, Ngo, Finney Lamb and Mok 2016). Literature is particularly scarce with respect to such, and the majority of it focuses besides on victims of frauds, instead than of corporate violence (with some exceptions for victims of workplace offences and for residents of highly



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polluted areas). Yet we assume 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.

Corporate violence victims

As we have already observed, the existing (and per se scarce) literature on corporate violence mainly focuses on the study of its harmful consequences as a social phenomenon (which they certainly are), to be analyzed in its general traits and measured, or at least estimated, as precisely as possible in its overall dimension. This means that even more rare are studies and researches that instead focus on the individual perspective of the single victim, with their specific losses, sufferings, fears, needs, etc. – exactly the perspective which is most directly relevant in view of an effective implementation of Directive 2012/29/EU. 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.

A first trait common to all white-collar and corporate crimes is related to an element of ‘violation of implied or delegated trust’ that they share due, basically, to the great asymmetry of information – and, more generally, power – that exists between those (individuals or corporations) that 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, of corporate violence – also implies a breach of (at least implicit) trust against the victim – an element which is certainly absent in the majority of conventional crimes, and which is, instead, immediately apparent in cases of

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product safety violations (imagine for instance a person suffering from an illness that requires the administration of a specific drug, who have no choice but to literally place their health and life in the hands of the manufacturer of that drug), or of violations of health and safety regulations on the workplace by the employer, but that can also be traced in environmental crimes: for instance, residents in an area potentially interested by the emissions of an industrial plant have basically no choice but to trust in the respect of environmental laws on the corporation's part. Thus, it can be expected that, once that a victim of corporate crime becomes aware of the offence they suffered, feelings of betrayal, rage, resentment, frustration and mistrust arise.

This expectation actually receives confirmation by those studies (admittedly few) that are based on interviews to victims of corporate crime (albeit, basically, of financial frauds), in order to analyze 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 grow to engulf all like economic and financial organizations 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. Such sentiments may be further fuelled by several specific problems that the victims of corporate crime may face while dealing with law enforcement agencies: from a basic difficulty in picking the right one in a maze of public bodies with overlapping competences, to a generally bureaucratic and indifferent attitude of public officers towards them; from a lack of effective support programs, to a general – institutional as well as public – perception of them as less 'deserving' 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 at the hands of the legal system, due to a general feeling of being 'second-rate' victims or just 'bureaucratic files',



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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 by public agencies (by way of failures in providing information, support, counselling, and legal 'closure') greatly contributes to the victims' distress and appears associated with increased likelihood of developing a mental health condition by the affected persons has emerged from a recent survey of bereaved family members of workers killed on the job in Australia (Matthews, Bohle, Quinlan, Kimber, Ngo, Finney Lamb and Mok 2016).

Sentiments of shame, guilt and self-blame are also reported, particularly by victims of frauds (according to the common perception that they, at least to some extent, 'contributed to' or at least 'precipitated' the crime), in many way similar to those experienced by victims of rape (Levi 2001), with whom victims of frauds appear also to share higher rates of major depressive episodes and generalized anxiety disorders after the crime (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 it 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') and illnesses or harms suffered by consumers (*caveat emptor!*) (Tombs 2007; Croall 2008; Bisschop and Vande Walle 2013). Actually, bereaved family members of people victim of work-related deaths appear to 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, Bohle, Quinlan, Kimber, Ngo, Finney Lamb and Mok 2016).

The quality of life of victims of corporate violence can obviously also be severely affected by a set of more immediate and practical negative



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consequences (Shover, Fox and Mills 1994; Croall 2001; Levi 2001; Friedrichs 2007; Rosoff, Pontell and Tillman 2007; Croall 2010; Snell and Tombs 2011; Matthews, Bohle, Quinlan, Kimber, Ngo, Finney Lamb and Mok 2016): suffered harms 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, 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 incomes, is a traumatic event for their relatives, which can be further exacerbated by the failure to get the 'truth' about causes and responsibilities, which is an all too common occurrence in cases of corporate violence (Snell and Tombs 2011; Matthews, Bohle, Quinlan, Kimber, Ngo, Finney Lamb and Mok 2016), as already noted above. In some severe 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, 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 caused harm to themselves or their relatives and friends; an occurrence which is particularly likely when multiple vulnerability factors happen to add to each other, as it 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 it happens, for instance, with the marketing of unsafe drugs or medical devices specifically



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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).

On the whole, these preliminary data drawn from criminological and victimological literature hint at a series of needs of corporate crime and corporate violence victims (Croall 2008; Matthews, Bohle, Quinlan, Kimber, Ngo, Finney Lamb and Mok 2016) which an effective implementation of Directive 2012/29/EU should provide for: a need for specific psychological and emotional support that is in no way lesser than the one experienced by victims of 'common' crimes and 'true' violence; an increased need for information and legal support, to deal with the greater legal and regulatory complexities implicit in these offences, as well as with the great disproportion of resources that opposes victims and offenders in this area; a need for specialized medical and social support, 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, with a specific need for preventive screening; a general need for research and advocacy with respect to a typology of crimes that remain opaque and underestimated for both the general population and public institutions. Finally, it does not appear too far-fetched to suppose that these victims, whom society and institutions often fail to recognize and treat as such, may experience on occasions an even greater need of recognition of their 'victim status' and of the wrongs they 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 victimisations, will happen) than on instrumental outcomes (Garrett 2014; Hall 2016).



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III.2.

Vulnerability and Needs of Crime victims in General and of Corporate Violence Victims in Particular

Katrien Lauwaert

Vulnerability

In victim related research, practice and policy, it is common to dedicate specific attention to certain groups of victims which are deemed 'vulnerable'. In what follows we explore the different meanings of vulnerability and how this concept relates to victims of corporate violence. Vulnerability is first of all linked to the notion of *'the ideal victim'*. This phenomenon has been described in various ways (Christie 1986; Fattah 1991). In essence, however, ideal victims are 'weak persons of flawless behaviour and character' (Strobl 2010: 11). According to Whyte (2007: 447) 'the ideal victims is weak; the victim is carrying out a respectable project; the victim is in a place where she could not possibly be blamed for being; the offender is identified, physically dominant and bad; the offender is unknown to the victim; and finally, the victim needs to be unopposed by counter powers strong enough to silence the victim'. Groups who correspond to the profile of the 'ideal victim' obtain public sympathy easily and they attract media attention. They are seen as vulnerable groups and are therefore more likely to receive extra attention and protection. Since the development of the concept of ideal victim we have certainly moved beyond the stereotype of 'the little old lady being robbed by a stranger'. Victimological research has

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uncovered (many) other vulnerable groups in society, such as victims of hate crime or homophobic crime (Rock 2007). Nevertheless, victim hierarchies still prevail. The profile of victims of corporate crime rarely matches unambiguously the ideal victim and this is probably one of the reasons why they are not 'most readily given the complete and legitimate status of being a victim' (Whyte 2007: 447).

In victimological literature we encounter vulnerability also in the sense of victimisation proneness, which is people's *risk* or likelihood of becoming victimised. Vulnerable people run a higher risk of becoming a victim. A lot of empirical research has been conducted to identify factors related to a higher risk of victimisation. Lifestyle and routine activities theory have been developed in this vein of research. Gradually more sophisticated versions have been elaborated such as the dynamic multi-contextual criminal opportunity theory which combines the examination of the presence of motivated offenders, the attractiveness of the target and the protection of the target, both at the micro and macro level, to explain risks of victimisation (Goodey 2005, Wittebrood 2007; Green 2007).

Elsewhere victimologists speak of vulnerability as the level of *harm* people suffer when victimisation occurs, for example because of physical or mental weakness or low income. The greater the consequences of the victimisation, the more vulnerable a person is. Pemberton reports that specifically in clinical psychological research the term vulnerability is mainly focused on the risk of developing mental health problems as a consequence of primary victimisation (Biffi et al 2016). Although it is not possible to make general statements about the vulnerability of victims of corporate violence in this sense, the literature indicates that the impact of corporate environmental crimes affect disproportionately the weak, the poor and the powerless (Hall 2016).

The EU Victims Directive, on the other hand, links vulnerability to *the risk of becoming a victim of secondary or repeat victimisation*. It requires that 'victims receive a timely and individual assessment (...) to identify specific protection needs (...) due to their particular vulnerability to secondary and repeat victimisation, to intimidation and retaliation' (Art 22, al 1)



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Secondary victimisation refers to the victim not feeling accepted, understood and/or supported by others. In other words, people's reaction and attitude provoke victimisation for a second time, and cause feelings of rejection and isolation on the part of the victim. Secondary victimisation is often highlighted in relation to criminal justice officials, such as police officers, the public prosecutor or judges. It has much to do with attitude and poor investment in tasks which are now obligations named in the Directive: a respectful treatment of victims, not using jargon in oral and written communication with victims, providing information and focusing on more than just the one aspect of the victim's situation which constitutes the professional's business. The same kind of problems nevertheless also occur in contacts with other professionals such as lawyers, doctors, insurance companies, the media and even in contacts with social services (Aertsen 2002; Wemmers 2003; Condry 2010).

Repeat victimisation refers to the well-established finding that previous victimisation increases the risk of renewed victimisation. This is true for offences which tend to be repetitive, such as stalking or domestic violence, but also for offences that may seem just bad luck. Victimisation research has not only demonstrated that after a first victimisation the risk of being victimized again increases. We also know that a relatively small group of victims accounts for a major part of victimisations, as they accumulate causes of vulnerability. Additionally, victims of one type of crime are also more likely to be victims of other types (Biffi et al 2016; Farrell and Pease 2014).

The goal of the Directive is to promote the identification of people who are more at risk of being victimised again or to be victimised by the attitude of the professionals who treat their case. This should be done through an individual assessment, meaning 'a personalised evaluation taking specifically into account the personal characteristics of the victim, the type or nature of the crime and its circumstances'. This assessment should also establish which specific protection these vulnerable victims would need. The Directive presumes child victims to be vulnerable for repeat and secondary victimisation and names other groups to which particular attention should

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be paid when assessing vulnerability. Amongst them are victims who have suffered considerable harm due to the severity of the crime and victims whose relationship to and dependence on the offender make them particularly vulnerable. Although they are not explicitly mentioned, certain victims of corporate violence certainly belong to these groups.

Needs of victims of crime

The concept of victims' needs must be approached with due caution. It would be erroneous to just present a list of established victims needs and assume that these are applicable to each victim of crime. The reason is simple: victims' needs are not uniform and they (often) change over time. Moreover, needs are not always expressed and may thus stay invisible if not actively explored. Therefore it is indicated to actively offer services and to assess in a proactive manner with the victim what kind of support he/she wants, so that the offer can be tailored to the individual victim's needs. It might be necessary to repeat this in a later phase. Also, it is key to keep in mind and respect that not all victims want external support. From research we know that between 30 and 40% of victims desire some form of support (Aertsen 2002).

Crime has a different impact on different people and each victim deals with this impact in his or her own way. What people need to overcome victimisation is thus extremely *diverse*. Victims' needs depend first of all on the *nature and circumstances of the offence*. The impact of sexual offences, for example, tends to be more serious than the impact of other types of violence. Victims of violent offences for their part, suffer generally more coping problems than victims of property crimes. Victims' needs are moreover influenced by *personal characteristics*. Gender, age, ethnicity, disability and sexuality may make a difference. The victim's *personal circumstances before and after the offence* will also play a role. Previous traumatic events in general and previous victimisation can worsen the psychological impact of a crime. People with a high level of income will bear

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more easily the cost of material damage or medical treatment. All these elements play a role in how people experience and cope with victimisation. They determine people's physical, mental and social power to overcome adverse events (Goodey 2005; Aertsen 2002).

Dealing with victimisation is also a *dynamic process*. Victims' needs (can) change over *time* (Daly 2014). Practical help will especially be appreciated in moments of crisis, shortly after the victimisation. The need for information about insurances and possibilities for legal support, for example, may come up later. Someone who appears to react in a calm and rational way at first, is not always shielded from developing severe psychological problems later on for which he/she will need professional help (Aertsen 2002). Not only time, but also the reactions of the victims' *environment* play a considerable role in the dynamic process of coping with crime. The immediate reaction of bystanders, even if expressed in small gestures of help, contributes to a restoration of trust in the surrounding world and influences coping processes positively. Also being well surrounded after the crime by family and friends who lend a listening ear may considerably support a fast recovery. Professionals and institutions providing services to victims are also part of the 'environment'. Inadequate reactions on their behalf may cause secondary victimisation as we have explained before.

It is finally also important to understand that victims have commonly a rather *passive attitude*. Even if they do need and expect support, they will not explicitly ask for help or take action themselves, or some of their needs may stay unexpressed. This can be explained by the humiliating experience of being harmed intentionally by the wrongdoing and by the impact of the violation of personal integrity. It puts people up with a disturbed self-perception, a loss of trust in the world surrounding them and feelings of shame, all of which translate into hesitation to reach out for help (Aertsen 2002).

Keeping in mind these caveats concerning the diversity of victims' needs, we can nevertheless assert that there is a set of *needs which are frequently expressed* by victims, or at least by victims of conventional crime, who are

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the focal point of most victimological research. Frequently expressed needs concern receiving recognition and information, safety and protection from repeat victimisation and future harm, participation in the reaction on the offence, obtaining financial compensation or redress, practical and emotional support and legal assistance. These categories of needs are complementary and to a certain extent overlapping. Practical support in terms of changing locks after a burglary will for example support people's safety and prevent re-victimisation. Giving recognition is very much linked to providing emotional support.

The need for *recognition* is probably the most fundamental of victims' needs. Recognition is about taking victims seriously, acknowledging the event(s) and its (their) consequences. It involves listening to and hearing their message, and if possible, acting upon it. In the work of professionals a key element for recognition is the so-called presumption of victimhood. This principle mirrors the presumption of innocence attributed to offenders and underscores that it is in the interest of the victim to be treated right away as if the crime indeed took place. Later the court or another instance will determine whether indeed this was the case. Until that moment, an alleged victim should be treated as a victim (Groenhuijsen and Kwakman 2002, Pemberton and Vanfraechem 2015). Recognition and acknowledgement go hand in hand with being treated with dignity and respect.

How to understand that recognition is a key need for victims of crime? People lead their lives built on basic cognitive beliefs. We somehow take for granted personal invulnerability, have a positive self-perception and we build our day-to-day lives on the assumption that the world is meaningful and comprehensible. Victimisation often implies the scattering of these cognitive meanings. People feel they lose control and have a destroyed belief in an orderly world (Spalek 2006). The event upsets the predictability of everyday life and the trust in other people and may lead to an increased sense of vulnerability and insecurity. Intentional wrongdoing sends a symbolic message of degradation. It attacks people's sense of self-worth and self-respect. Redress of basic trust in one-self and the world around us is fundamental for victims to be able to turn the page and fully put the offence

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behind them. Braithwaite and Pettit (1990) call this the restoration of the victim's sense of dominion. Giving recognition is a key element for regaining trust. This can be achieved effectively by the victim's family, close friends, colleagues or neighbours, but also professionals can play a crucial role (Aertsen 2002). They will restore trust through symbolic and tangible acts to show the victim that she is a valuable person and that her dominion is worthy of respect (Aertsen 2002; Strang 2002; Spalek 2006).

Creating *safety* refers to immediate action needed to bring change in a dangerous situation. We can think of rescuing victims from a site after an explosion, or removing an abusive partner from the house. Safety can also necessitate a prolonged protection, for example throughout the criminal trial and even after sentencing execution. This will be particularly the case in situations of continuing and repetitive victimisation and in cases with a high risk of retaliation. Examples of such situations are stalking, chronic forms of domestic and sexual violence and human trafficking. Also situations of organised or state crime require intensified protection, especially when the victims are the sole witnesses against the perpetrators (Pemberton and Vanfraechem 2015).

Victims want *information* about practicalities, possibilities for support and about their legal case. This is a key need. Lack of sufficient information can cause important distress (Pemberton and Vanfraechem 2015). It can be important to inform victims about stress and coping in order to help them understand their own (sometimes unexpected) reactions and to support recovery. Moreover, information about possibilities for practical and emotional support might be extremely relevant. Many victims also want to be kept informed about their case once they filed a complaint, and, importantly, they want to stay informed throughout the various stages of their cases (Strang 2002). Spalek and Strang refer to different studies showing that victims were initially happy with the treatment by the police. Subsequently the satisfaction started to decline due to a large extent to a lack of information about the progress of their cases. Also, when the victim was not needed for the criminal investigation, for example when the offender pleaded guilty, the victim was considered as redundant and

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information provision about the progress and outcome of the case to the victim was not organised (Spalek 2006; Strang 2002). For Spalek these examples explain how victims' rights are not necessarily implemented for the sake of victims' needs, but because the criminal justice system is dependent of the victim's participation for reporting and investigation of cases and as providers of evidence in court. The system tries to satisfy victims as a strategy in the pursuit of the system's own, wider goals: making the system function efficiently and raising public confidence in criminal justice. The risk then is that the system will let the victims down as soon as their utility for the system's goals decreases (Spalek 2006). Providing and receiving information only make sense if victims are able to understand the information. This may require translation to a language the victim can understand, but also the use of accessible wording and the assistance of a professional who can explain what is going on in legal proceedings. Finally, also the right not to receive any further information should be respected. Some victims want to leave the criminal event behind and they do not want be reminded of it, because it was either not a major event for them or it continues to be too painful to deal with it (Pemberton and Vanfraechem 2015).

Practical assistance can refer to very different actions. Victims may need to arrange for immediate reparation work, they may need urgent or longer term medical help, they may need support to do administrative paper work (insurances, renew identity papers...), they may need transport to get home or a translator to understand and be understood. Although these may seem rather minor services, they can play a key role in restoring trust shortly after the victimisation.

Emotional support relates to the process of dealing psychologically with the crime. Victims need a good first reception in which recognition is a key factor. Besides that, needs for emotional support vary considerably. One person can be relatively unaffected by a crime, while another person, victim of a similar crime can be overwhelmed by what happened and suffer from fear and depression over an extended period of time. This means that a first reception of good quality or a short term support can be sufficient for some,

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while long term specialized support will be needed for others. It is furthermore important to keep in mind that devastating emotional or psychological effects can be caused by severe crimes, but even by minor crimes which are experienced regularly or repeatedly. Also, severe emotional effects such as post-traumatic stress disorder may only become visible a long time after the offence has been committed (Aertsen 2002). Even when the emotional effects of the crime are clear, people do not always want support to deal with these effects. Some do, others do not. In order to deal with what happened, some also want to confront the offender with the harmful effects of his behaviour, while others want to avoid contact with the offender by all means.

Emotional support and practical assistance can be provided by relatives and friends, community support services (public or non-governmental) and to some extent by the judicial authorities, in particular by the police shortly after the event or the complaint.

Victims, but certainly not all victims, desire *material or financial compensation* for the harm done. This need is not always limited to immediate and acute damage, for example linked to people suffering immediate physical damage or when the fulfilment of their basic needs is involved (housing e.g.). Also more long lasting damage, such as long term medical costs, immaterial damage or loss of the ability to work may need compensation. Payment by the offender himself is often preferred above compensation paid by the state or compensation schemes, even if this implies receiving a lower sum. Payment by the offender has, besides the material aspect, also a symbolic function. It is symbolic payback to the victim (Strang 2002; Pemberton and Vanfraechem, 2015).

Victims want to be involved in some way in society's reaction to the crime. Being well informed about their case is one, quite limited form of *participation*. Some victims appreciate a more active involvement, for example by acting as civil party in the court case, by telling their story in an oral or a written victim impact statement (Erez 1999) or by confronting the offender directly in restorative justice processes. Being able to have your say as a victim is known to provide a sense of justice. Procedural justice research



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shows that this does not imply that people want to decide over the outcome of judicial decisions. Participation in itself leads to higher satisfaction, even if the outcome does not reflect what the victim had hoped for (Van Camp and De Mesmaecker 2014; Tyler 1990; Strang 2002).

Legal assistance helps victims to understand what is going on in the judicial handling of their case and supports them in taking (strategic) decisions. This is needed as criminal proceedings are often complex, choices that can be made unclear, and technical jargon used in oral and written communication incomprehensible for lay men.

A strand of victimological research explores specifically *victims' justice needs or interests*. The central question then is what victims are looking for in justice responses, what gives them a sense of justice. Drawing from the criminal justice and from the transitional justice literature, Daly (2014) identifies five main justice needs or interests. In other words, a justice mechanism which is doing justice to victims should, according to her, be able to address one or more of the following needs: participation, voice, validation, vindication and offender accountability.

Participation refers to 'being informed of options and developments in one's case, including different types of justice mechanisms available; discussing ways to address offending and victimisation in meetings with admitted offenders and others; and asking questions and receiving information about crimes' (Daly 2014: 388). *Voice* refers to victims being provided with the possibility to tell their story and its impact in a setting where public recognition and acknowledgement can be given. Voice can be linked to participation by speaking or by another type of presence in the justice process. *Validation* is about acknowledgement that the offending happened and that the victim was harmed, without blaming the victim and without sending the message that the situation was somehow deserved. *Vindication* requires actions of other people (the significant others, the community or legal officials) to show that the acts committed were wrong. This can be done by censoring an act, by symbolic or material forms of reparation (apologies, financial compensation, memorialisation...) or by

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standard punishment through the criminal justice system. *Offender accountability* demands that offenders take responsibility. This can be done in an active way, for example through sincere apologies and concrete acts of reparation, but also by accepting censure and/or a sanction. These justice needs can be tested on the traditional criminal justice mechanisms, but also to newer, alternative forms of sanctioning and even on justice mechanisms in civil society, outside of the law context strictly speaking. The justice needs summed up above can be distinguished, according to Daly, from survival or coping needs (related to safety, counselling and basic needs such as food) and from service needs (such as needs for information and support). Depending on the particular victimisation some of these needs will need greater priority than others (Daly 2014).

The Directive picks up many of the possible needs of victims presented above, sometimes as fundamental principles, sometimes in a limited and concise way. Adequate implementation of the Victims' Directive will therefore certainly contribute to improve the plight of victims of crime in criminal justice settings. We should not forget however, that many victims needs can be met fastest and most efficiently in other societal spheres. Huge social capital for dealing with the aftermath of crime is present in the circle of family, friends and colleagues. Moreover there are numerous other professionals and institutions dealing with victims who can all contribute substantially: insurance companies, family doctors, hospitals, local administrative services to name a few.

Needs of victims of corporate violence

In this third and last section we address the specific needs of victims of corporate violence. Victims of corporate violence is one group of victims which has stayed largely under the radar of mainstream victimological inquiry. As Spalek contents, victimological research has focused mostly on conventional crimes and less is known about the experience of victimisation

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by non-conventional crimes such as white collar crime. 'The individual impact of white-collar violations has been seldomly addressed' (Spalek 2006: 59). Specifically for victims of environmental crime Hall (2016: 104) points out that 'at present we are faced with an almost total lack of empirical research investigating the needs of victims of environmental crime, and what such victims might actually want from a criminal justice (or other) process'. These shortcomings in victimological research do have an impact on policy and practice as many victimological studies are geared towards acquiring knowledge of victimisation in order to support effective responses to victims' needs (Spalek 2006; Skinnider 2011; Pemberton 2016). What follows is therefore inevitably exploratory and at least partly hypothetical in nature. General victims needs (as described above) can provide a basis to start from. Comparisons with victims of other situations of collective victimisation can also contribute to the reflection. Moreover the typical characteristics of the corporate violence victimisation, will provide further elements of particular attention.

A preliminary issue which needs to be addressed is the *identification* of those who have been harmed by corporate violence *as victims of crime*, both by themselves and by society. Intrinsic qualities of corporate violence hinder understanding it as a crime. People are not always aware that they have been victimised, or the victimisation appears a long time after the acts causing it, so that the link with the harmful behaviour is not always apparent. Additionally, the source of the harm can be unclear as well as who is responsible. It is also a typical characteristic of corporate violence that the harm done is not interpersonal or direct, but rather indirect and the consequence of decisions – actions or omissions – taken by complex organisations. These are often taken not to harm wilfully, but to make profit. It is therefore common that victims are unaware of the fact that the harmful behaviour is criminal behaviour. Especially when the exposure to the harm was voluntary, for example due to lifestyle or occupation, people will not easily self-define as victims of crime (White 2008; Skinnider 2011; Pemberton 2016).



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The same kind of obstacles will hinder the *recognition* by others in and outside criminal justice. Convincing authorities of the harm and the wrongdoing may need expert opinion. Nevertheless, this recognition is especially needed as self-respect and self-worth may be seriously damaged by the violation of trust of the perpetrator(s) and by sentiments of shame and self-blame in the situations where the victim has actively contributed to the harm, for example by purchasing damaging products or by continuing to work in the plant which produces the harm.

Receiving *information* is a pressing need in case of corporate violence. The etiology of the harm itself may be hard to understand, and big corporations have the means and the support of legal counsel to prevent people from knowing that they are victimised, to hide information about the facts, to conceal their responsibility and to set up complicated defence strategies once they are under legal scrutiny (Skinnider 2011). The asymmetry of information is huge.

When health issues are at stake, *short and long term financial and practical support* can be vital for victims of corporate violence, as well as prevention strategies to avoid re-victimisation and future victimisation of others.

Whether the *participation of victims in criminal trials* effectively meets the needs of victims of corporate violence is a more debated question. From restorative justice research (see e.g. Shapland, Robinson and Sorsby 2011) we know that a major reason for victims to participate more actively and personally in the reaction to their victimisation, is the wish to prevent the wrongdoing from happening again, the wish to stop the harmful behaviour. The struggle they have to go through, can in this way at least serve the good cause of protecting other people of having to suffer a similar plight. What needs to be changed is most often translated in terms of behavioural changes on the part of the offender: getting rid of drug addiction, finding a job, following an aggression reduction therapy... In case of corporate violence, what is needed to prevent repeated offending often transcends however the situation of the individual offender and involves more structural or systemic changes. The criminal justice system is badly equipped



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to initiate those changes. Problems are individualised. Official and state supported victim services equally tend to follow this individual approach. If it takes more systemic changes to prevent further victimisation, so-called unofficial victims movements, such as self-help associations, tend to take the lead. They give victims a voice and press for wider changes. In short, the individualised approach which is dominant in criminal justice should not blur the more structural issues present in the needs of victimisation of corporate violence. Real solutions will then require (large scale) action and structural or cultural changes at the level of businesses and/or legislation. Without these the context may be insufficiently changed as to prevent repeat victimisation.

Other typical characteristics of corporate violence raise further doubts about the extent to which *criminal proceedings* can meet victims' needs. Corporate violence often affects large groups of victims and are complex cases with shared responsibility. Criminal trials are poorly suited to accommodate large groups of victims. This has also become clear in the context of international criminal justice. Because the cases are complex the procedures are long and complicated with victims having to wait for compensation while many of their needs are urgent. Such procedures are also costly and draw money to proving the guilt of a few, while the money available for victims is often limited and/or insufficient. Although the harm done is clear and extensive it is often difficult to proof guilt of individual perpetrators as it is hard to attach responsibility to just one or a few persons, with a high failure rate as a consequence (Hall 2016; Pemberton 2016; Letschert and Parmentier 2014).

This is not to say that criminal proceedings may not meet victims of corporate violence's needs at all. Criminal prosecution may still have an important symbolic function: 'showing that crime eventually does not pay and repairing citizens' shattered believe in a just world' (Pemberton 2016). The social disapproval conveyed through a sentence may also raise awareness about the dangerousness of the acts and the social harm they engender. Additionally, if obtained, a trial may lead to financial compensation (Hall 2016).

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The question then is which other avenues in dealing with corporate crime exist which can replace or at least complement criminal justice so that justice can be done better from a victim's point of view. Staying in the justice sphere victims can turn to *civil proceedings*. These can lead to financial compensation, but present also difficulties. The high cost of these procedures is on victims or victims groups. Class action suits, if allowed, may offer a solution to this problem as they allow large groups of victims to sue a corporation in a joint action. Because of complexity and shared responsibility, establishing causal relations between acts and harms may be difficult and the culpability of specific individuals may be hard to prove. In many European countries victims of crime can also turn to *state funded compensation schemes*. Access to these administrative systems is however often restricted to victims suffering physical injury as a result of violent crime, although there are considerable differences in their scope of application (Hall 2010; Miers 2007; Miers 2014). *Restorative justice* processes is another alternative route. White collar crime has remained relatively untouched in the area of restorative justice (Chiste 2008; Luedtke 2014). Information on the use of it in case of corporate violence is scarce, but there are examples of such cases in New Zealand and Australia (Skinnider 2011; Braithwaite 2016). A specific area of practice and research is environmental alternative dispute resolution (ADR). Much could be learnt from that field, while keeping in mind that it is not focused on criminal cases and that its philosophy and practice may in fact differ significantly from actual restorative justice. Hall (2016) mentions for example that victims themselves get little attention in the literature on environmental ADR. Restorative justice may have much to offer in the field of corporate violence, although there are definitely also many challenges to address (Gabbay 2007; Spalding 2015). As restorative justice processes are fluid and flexible, they can overcome some of the problems which obstruct the more classical avenues: the complex web of responsibilities, causality, and the fact that large number of people and local communities are victimised. The outcomes of circle discussions, for example, can be tailored to concrete needs and

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incorporate a reaction to the harm done as well as measures to prevent further harm to the same and new victims in the nearby future or to future generations.

Applying the general principle of a tailored approach, central in the Victims Directive, and taking into account the characteristics of many corporate violence cases, it would make much sense to provide (long-term) support and restoration packages tailored to the needs of a specific community of victims, be it a geographical community or not (Lee 2009). In case of geographically concentrated pollution Lee suggests personal interviews with victims as an appropriate basis to grasp the social welfare needs of the affected community before formulating appropriate strategies to develop sustainable programmes to deal with the environmental injustice. A holistic approach could be used to elaborate such packages, or at least to gradually develop different actions in view of meeting victims' needs. Besides legal avenues a broad scope of other possibilities should be envisaged. Examples could be drawn from the field of memorialisation. Structural issues could be addressed via parliamentary commissions or other official initiatives for 'digging up the truth' and making recommendations for the future. Inspiration could be drawn from 'responsive regulation' strategies (Braithwaite 2002), which propose gradual interventions going from persuasion of the corporations to make changes, to warnings, civil and criminal penalties and finally licence suspensions and revocations. In such a more holistic approach it is clear that not only criminal justice professionals and victims themselves are to take action. Also local and national authorities have a role to play.

Conclusion

If those who have been harmed by corporate violence are identified both by themselves and by society as victims of crime, they could benefit greatly from a firm implementation of different aspects of the Victims Directive. This is particularly true for issues pertaining to recognition, information and special protection needs due to accumulated vulnerabilities. The lack of self-

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identification as victims of crime, which is often observed, calls for making proactive offers of support to this particular group of victims. There are doubts about the extent to which participation in a criminal procedure is a preferable strategy for them, due to the particularities of corporate violence victimisation. A more holistic approach is proposed, through which the main focus broadens from individual suffering and criminal justice solutions to also include a collective harm perspective and a broad spectrum of strategies for addressing victims of corporate violence's needs.





Chapter IV

Implementing the Directive 2012/29/EU with Victims of Corporate Crime and Corporate Violence: First Findings

Claudia Mazzucato

Building bridges

Borrowing some thoughts from literature concerning victims of international crimes, we too wonder whether until now victims of corporate violence 'have received "second class" treatment' (de Casadevante Romani 2012: 4). And in case they did, we wonder if this is because of the complex forms of their victimisation and the many obstacles they find when accessing justice, or because of corporate violence being one of the 'crimes of the powerful' (Rothe and Kauzlarich 2016; Leonard 2015: 61).

Significant attention has been recently paid by the United Nations and the EU to the violations of human rights in business conduct in the framework of the so-called 'Business and Human Rights'¹, be those violations criminal

¹ See also the updated OECD (2011) *OECD Guidelines for Multinational Enterprises* (OECD Publishing), available at <http://dx.doi.org/10.1787/9789264115415-en> (last accessed on 15 December 2016).





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offences *or not*. Business and Human Rights is a very interesting field for developing policies and practices (including judiciary practices), and a far-reaching field of research. This topic is briefly presented by Engelhart in Chapter I.5.²

Victims of corporate crime and corporate violence, as such, though, are not – not yet, at least – formally recognised as belonging to a ‘vulnerable group’ in neither international nor European (soft or hard) legal sources, despite the studies now available about the specificity of corporate victimisation (*supra* Chapter III) and the many cases occurring worldwide. Nor are these victims quoted among the *examples* of vulnerable ones, as are the cases, instead, of the elderly or of the victims of organised crime or other categories (see *supra* Chapters I, II.1, III.2).

If each victim matters to the European Union (as discussed in Chapters I and II.1), yet victims of corporate violence *per se* do not seem to ever be mentioned in official documents of the EU regarding victims and victims’ rights. The Stockholm Programme³, 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 intended as financial crime, but *not* to the *victims* of it. Similarly, the European Internal Security Strategy (ISS)⁴ 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. The ISS recalls, among the European principles and values that inspired its drafting, the ‘protection of all citizens, especially the most vulnerable, *with the focus on victims of crimes*’ (emphasis added): yet, other groups of victims are made object of an explicit reference (ie, ‘victims

² Section D) of the Appendix collects the major legal sources related to this subject.

³ European Council, The Stockholm Programme – *An open and secure Europe serving and protecting citizens* (2010/C 115/01).

⁴ 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. A renewed ISS





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of crimes such as trafficking in human beings or gender violence, including victims of terrorism who also need special attention, support and social recognition'). Corporate violence, however, seems to perfectly fit 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', as said, which is included in the item dedicated to 'serious crime'; 'cross border crime'; 'violence itself'; 'man-made disasters'. Moreover, connections between corporate violence and typical areas of crime of EU concern may easily exist, as it is the case, for instance, of corporations involved in human trafficking within the broader context of labour exploitation (see, eg, in US literature Rothe and Kauzlarich 2016: 91). It truly seems that corporate violence is 'silent' and 'invisible', and many are still the misconceptions in its regard that appear to perpetuate this situation (Leonard 2016: 62).

There is of course a significant EU commitment in various areas, such as corporate governance and sustainability,⁵ disclosure of non-financial information,⁶ consumers' protection⁷, and others. Additionally, there are

⁵ See, eg, the overview presented in the European Commission's webpage dedicated to 'Company Law and Corporate Governance': http://ec.europa.eu/justice/civil/company-law/index_en.htm (last accessed on 15 December 2016). 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).

⁶ 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, 2012/95/EU Directives, 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. (...)





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many important legal instruments in the fields, for instance, of product safety and of environmental protection, as further described by Manacorda in Chapter V. But there appears to be no connection – or no explicit connection – between European law of victims and European legal instruments in the afore-mentioned corporate-sensitive areas. Briefly, there seems to be a sort of gap between the system of rights set out for victims in the European Union and other sectors of EU legal intervention, which are significantly oriented to risk assessment, crime prevention, criminalisation, but apparently *not* addressed to victims' *direct* protection. Those sectorial European laws appear focused more on *potential* victims than actual victims. Hence, until now only the 2012/29/UE Directive deals with of the entire protection of *actual* victims of corporate crime and corporate violence.

A 'dialogue', we think, is needed not only between European Courts: a normative dialogue is perhaps necessary among European legal sources too. Worth exploring are 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 consumers' 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 an effective protection of actual victims throughout the European Union. These legal 'bridges' and 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

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 15 December 2016).

⁷ For a brief overview of actions and legal tools in the EU, see, eg, the European Commission webpage dedicated to 'Consumers' (consumers' safety; consumers' rights and law): <http://ec.europa.eu/consumers/> (last accessed on 15 December 2016).

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better implement it. Moreover, creating legal synergies may even help overcoming other types of gaps that greatly affect a successful protection of corporate victims, such as the immense problem of scientific uncertainty (for instance uncertainty about the harmful or hazardous nature of a certain 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 the EU judicial cooperation in criminal matters.

In building those bridges, a few warnings are necessary. The 'fundamental' and constitutional stability – and righteousness – 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. And especially the commitment to take victims' rights and victims' protection needs in due consideration, 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 far too well how hard to accomplish this task is. We have also learnt from research how corporate violence is an intricate jungle of problems and, sometimes, an inextricable enigma. Caution and wisdom are required when exploring this field and offering proposals.

Dilemmas on how to respond to corporate violence, in order to better protect its victims, do not seem to find their answers in 'conventional' forms of (criminal) justice: this is one of the first findings from this project so far. The selection of cases of corporate victimisation presented in Chapter VI offers some examples in this respect. Punishment-oriented criminal proceedings and corporate criminal liability-related proceedings often appear ineffective in ascertaining offenses, in holding corporations and corporate offenders responsible, and in preventing further negative consequences for citizens and communities as a whole, and end up being costly also 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 too cause



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secondary victimisation or entail a lack of recognition of the victims of corporate violence with indirect adverse consequences in victims' access to support and welfare/medical services. Probably, in order to implement the Victims Directive in the field of corporate violence a new strategy has to be developed: very provisionally, in fact, it seems that responsive regulation (Ayres 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 certainly worth a deeper scientific investigation and perhaps are also worth experimenting in the European Union.

Revealing common features to better assess/address special needs

The Directive 2012/29/UE imposes a personalised and tailored approach to each single 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 single 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 Article 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 Article 22. If this task is properly and fully accomplished, then one may argue that there is no real necessity to focus on *another category* – or group – of victims.

When scrutinised further, though, the system of support-protection-rights of victims resulting from European law combines the consideration for 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



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EU legal context, in fact, the system set out by the European legislator now comprises:

- a) a set of *common* minimum standards established by the Directive 2012/29/EU;
- b) 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;
- c) a series of 'satellite Directives' concerning '*specific* situations' of vulnerability or of victimisation (trafficking in human beings⁸, sexual offences against children⁹, terrorism¹⁰) (see Chapter II.1).

According to Article 22 of the Victims Directive, in particular, the *individual* assessment of specific protection needs is carried out by taking into account, besides the *unique* 'personal characteristics of the victim' (Art 22(2) letter a) and the 'circumstances of the crime' (letter c), 'the *type* and *nature* of the crime' (letter b) (emphasis added). 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.

⁸ 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*.

⁹ 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*.

¹⁰ Proposal for a Directive of the European Parliament and of the Council *on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism*, COM(2015) 625 final, Brussels, 2.12.2015.





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The knowledge of the criminological and victimological features of corporate crime and corporate violence described in Chapter III enables policy makers and practitioners to at least rely on epistemological 'hints' resumed 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 Romani 2012: 7). Knowledge of common features of the particular corporate victimisation is therefore helpful to put the 'general' Victims Directive *in practice*.

A closer look at the Directive 2012/29/EU with the lenses of corporate violence victimisation

In Chapter II (II.1, II.2, II.3) a brief overview of the provisions of the Directive 2012/29/UE is provided. Our lenses in examining the Directive now change: our interest will be focused on its implementation in the very field of corporate crime and corporate violence. In brief, we will now read through the Directive again, bearing in mind the criminological and the victimological features of corporate crime and corporate violence and the needs of corporate victims described in the previous Chapter (*supra* Visconti and Lauwaert). We will briefly point out (only) those provisions of the Victims Directive that most directly pertain to the scope of our research and of our project. We will select only a few major aspects of the many issues emerging from the perspective of implementing the Directive 2012/29/UE in cases of corporate (violence) victimisation.

Our analysis is based on the following:

- European Commission DG Justice *Guidance Document related to the transposition and implementation of Directive 2012/29/UE*, December 2013;

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- desk research about corporate victimisation (*cf* list of references);
- first findings emerging from the interviews and focus groups which are presently being carried out in the frame of the empirical research of this project and which concern the individual assessment of victims' needs. Interviews and focus groups involve victims of corporate violence, victims associations and professionals having supported victims of corporate violence;¹¹
- findings from the study of some 'leading cases', as further described and analysed in Chapter VI;
- the contributions to our reflection stemming from the project's International Conference that took place in Milan in October 2016. During the conference international keynote speakers, practitioners, corporate representatives and victims associations' representatives were given the floor in plenary sessions and separate workshops.¹²

Since the empirical side of the research focus of this project is still on going, this analysis is to be considered a 'work in progress', presenting the project's 'first findings' 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, yet problems and open issues do not (and must not) prevent from trying to best (and immediately) implement the Victims Directive in the ground-breaking and far-reaching field of corporate violent crimes. Of course, in so doing, a sound respect for both the rights of corporate victims and the rights of the defendants, from corporate legal entities to individual persons having acted in the interest of the corporation, or both, must be constantly sought.

¹¹ The project's second publication (forthcoming) will presents the results of the empirical research. The report will be made available on the project's website (www.victimsandcorporation.eu).

¹² The programme of the International Conference is available at the project website (<http://www.victimsandcorporations.eu/events/international-conference-13-14-october-2016/>).



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The scope of the 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 about white-collar crimes, one of the major problems with these crimes is precisely their being or not being 'crimes' – ie, criminal offenses – in the strict legal meaning of the term (Sutherland 1949). The topic is immensely discussed in the criminological literature and is summarised in Chapter III. 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 offenses 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, instead, international legal documents refer to the broader notion of 'violations of human rights'. The United Nations have coined the notion of 'victim of abuse of power' (Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985) to refer to persons who 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/UE, unless those violations are actually criminal offenses under national law. As stated by Matthew Hall with specific regards to

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environmental victims, 'That the Directive should exclude victims in this way is somewhat puzzling, given the pedigree of this instrument' (Hall 2013: 59).

A second condition for the Directive to find application is that the criminal offenses must be committed in the EU *or* that criminal proceedings take place in the European Union, irrespective, though, of the nationality or residence status of the potential victims. Article 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 needless to say how great 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 very complex to determine *where* a certain corporate offense has taken place and which, consequently, are the applicable law and the Country where the criminal proceeding has to take place.

The notion of victim and their recognition

Provided there actually *is* a national law establishing a criminal offence, the path that victims of corporate violence must take to secure support, protection, and justice is still a long and difficult one.

This topic is particularly dense of philosophical, juridical and practical implications, and we cannot here but sketch a few aspects. *Who* are corporate victims, according to the Directive 2012/29/UE? 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 provisions and the CJEU case law (Gialuz 2015: 22; Mitsilegas 2015: 320; Venturoli 2015: 99; Savy 2013: 11). Others do not.



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The definition of victim as stated in Article 2(1) of the Directive has enriched the Framework Decision 2001/220/JHA regarding this topic. Article 2(1) provides quite a clear definition, although advocates of victims rights stigmatize it as being too narrow, and even more advocates of corporate victims do so (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. Although crime victims are of course sheltered by the protection system designed by the Directive 2012/29/UE as a community of *individuals*, to underline 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/UE (and the 2001 Framework Decision), 'victims' are only 'natural persons' (Article 2(1 a)). Ruling about the Third Pillar Victims' Framework Decision, the Court of Justice of the European Union has excluded in the past that legal persons fall under the notion of 'victim of crime' (Case C-205/09 *Eredics – Sápi* 21 October 2010; Case C-467/05 *Dell'Orto* 28 June 2007). The reasons for this exclusion lie in the intimate bond that links the 'victim' to the *human* experience of suffering from a harm. In brief: corporations are not to be considered victims under the Directive 2012/29. Natural persons being victims of illicit conducts carried out by corporations, instead, are. Yet the Court of Justice in *Giovanardi* (Case C-79/11 *Giovanardi* 12 July 2012) 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 the particular legal system under consideration (Italy), of the liability of legal persons. Corporate legal bodies, on the other hand, may fall under the purview of the broader notion of 'victim' for the (different) purposes of the Directive 2004/80/EC (*Dell'Orto* [58]).

The notion of 'victim of crime' poses other relevant questions that challenge juridical and judicial logics. Oddly, though, there is little analysis

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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 it is discovered and the illicit facts are ascertained in their criminal relevance. And this is the task of criminal justice.

Very interestingly and importantly, Recital 19 of the Directive clearly states that 'A person should be considered to be a victim *regardless of whether an offender is identified, apprehended, prosecuted or convicted*' (emphasis added). There seems 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 counterbalances perhaps 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/UE are those dedicated to the *recognition* of victims. The Directive insists on the importance for the victim to be recognised: Recital 9, Article 1(2), Chapter 4 stress that victims of crime and their protection needs should be recognised.

These articles and recitals of the Directive are very 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).

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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*. Their recognition is frequently at stake: is this substance really toxic? Is this very illness caused by that very exposure to that substance? Within the boundaries 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. 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 access to relevant information, victim support and, when needed, to protection measures.

Awareness of competent authorities, as a part of the duty to recognise victims in order to offer support and address their need, raises nonetheless 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 a single person to ‘uncover’ it, except when it is too late. Protection from repeated or increased victimisation necessarily implies a proactive role of enforcement agencies: such is the case of food frauds, selling of defective drugs or food, exposure to toxic substances, exposure to polluted areas. In the case of corporate violence, delays in reporting criminal offences may depend on the common reasons recalled in Recital n. 25 of the Victims Directive – ie, fear of retaliation or stigmatisation –, especially when the victims is the employee and the corporation is 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 itself.

The right to information

Within the system designed by the Directive 2012/29/UE, information to victims is of the utmost importance. This right of the victim (and the

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correspondent duty of various authorities and services) is in fact central and strategic, being so strictly connected, in the abstract provisions and in practice, to access to support, to justice, and to protection (Chapter 2 of the Directive, but in fact other provisions too 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 'informed choice(s)'.

The right to information is furthermore crucial in the field of corporate victimisation where it has specific and proper facets. 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 beforehand, and furthermore, they need access to the information necessary to 'discover' and/or become aware of their victimisation. 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 to file a report, to make a complaint, to decide whether or not to participate in a criminal proceedings, to accept or not 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 it is strictly linked to another of the main purposes of the Directive, that is the protection of victims from repeat victimisation.

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 controversial scientific information, on the other hand.

Corporate victims' right to information intersects other relevant areas where the 'right to know' is recognised and protected in the European



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Union:¹³ information to consumers (see, eg, Directive 2001/95/EC), access to environmental information (Århus Convention and related Directives), disclosure of non-financial information (Directive 2014/95/EU), to name a few. By matching these different facets, a stronger meaning to the right to information due to victims as individual persons, as citizens and as consumers, is formed.

When implementing the 2012/29/UE Directive to cases of corporate violence, some adjustments to certain provisions are necessary. If is the case, for instance, of the provisions of Article 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 the information of whether the corporate offender has been released (whose detention is not so frequent), is the information about on-going, resumed, or new activities that may again expose the actual or/and potential victims to the same or a novel risk of harm.

The dependence on the offender

Article 22(3) of the Victims Directive attracts the attention on 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

¹³ Cf *infra* Chapter V. Official links to the legal resources quoted are available in the Appendix to this publication (*European and International Selected Legal Resources and Case Law*).



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health/safety regulations in the workplace or of medical devices and drug safety regulations, in fact, almost invariably occur under various forms of dependence of the victim on the (corporate) offender. It can be an economic dependence, as it is the case of the workers, or it can be an even more threatening technological or medical dependence from a device or a drug that, if properly produced, could be life saving.

Crime as a violation of individual rights

The Directive 2012/29/UE sees the crime as a 'wrong against society as well as a violation of the individual rights of victims' (Recital 9). 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 n. 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:

- Article 11, Freedom of expression and information: right to receive information;
- Article 27, Workers' right to information and consultation;
- Article 31, Fair and just working conditions: respect for health, safety and dignity;



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- Article 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;
- Article 35, Health care: high level of human health protection;
- Article 37, Environmental protection: high level of environment protection; principle of sustainable development;
- Article 38, Consumer protection: high level of consumer protection;

The precautionary principle, as outlined by article 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.

Open issues

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

As of *theory*, a provisional set of issues emerge by necessity, although deserving further sustained reflection and being subject to review, due to their complexity and multi-faceted implications:

- a) 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 consumers' protection (see Chapter V) allows a change of perspective. On one hand, this perspective enables to focus on the possible extent of the *actual* mutual enrichment of EU legal resources and, on the other, it provides an interesting overview of possible lacking aspects, or weaknesses, for further legal developments.
- b) Corporate violence shows a very peculiar capability of affecting – and attracting – nearly the whole set of European fundamental rights, values

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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 EU priority of the protection of victims of crime raises the question whether, *having regard to Article 82(2) TFUE* and the scope of its provisions, the establishment of *ad hoc* minimum rules concerning the rights, the support and the protection of victims of criminal offences comprised under the phenomenology of corporate violence is needed, having these particular victims specific needs that might require a more targeted and integrated support than that granted by the sole Directive 2012/29/UE.
- d) Another question raised by the research conducted under this project is whether the phenomena related to corporate violence, and their ensuing forms of victimisation, may fall under the provisions and scope of *Article 83 (1) TFUE*. That is, if corporate violence has 'developed' as one of those 'other areas of crime' meeting the criteria set out in Article 83(1) TFUE, and therefore:
- 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 and of a new 'vertical' directive, having regard to Article 82(2) *and* Article 83(1). This imaginary directive would be similar, as far as nature and broad contents, to the existing Directives concerning human trafficking and the sexual exploitation of children. It could therefore combine criminalisation of offences of corporate violence, envisaging corporate criminal liability,

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crime prevention strategies (including corporate governance, corporate social responsibility, compliance programmes, etc), and victims' 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. 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 on going risks and repeat victimisation could also be addressed.

The political and social implications of these issues, and especially of the last questions, are great. The issues raised are thorny and controversial. There are *pros* and *cons*. Fundamental rights of European citizens and interests of corporations in the EU are involved. The constitutional and European legal basis for such actions are to be carefully assessed. We leave these very delicate questions open, waiting for further discussion stimulated by the analysis stemming from the on-going empirical research¹⁴ and other activities connected to this project.

¹⁴ A research for which we here acknowledge the great and thoughtful contribution of the many persons generously taking part in it, and especially the many victims of corporate crime we are interviewing.



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Chapter V

Synergies and Complementarities between the Directive 2012/29/UE and Other EU Legislation in the Fields of Environment Protection, Food Safety and Drugs Safety

*Stefano Manacorda**

Introduction

Following the EU Directive on the protection of victims¹, '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 (Article 2 - Definitions, para 1.a).

Recital n. 38 adds that: 'Persons who are particularly vulnerable or who find themselves in situations that expose them to a particularly high risk of harm, such as persons subjected to repeat violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crime in a Member State of which they are not nationals or residents, should be provided with specialist support and legal protection.'

No direct reference is made to the victims of corporate crimes, nor in general neither in the following specific sectors: Environment protection, Food safety and Drugs safety. The need then arises to verify if and to which extent they are taken into account in other legal tools by looking at the EU legislation in these areas.

* Irene Gasparini, PhD student, has contributed to the research.

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.



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The following paragraphs identify for each of the three sectors the fundamental principles as enshrined in the Treaties and described in the EU policy before examining the relevant EU secondary legislation. The research is mainly focused on the analysis of the protection granted to basic values of individuals, namely human life and health, which can actually (by harm) or potentially (by risk) be affected by illicit conducts of corporations.

This research is conducted by keeping in mind that the EU Charter of Fundamental Rights of the European Union endorses the right to life under Art 2², and prescribes that all Union's policies and activities ensure a 'high level of human health protection' under Art 35³.

Due to the high complexity of the domains at stake, the following notes are not intended to represent an exhaustive compilation of the EU legislation in the three sectors and their analysis is subject to further review.

Environment protection

The protection of the human being within the EU primary sources.

The pillar objectives of EU Environmental Law are set forth in numerous provisions of the Treaty on the European Union ('TEU') and of the Treaty on the Functioning of the European Union ('TFEU'), which embrace **in a broad concept of environment** not only natural resources but also **human beings**.

The EU **Charter** of Fundamental Rights of the European Union, apart from Art 2 and Art 35 mentioned above, prescribes at Art 37 that a 'high level of environmental protection and the improvement of the quality of the

² Art 2(1): 'Everyone has the right to life'.

³ Art 35: 'Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities'.





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environment' be integrated in the Union policies in accordance with the principle of sustainable development⁴.

Among the primary sources, it is **Art 3 TEU** that sets among the Union's aims the one to promote 'the **well-being of its peoples**' (para 1) and, namely, a 'high level of protection and improvement of the quality of the environment' (para 3)⁵. Moreover, under **Art 11 TFEU** 'environmental protection requirements' must be integrated into the Union's policies and activities.

Among the objectives to be pursued by the EU environmental policy, **Art 191(1)⁶ TFEU** explicitly mentions, in addition to the one of 'preserving, protecting and improving the quality of the environment' and others, the **protection of human health**. Namely, as further specified under para 2 the Union policy on environment (based on the precautionary principle that preventive action should be taken, that environmental damage should be rectified at source and that the polluter should pay) aims at a '**high level of protection**' of human health.

⁴ Art 37: 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

⁵ Art 3(1): 'The Union's aim is to promote peace, its values and the well-being of its peoples'; [...] (3) 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance'.

⁶ Art 191(1): '1. Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change'; (2): 'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay [...]'.
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In line with such principles, the **7th Environment Action Programme** was adopted with Decision 1386/2013/EU on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', which singled out '**health and quality of life**' among the four priority areas of the EU environmental strategy.

The lack of reference to victims in Directives 2008/99/EC and 2009/123/EC

Since the European Court of Justice with its landmark judgment in 2005 paved the way for enforcement of environmental justice through criminal law⁷, at least **two main legal documents providing for criminal penalties for infringements of environmental law** have been adopted. These are the 2008 Directive on the protection of the environment through criminal law (Directive 2008/99/EC, or 'Environmental Crime Directive') and the 2009 Directive on ship-source pollution and the introduction of penalties for infringements (Directive 2009/123/EC, amending Directive 2005/35/EC). The adoption of criminal law in response to breaches of environmental legislation is certainly indicative of the progressive strengthening of the policy of the Union. Nevertheless, both Directives appear to have scarcely paid attention to the status, position and substantive/procedural rights of victims of environmental crime.

The **2008 Directive on the protection of the environment through criminal law** targets unlawful conducts that cause or are likely to cause death or injury, thereby expressly punishing the **endangering or harm to human life and health**. However, despite dealing directly with the impact of environmental criminal offences on individuals, not only does **a definition of 'victim' totally lack** (not to mention, eg, the absence of specific concern for particularly vulnerable categories of individuals and the protection against secondary and repeat victimisation), but also the core protected values to

⁷ Case 176-03, *Commission of the European Communities v. Council of the European Union*, Judgment, 13.9.2005.



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which individuals are entitled are not defined in detail throughout the Directive.

Also in the 2009 Directive on ship-source pollution the notion of 'victim' is completely absent. The only (indirect) mention can be found in the 2005 Directive that the first one amends, whereby it is prescribed that penalties for discharge of polluting substances should not limit the 'efficient **compensation of victims of pollution incidents**' (Recital 9). Reference to 'human health' is also made in the description of polluting substances under Annex II, a residual indication that doesn't aim to provide any substantial protection or set of rights to human beings harmed by ship-source pollution.

The reference to protected values inherent to corporate victims in Directive 2008/99/EC

The absence of a notion of 'victim of environmental crime' in the current criminal EU legislation has led the present research to expand its initial inquiry into EU secondary law that deals in general – *i.e.* not necessarily through criminal law – with environmental damage affecting human beings. Namely the search has targeted the **identification of certain core protected legal values** in the environmental legislation that are of primary importance for individuals actually or potentially affected by illegal behaviours related to environment.

Such an expansion of the inquiry has proven particularly relevant, given that **Art 2 (a)** of the **2008 Environmental Crime Directive** expressly refers – among others – to an extensive **list of EU secondary legislation** (in **Annex A and B** to the Directive) dealing (not necessarily through criminal sanctions) with environmental matters in order to define an unlawful conduct. Such an unlawful conduct may amount to a '**criminal offence**' under **Art 3 (a), (b), (d)** and **(e)** if committed intentionally or with at least serious negligence and actually or potentially causing – among others – the death or serious injury of a person. Therefore, the analysis of the recalled EU legislative documents on environmental protection (although not necessarily 'criminal') is





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indirectly very relevant also to the criminal safeguard as they give specific content to the 'unlawfulness' prerequisite and identify certain underlying values worth of protection.

Two recurring core values are expressly made object of safeguard and are strictly intertwined with the protection of the environment: **'human life' and 'human health'**. At times they are valued independently and parallel to the protection of the environment; other times the definition and remedy of 'environmental damage' itself is anchored to the presence and subsequent removal of a threat/damage also to human life and health.

The protective strategy addressing these values across the EU environmental legislation could be framed according to **two levels** that will be analysed in detail in the following paragraphs. Both well founded on the precautionary principle and a risk-centred protection, a first set of instruments adopted within the EU legislation places a general focus on the **collective dimension** of the protected core values of life and public health, whereas the second strategy consists in a direct safeguard of life and health in their **individual dimension**.

'Collective values': public health and the prevention or minimization of a risk

The analysis of relevant EU secondary law has allowed to identify a first group of legislative texts dealing with the safeguard of human life and health from illicit conducts that may result in environmental damage. Even though such illicit conducts do not specifically qualify as 'criminal' and do not trigger criminal sanctions in the examined legal tools, they provide useful insight into the **core values** on which the EU focuses when dealing with the environmental impact of occupational/industrial activities on human beings.

The protection of the human being at this level is mostly worded in terms of protection of a **'collective'**, public dimension of human life and health. Those values must be shielded from actual or potential **risks**, in accordance with the precautionary principle. In other words, the examined legislation does not focus on the individual as such but on the individual as a member

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of a community, which should be protected against diffused threats to public health.

The recalled Decision 1386/2013/EU adopting the **7th Environment Action Programme** significantly stresses on the minimization, prevention and reduction of significant adverse risks and impacts of certain industrial activities or of waste management on human health and well-being (Recitals 15, 16, 17, 25, 26), bearing in mind the (potential) impact of environmental degradation also on future generations.

a) A first instance of this first-level approach is represented by **Directive 2002/49/EC** on reduction of 'environmental noise' caused, *inter alia*, by air traffic and industrial activity. The Directive aims at preventing and reducing environmental noise 'particularly where exposure levels can induce harmful effects on human health' (Art 1(1)c). In particular, the scope expands to the protection of humans exposed in built-up areas, public parks, hospitals and schools (Art 2(1)), thereby – at least in the last two cases – shielding also vulnerable individuals (patients and kids).

b) A leading example of this risk-based approach is then provided by **Directive 2004/35/CE ('Environmental Liability Directive')** on environmental liability, which is aimed at preventing and remedying environmental damage caused by the operator of an occupational activity under the principle of strict or fault-based liability. The overarching concept of 'environmental damage' in the Directive is specified as including damage to protected species and natural habitats, contamination of waters and land damage. It must be noted that environmental damage caused by a list of potentially dangerous activities is relevant – thus recoverable – if it causes a 'potential or actual risk for human health and the environment' (Recitals 8 and 9).

With specific regard to soil pollution, the Directive defines 'land damage' as 'any land contamination that creates a significant risk for human health being adversely affected as a result of the direct or indirect introduction in, on, or under land of any substances, preparations, organisms or micro-organisms' (Art 2 (1) c), thereby anchoring a specific type of environmental

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damage to a possible negative impact on a human health. Additionally, the Directive encourages land damage assessments to include the extent to which 'human health is likely to be adversely affected' (Recital 7).

c) Another important legal tool is represented by the so-called '**REACH Regulation (EC) No. 1907/2006 on the production and use of chemicals**'. The Regulation prescribes that 'industry should manufacture, import or use substances or place them on the market with such responsibility and care as may be required to ensure that, under reasonably foreseeable conditions, **human health and the environment are not adversely affected**' (Recital 16). Human health is therefore protected through a risk-assessment strategy (entailing information on chemical substances, identification of hazardous properties and risk through the supply chains) based on 'careful attention' to substances of high concern, according to the precautionary principle (Art 1(3)). The aim of the legislation is to prevent and '**minimize the likelihood of adverse effects**' deriving from the exposure to substances caused by discharges, emissions and losses (Recital 70). The Regulation further recurs to the notion of '**unacceptable risk to human health**' caused by the manufacture, use or placing on the market of a certain substance, providing for the substitution of that substance with suitable safer alternatives (Recital 73 and Art 68).

The 'REACH' Regulation singles out among the targets of its protective strategy those human beings (collectively) identified as '**vulnerable**'. If, on the one hand, such a 'vulnerability-parameter' is not well defined (children and pregnant women are the only categories mentioned in Annex I, section on Human Health Hazard Assessment), the Regulation clearly stresses on the importance to ensure a high level of protection for human health, having regard to '**relevant human population groups and possibly to certain vulnerable sub-populations**' (Recital 69).

d) A coherent risk-based perspective is also adopted by the EU as regards the illicit treatment, use, management and shipment of **hazardous waste** produced by all sorts of industrial activities (eg, mining residues, residues of

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industrial processes, oil field slops, as well as agricultural, commercial and shop discards⁸). **Directive 2006/12/EC** sets its aim as the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste (Recital 2) by directing Member States to take all necessary measures to ensure that waste recovery and disposal is carried out **'without endangering human health'** (Art 4).

e) On the same line, **Regulation (EC) No. 1013/2006** provides for an 'environmentally sound management' of **waste**, meaning that all practicable steps should be taken in order to ensure that 'waste is operated in a manner that will **protect human health' by avoiding to endanger it**⁹ (Art 2(8) and Art 49).

f) A similar approach is also adopted by **Directive 2006/11/EC** aimed at reducing pollution caused by the discharge of certain dangerous substances into the **aquatic environment**, whereby 'pollution' itself is defined as the discharge (by man) of substances or energies in the aquatic environment that 'are such as to cause [among others] **hazards to human health'** (Art 2(e)). The Directive further targets among the listed substances under Annex I those that have a 'deleterious effect on the taste and/or smell of the products for human consumption'.

g) In line with the examined legal documents, the 2008 '**Waste Framework Directive'** (2008/98/EC) states that the main object of any **waste policy** is 'to **minimize the [negative] effects** of the generation and management of waste **on human health** and the environment'. In a clearly preventive framework, the producer and the holder should manage waste and by-products in such a way that does **not endanger human health** (Art 3).

⁸ See the list in Annexes to the 'Waste Framework Directive' 2006/12/EC (namely Annex I).

⁹ Case C-487/14, Court of Justice (7th chamber), Judgment of November 16th 2015.



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'Individual values': harm and risk to human life and health

By examining the **Directive on the protection of the environment through criminal law (Directive 2008/99/EC)** the analysis is shifted to a second level of protection of individuals who are negatively affected by environmental impact. Rather than on public health the focus here is on the **direct harm or injury** caused to values such as **human life and health**. Therefore, a harm that is suffered by the human being not merely as a member of an affected community/collective entity but directly as a **single individual**. It is **Art 3** of the Directive that defines environmental criminal offence as the unlawful conduct, committed with intention or at least serious negligence, which, *inter alia*, 'causes or is likely to cause death or serious injury to any person'. The **direct harm to life and health** is clearly targeted in the description of the criminal event – death/injury –, and it is precisely what triggers criminal jurisdiction over certain unlawful and intentional/negligent conducts (such as discharging materials or ionizing radiations into air, soil or water; collecting, transporting, recovering and disposing of waste; conducting a dangerous activity or storing/using dangerous substances in the operation of a plant).

However, the wording 'causes or likely to cause' opens to the punishment not only of concrete harm to the individual but **also of its risk**, this way encompassing in the scope of the Directive **abstract endangerment crimes**.

Measures, compensations and sanctions

The terms in which protection of human life and health is worded in the EU legal framework necessarily determines the type of remedies and restoration measures that should be granted to these protected values when an environmental damage has occurred.

When environmental damage is conceived as **collectively** posing a risk to human health measures to be taken mainly imply: **a) reduction/elimination of significant risks** and **b) prevention of further damage to public health**.

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a) Accordingly, the remedy of any environmental damage (to habitats and endangered species, water and soil) that has already occurred according to **Directive 2004/35/EC** expressly includes the **removal of any significant risk of adversely affecting** human health (Art 2(15) and Annex II, para 1). The provisions on remedial actions (Art 6(1)a) further specify that where environmental damage has occurred, the operator should immediately take all practicable measures to **limit or prevent further** environmental damage and **adverse effects on human health**. Furthermore, in the choice of remedial measures (Art 7) the public authority should always take into account the risks to human health, bearing in mind that damage with a proven effect on human health must be classified as 'significant damage' (see Annex I).

b) In the field of waste management, for instance, **Directive 2012/19** on waste electrical and electronic equipment states that protection of human health and the environment should be ensured by (preventing and) '**reducing adverse impacts**' of such waste on the environment and **human health** (Art 1).

c) Another example of this remedial approach, focused on the elimination and further prevention of risks, can be found in the **Directive 2012/18/EC on industrial accidents**. Despite specifically encompassing 'death' and 'injury' in the definition of major industrial accident (Annex VI), the focus of the Directive is explicitly on risk-reduction measures and on the **minimization/limitation of the consequences** of major accidents for human health (Art 13).

d) On a sharply different note, under **Regulation (EC) No. 1907/2006** on use and management of chemicals, Member States should set up 'an appropriate framework for penalties with a view to imposing **effective, proportionate and dissuasive penalties for non-compliance**, as non-compliance **can result in damage to human health** and the environment'

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(Recital 122). Despite the focus on public health and its collective dimension, the Regulation does not limit the protective strategy to the reduction and elimination of risk but it introduces penalties, placing the remedies on a similar standpoint as the one provided with reference to individuals exposed to harm or risk.

As a matter of fact, when environmental damage is conceived as *individually* posing a risk to human health, measures to be taken mainly imply the recourse to **criminal law and criminal sanctions** being the 2008 Directive focused on the prescription of '**effective, proportionate and dissuasive criminal penalties**' for liable legal persons under Art 5. Surprisingly, when individual life and health are at stake, **individuals** are not provided with specific remedies or restoration measures.

Access to justice

In addition to individual/collective protective approaches, the EU legal framework also provides victims with specific rights to **standing in criminal proceedings** and **access to justice**. The imposition of standards aimed at **protecting public health** in the examined domains (of air quality, water pollution and waste management) creates **subjective rights** that individuals are entitled to rely on before national jurisdictions¹⁰, although not necessarily in criminal proceedings. The 2001 EU Framework Decision on the

¹⁰ Case C-361/88, *Commission v. Federal Republic of Germany*, Judgment, 30.5.1991. See also the Opinion of the Advocate General in the same case (6.2.1991): 'It may be seen from the preambles to the contested directives that, in addition to protecting the environment, they are intended to protect human health and to improve the quality of life. The obligations in the Member States to ensure that the concentrations in the air of the substances in question do not exceed the levels deemed permissible has, as its corollary, the rights of individuals to rely on those quality standards when they are infringed, either in fact or by the measures adopted by the public authorities'.



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Standing of Victims in Criminal Proceedings also plays an important role, despite the absence in it of any specific reference to 'environmental victims'.

What follows is, on one hand, i) a **general right to standing** of victims of crime, though not specifically inclusive of 'environmental crime victims'; on the other hand, ii) the **protection of human beings against environmental harm** and their right to standing, however not necessarily in criminal proceedings.

Within the EU secondary legislation, a stark difference arises in terms of access to justice when juxtaposing the Environmental Liability Directive (2004/35/EC) and the Environmental Crime Directive (2008/99/EC).

As a matter of fact, on the one hand, the **2004 Environmental Liability Directive** provides for a broad safeguard of the position of the individuals actually or potentially affected by environmental damage. Namely, it grants them with: a) access to information on environmental matters; b) right to public participation in decision-making and judicial review of public/private projects/decisions which might have an impact on human health and the environment; and c) right to have their interests represented by public interest groups (such as NGOs for the protection of the environment) in **administrative/civil proceedings**.

As **Art 12 (1)** of the Directive prescribes, 'natural or legal persons: (a) affected or likely to be affected by environmental damage or (b) having a sufficient interest in environmental decision making relating to the damage or, alternatively, (c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive'. In this regard, the interest of any non-governmental organization promoting environmental protection is deemed to have rights under Art 12 (1)(b) and (c). The Directive provides that such persons and non-governmental organizations shall have 'access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act





of the competent authority under this Directive' (**Art 13(1)**). In addition, public interest groups also have the right to submit observations regarding the restorative measures to be taken under Art 7(4)(2) of the Directive.

In respect with the participation of groups and NGO's, the 2004 Directive seems to have welcomed the main contents of 1998 UNECE **Aarhus Convention** on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (implemented through Directive 2003/4/EC on public access to environmental information, Directive 2003/35/EC on public participation to plans and programmes related to the environment and Regulation (EC) No. 1367/2006 or 'the Aarhus Regulation'). Moreover has been taken into account the **1998 Council of Europe 'Convention on the Protection of Environment through Criminal Law'** (not yet entered into force) providing for States to grant groups and associations/NGOs involved in the protection of the environment (therefore not individuals) the right to participate in criminal proceedings (Art 11).

On the contrary, the **2008 Environmental Crime Directive** does not show any sign of having accepted the contents of the 1998 Council of Europe Convention¹¹ **lacking any reference to access to justice and participation** of those who have suffered environmental harm in criminal proceedings, also through representative public interest groups/NGOs.

Food safety

The second selected sector, due to the potential involvement of corporate responsibility for harm and risk to human health and life, is the one of food safety.

¹¹ 'That the 2008 Directive does not contain similar language [...] is both unfortunate and somewhat surprising, given the previous willingness to follow the Council of Europe's lead in the 2004 Environmental Liability Directive': Cardwell, French and Hall 2011: 113.





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Contrary to environmental regulation, the protective channel of **criminal law is here absent at the EU level**. The safeguard of human **life and health, primarily in their collective dimension, is provided mainly through preventive measures**, in line with the precautionary principle. The legal framework is focused on the notion of risk rather than harm, and it entails penalties for violations of sector regulations as well as a residual regime of civil liability for the producer. Such preventive measures and penalties **do not prevent, in any case, Member States from adopting (also) a criminal liability regime**.

The general underpinning principles in the field of consumer protection are found mainly in **Art 114 (3)**¹² (which sets the protective base at a 'high level of protection'), and **Art 169(1)**¹³ (on health, safety and economic interest of consumers) of the **TFEU**. Similarly, the EU Fundamental **Charter** provides for a high level of consumer protection in all Union policies under **Art 38**¹⁴.

At a Union policy level, the 1997 Green Paper on General Principles of Food Law in the EU (COM(97)176final) and the 2000 White Paper on Food Safety (COM(99)0719final) released by the Commission set the protection of consumer health as a 'key policy priority' (to be achieved – among others – through traceability of the product, food-chain monitoring and prevention of food-related health risks). Moreover, the 1997 Green Paper expressly provides that 'when a food business markets a foodstuff which does not conform to the safety requirements prescribed by Community or national law, that business may be liable to criminal or administrative penalties under

¹² Art 114(3): 'The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective'.

¹³ Art 169(1): 'In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests'.

¹⁴ Art 38: 'Union policies shall ensure a high level of consumer protection'.



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the law of the Member state concerned' (p. 46). Since the adoption of such documents, **secondary legislative acts have been gradually adopted** in order to create a specific legal framework in this sector **and replace Directive 92/59/CEE**, which imposed only a general and horizontal obligation on manufacturers to produce and release on the market 'safe products'.

Today the EU legal framework regarding food safety does **not address the human being as a 'victim'** in case of products being placed on the market by corporations and potentially or actually causing cause harm to consumers' health.

Moreover, the liability regime for the manufacturer in such cases is not framed as strictly criminal, however the relevant legal documents impose on Member States the adoption of **effective, proportionate and dissuasive penalties** in domestic legislations.

Also, specific provisions regarding consumers **right to redress/remedy and access to justice appear to be entirely absent**, as the EU legal framework in this sector is primarily focused on **prevention, reduction and elimination of risk** for consumers' health.

The following legal documents deal with issues related to food safety and protection of consumers' health in general. On the one hand, the regime on food safety (1) aims at ensuring a high level of protection of human health through preventive measures and sanctions. The same approach is adopted also in relation to legal tools specifically related to Genetically Modified Organisms ('GMO') and pesticides (2). On the other hand, the residual/complementary civil liability regime applies to the manufacturer (3) who has placed unsafe food products on the market.

The legal framework on food safety: risk to human health, measures and sanctions.

a) The main legal reference in this sector is **Regulation (EC) No. 178/2002**, which sets the **general principles on food safety**, and namely a **high level of**

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protection of human health and consumers' interest in relation to food (Art 1).

It also upholds the **prohibition to place unsafe food on the market** – where 'unsafe' means injurious to/having an adverse effect on human health – (Art 14 e 15) and the need to respond to food safety problems in order to protect human health (Recital 10).

As expressly stated in the Regulation, **food law is aimed at the reduction, elimination or avoidance of a risk to health**, and risk analysis - risk assessment, risk management, and risk communication - is able to contribute to the determination of effective, proportionate and targeted measures or other actions to protect health (Recital 17). '**Risk**' is defined as a function of the **probability of an adverse health effect** and the severity of that effect, consequential to a hazard (Art 3).

In conformity with the precautionary principle, the Regulation provides that in order to ensure a high level of health protection **provisional risk management measures** (in scientific uncertainty) should be taken in case of possibility of harmful effects on health (Art 7). The Regulation also recalls past food safety incidents in order to prompt common measures (in the EU) able to counter serious risks to human health.

In this regard, **food business operators are responsible** for ensuring that foods satisfy safety requirements under food law at all stages of production, processing and distribution within the businesses under their control. In case unsafe foods are placed on the market, food business operators shall act immediately in order to prevent, reduce or eliminate connected risks (eg, withdrawal procedures, collaboration with competent authorities). The general regime of civil liability of manufacturers who place unsafe products on the market is also recalled through an express reference to Directive 85/375/EEC (Art 21) (see *infra* in this Chapter).

In addition, in case of infringements of food law, Member States shall provide **effective, dissuasive and proportionate penalties** (Art 17 and 18).



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b) Regulation (EC) No. 882/2004 on official controls and compliance with food law is aimed at protecting consumers' interests by **preventing, eliminating or reducing to acceptable levels risks to human health** (Art 1).

It deals with management crisis (contingency plans) in case food is found to pose serious **risks to human health** (Art 13), and with official controls aimed at preventing potential threats (Art 15).

A broad reference to criminal liability is made in the Regulation when stating that performance of official controls should be **without prejudice** to feed business operators' primary legal responsibility for ensuring feed and food safety, as laid down in Regulation (EC) No 178/2002, and **any civil or criminal liability** arising from the breach of their obligations (Art 1, para 4).

Moreover, under the Regulation, Member States shall provide for sanctions applicable to infringements of food law and shall take all measures necessary to ensure that they are implemented. The **sanctions** must be **effective, proportionate and dissuasive** (Art 55).

c) Regulation (EC) No. 853/2004 (as well as Regulation 853/2004 and 854/2004) on **hygiene of foodstuffs** aims at a high level of protection of human life and health (Recital 1) and a high level of consumer protection with regard to food safety (Recital 7, 8). The Regulation expressly places the **primary responsibility to ensure safety all along the food chain on food business operators** (Art 1). In particular, at all stages of production, processing and distribution, food is to be protected against any contamination likely to render the food unfit for human consumption, injurious to health or contaminated in such a way that it would be unreasonable to expect it to be consumed in that state (Chapter IX, point 3).

d) Regulation (EC) No. 1169/2011 on the provision of food information to consumers aims at ensuring a high level of protection of consumers' health by regulating information on food products regarding risks of harmful effects for human health (Art 4).





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Legal tools regulating GMO and pesticides: risk to human health, measures and sanctions

The following legal references are specifically related to **genetically modified organisms ('GMO')**.

a) Directive 2001/18/EC aims at controlling the risks deriving from the deliberate release into the environment and the placing on the market of GMO in order to protect human health (Recital 5 and Art 1). In this regard, direct or indirect, immediate, delayed or unforeseen **effects on human health should be traced** (Recital 43), **in addition to risk-assessments and risk-monitoring** for human health and safeguard procedures (including emergency response plans).

It is the responsibility of Member States to take all appropriate measures to **avoid adverse effects of GMO on human health** (Art 4).

In case of breach of provisions enshrined in the Directive - in particular, in case of negligence - Member States are encouraged to adopt **effective, proportionate and dissuasive penalties** (Art 33 and Recital 61).

b) Regulation (EC) No. 1829/2003 on genetically modified food and feed prescribes that **GMOs for food use should not have adverse effects on human health** (Art 4). It also provides, in case of infringement of the Regulation, that Member States shall lay down **effective, proportionate and dissuasive penalties** as well as take all necessary measures to ensure their implementation (Art 45).

c) Regulation (EC) No. 1946/2003 on **transboundary movements** of GMOs stresses the importance of controlling that such movements of importers/exporters also take into account risks to human health (Art 2). Under the Regulation, in case of infringements of the prescriptions therein, Member States shall lay down **effective, proportionate and dissuasive penalties** and ensure that they are implemented (Art 18).



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An additional set of legal documents indirectly linked to this sector regards the placement on the market of **biocides and pesticides**.

a) Regulation (EC) No. 1107/2009 on plant protection products aims at preventing that such products and their residues have immediate or delayed **harmful effects on human health** (Art 4(2)(a) and 4(3)(b)). In particular, special attention should be paid to the protection of **'vulnerable groups' of the population** (Recital 8), 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'* (Recital 14). In case of non-compliance with the provisions in the Regulation, Member States shall take **effective, proportionate and dissuasive penalties** (Art 72).

b) the Framework Regulation No. 528/2012 on biocidal products aims at providing a 'high level of protection of human health' (Recital 12) by preventing and reducing risks deriving from such products. Particular attention should be paid to the protection of **'vulnerable groups' of the population** (Recital 3 and Art 1(1)), defined as *'persons needing specific consideration when assessing the acute and chronic health effects of biocidal products. These include pregnant and nursing women, the unborn, infants and children, the elderly and, when subject to high exposure to biocidal products over the long term, workers and residents'*. Once again, Member States shall take **effective, proportionate and dissuasive penalties** for infringements of the provisions in the Regulation and ensure that they are implemented (Art 87).

Product safety and civil liability of the producer: harm, measures and penalties

The legal framework on product safety and civil liability of the manufacturer is also applicable to the food sector legislation, being the former a regime

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that generally applies in absence of specific sector regulation under EU law or as complementary to sector legislation. In addition, express reference to such a regime is made in certain legal documents (eg, Reg. 178/2002/EC).

a) In dealing with producer's liability for defectiveness of its products (Art 16), **Directive 85/374/EEC** includes in the definition of '**damage**' also damage caused by **death or by personal injuries** (Art 9), thereby entitling the damaged consumer to **compensation**.

b) **Directive 2001/95/CE** (amending **Directive 92/59/EEC**) on general product safety, which complements the provisions of sector legislation, recalls the general **obligation on economic operators/producers to place only safe products on the market** (Art 3).

To this regard, in order to ensure the effective enforcement of the obligations incumbent on producers and distributors, the Directive calls on Member States to establish authorities responsible for monitoring product safety and provided with powers to impose **effective, proportionate and dissuasive penalties** in case of infringement of such obligations (Recital 22 and Art 7).

Drug safety

The third examined sector where corporate responsibility for harm or risk to human health and life comes into play is the one related to unsafe or defective medical devices (1) and risks related to medicinal products for human use (2).

Similarly to the food safety sector (Section 2), the protective channel of criminal law is currently absent at the EU level. As a matter of fact, it should be noted that the EU **has not yet signed** the 2010 Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health ('**MEDICRIME Convention**', entered into force on 1.1.2016). Such binding international instrument aims at protecting

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public health through criminal law and specifically mentions among its aims the one of **'protecting the rights of victims'¹⁵** (Art 1). Such rights include access to information, assistance in physical/psychological/social recovery, compensation from the perpetrators (Art 19) as well as right to information, support, safety and (free) **access to justice at all stages of criminal investigations and proceedings**, also through representation by NGOs or other groups (Art 20).

Similarly to the sector legislation on food safety (Section 2), the safeguard of human life and health, primarily in their collective dimension, is here provided mainly through a preventive approach, in line with the precautionary principle, focused on the notion of risk rather than harm. The legal framework entails penalties for violations of normative prescriptions as well as a residual regime of civil liability for the manufacturer. Such preventive measures and penalties do not prevent, in any case, Member States from adopting (also) a criminal liability regime.

Human health is expressly stated as a **target of 'high level of protection'** at EU level in numerous provisions of the TFEU. Mentioned in **Art 4 (2)(k)¹⁶** among the subjects of shared competences between the EU and Member States, it is endorsed under **Art 6 (a)¹⁷, Art 9¹⁸, Art 114¹⁹, Art 168²⁰** dealing

¹⁵ 'Victim' under Art 4(k) of the Convention is defined as *'any natural person suffering adverse physical or psychological effects as a result of having used a counterfeit medical product or a medical product manufactured, supplied or placed on the market without authorisation or without being in compliance with the conformity requirements as described in Article 8'*.

¹⁶ Art 4 (2)(k): 'Shared competence between the Union and the Member States applies in the following principal areas: [...]common safety concerns in public health matters, for the aspects defined in this Treaty'.

¹⁷ Art 6 (a): 'The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health'.

¹⁸ Art 9: 'In defining and implementing its policies and activities, the Union shall take into account [...]a high level of [...] protection of human health'.

¹⁹ Art 114 para (3) 'The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to





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achieve this objective'; and para (8): 'When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council'.

²⁰ Art 168: '1. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health. The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

2. The Union shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. It shall in particular encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas. Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.

4. By way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns: (a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures; (b) measures in the veterinary and phytosanitary fields which have as their direct objective the

protection of public health; (c) measures setting high standards of quality and safety for medicinal products and devices for medical use.

5. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the

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specifically with **quality and safety for medicinal products and devices for medical use** and **Art 169²¹** on the protection of **consumer's health and safety**.

At a policy level, in the **EU 2020 'Strategy for smart, sustainable and inclusive growth'** (COM (2010) 2020 final), the Commission expressly mentions the need to provide present and future generations with a high-quality healthy life, reduce health inequalities, promote a healthy and active ageing population, adapt the workplace-related legislation to new health risks and ensuring citizens a better access to health care systems.

The current EU agenda on health protection is further described in detail in Regulation (EU) No. 282/2014 adopting the **3rd Programme for the Union's action in the field of health (2014-2020)** and setting four overarching goals (a. Promoting health, preventing diseases and fostering supportive environments for healthy lifestyles taking into account the 'health in all policies' principle; b. Protecting Union citizens from serious cross-border health threats; c. Contributing to innovative, efficient and

Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.

6. The Council, on a proposal from the Commission, may also adopt recommendations for the purposes set out in this Article.

7. Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood'.

²¹ Art 169(1): 'In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests'.

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sustainable health systems; d. Facilitating access to better and safer healthcare for Union citizens).

Focusing specifically on medical devices and medicinal products for human use, the protection of patients' life and health in EU law appears to be composed of a double frame. On the one hand, legal tools regulating unsafe/defective devices and medicinal products, as well as their related risks (1), provide a preventive and precautionary safeguard of the collective values of human life and health (mainly related to **withdrawal** of defective products on the market and incident **reporting**). On the other hand, the residual/complementary regime on product safety (2) horizontally imposes **civil liability** for defective products on the manufacturer as well as **penalties** for infringement of safety requirements, however without specifically addressing medical devices or medicinal products.

Legal tools regulating unsafe or defective medical devices and medicinal products: risk and measures

The EU legal documents specifically dealing with the safety of medical devices and medicinal products do **not qualify the human being as a 'victim'** of incidents caused by defective, malfunctioning or deteriorated devices and products placed on the market by corporations.

Nor do they provide that **liability of the manufacturer** in case of incident should be strictly **criminal** or entail **effective, proportionate and dissuasive penalties** in domestic legislations.

Also, specific provisions regarding **patients' right to redress/remedy and access to justice** appear to be entirely absent.

However, despite never referring to the concept of 'victim', criminal liability or access to justice, the relevant legal documents regulating products (A) and (B) uphold that both must provide patients, users and third parties with a **high level of protection**. Such an attention to the actual or potential adverse effects deriving from devices/products on the **life and health of patients** is demonstrated across the relevant legal tools as follows.

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Under EU law, a **medical device** is defined by Art 1 of the Directive 90/385/EEC²². Medical devices are further classified in 4 ranking product classes (I, IIa, IIb and III²³) on the basis of their potential risks for the human body (Directive 93/42/EEC, Annex IX).

The core legal tools addressing safety issues related to medical devices are three Council Directives of the 1990s that have been supplemented since by several amendments.

a) Council Directive 90/385/EEC on active implantable medical devices (consolidated version, last amended with Directive 2007/47/EC) prescribes to Member States the **withdrawal, prohibition or restriction on the market** of medical devices that **may compromise the health and/or safety of patients**, users or third persons (Art 7 and Art 10c).

However, the wording of the Directive is not merely preventive, for it also takes into account the potential and actual **death of a patient or a deterioration of his state of health** in defining 'incidents' – directly or indirectly caused by **malfunction of or deterioration in the characteristics or performances of a device** placed on the market – that, once occurred, should be recorded and evaluated by competent authorities of Member

²² 'An instrument, apparatus, appliance, software material or other article, whether used alone or in combination, together with any accessories, including the software intended by its manufacturer to be used specifically for diagnostic and/or therapeutic purposes and necessary for its proper application, intended by the manufacturer to be used for human beings for the purpose of diagnosis, prevention, monitoring, treatment or alleviation of disease; diagnosis, monitoring, treatment, alleviation of or compensation for an injury or handicap; investigation, replacement or modification of the anatomy or of a physiological process, control of conception, and which does not achieve its principal intended action in or on the human body by pharmacological, immunological or metabolic means, but which may be assisted in its function by such means'. The Court of Justice of the EU has further clarified and narrowed the notion of 'medical device' as excluding software that, despite being used in medical context is not precisely intended by the manufacturer for one or more specific medical purposes set out in such a definition of a medical device (Case C-219/11, Preliminary ruling, 22.11.2012).

²³ Examples of classified medical devices are: sterile plasters (Class I); hearing aids, powered wheelchairs (Class IIa); infusion pumps, surgical lasers (Class IIb); vascular and neurological implants, replacement heart valves, silicone gel-filled breast implants (Class III).





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States under Art 8. As a matter of fact, the manufacturer of the medical device is bound to immediately notify the authorities of any change in the characteristics or performances or inaccuracies in the instruction leaflets for a medical device that **has led or could lead to the death of a patient or a deterioration of his state of health.**

b) Similarly, **Council Directive 93/42/EEC on medical devices** (consolidated version, last amended with Directive 2011/100) refers to the same notion of **incident** as Directive 90/385/EEC (directly or indirectly causing **death of a patient or a deterioration of his state of health**), the same **interim measures** to be adopted by Member States in case of **device able to compromise health/safety of patients** (withdrawal, restriction, prohibition. Art 8) and the same obligation for the manufacturer to **report such incidents** to public authorities, which will centrally record them and evaluate them (Art 10). Moreover, by prescribing general technical requirements for medical devices under Annex I, the Directive aims at reducing as much as possible potential risks for patients, including the **risk of death of a patient or user and of serious deterioration in his state of health** (Annex I, para 12).

c) **Council Directive 98/79/EEC on *in vitro* diagnostic medical device** (consolidated version, last amended with Directive 2007/47/EC) upholds the same notion of '**incident**' as the previous Directives (adversely affecting **human life/health**. Art 8) and the same obligation for the manufacturer to immediately report such an incident to the competent national authorities (Art 11 and Annex III, para 5 (i)).

On 26 September 2012 the European Commission has adopted a **Proposal for a Regulation of the EU Parliament and the Council on medical devices and *in vitro* diagnostic medical devices**. The on-going legislative procedure will revise existing legislation on medical devices and replace, once adopted, the three Directives (COM 2012(542)final). The Proposal aims



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at ensuring a **high level of protection of human health and safety**²⁴. Coherently, **death, serious deterioration in health, permanent impairment of a body structure or function, life-threatening illness or injury** are essential components of the notions of **'serious adverse event'** and (partly) **'serious incident'** under the Proposal²⁵.

However, also in the Proposal **no reference** is made to **penalties** for the manufacturer liable of placing on the market defective medical devices, access to justice or remedies to harmed individuals.

As far as **'medicinal product' is concerned**, given the definition provided for by Directive 2001/83/EC, Art 1 para 2²⁶, the following texts apply.

a) Directive 2001/83/EC of the EU Parliament and the Council broadly focuses on the safeguard of public and individual health (eg, against adverse affects of medicinal products), and it prescribes that safety assessments in 'controlled clinical trials' should take into consideration **death and health risks (especially) for vulnerable patients** (eg, children, pregnant women, frail elderly).

'Risk' under the Directive is **'any risk relating to the quality, safety or efficacy** of the medicinal product as regards **patients' health or public**

²⁴ Among the 'lessons learned' taken into account in the legislative revision, the Proposal expressly refers to the scandal of *Poly Implant Prothèse* (PIP), involving a French manufacturer that allegedly used industrial silicone instead of medical grade silicone for breast implants for several years (contrary to the specifications and approval of the Notified Body TÜV Rheinland) on hundreds of thousands of women around the world.

²⁵ The case has been referred on 9 April 2015 to the EU Court of Justice by Germany Federal Supreme Court in order to seek clarification on Notified Body liability for medical devices. Three Proceedings are also currently under way under French jurisdiction.

²⁶ '[A]ny substance or combination of substances presented as having properties for treating or preventing disease in human beings; or any substance or combination of substances which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis'.





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health' (Art 1, para 28). The application to obtain the marketing authorization for a medicinal product should contain a **risk-management system** aimed at identifying, **characterising, preventing or minimising risks** related to medicinal products (Art 8, Art 1, para 28b).

The Directive does not specifically deal with the harm suffered by the individual due to a defective medicinal product, however it generally mentions the obligation of Member States to **control the production chain** (in order to facilitate withdrawal of products) and it refers to the **Product Liability Directive (85/374/CEE)** regulating the liability of the manufacturer.

b) Other legal documents, such as **Regulation (EC) No. 726/2004** of the EU Parliament and the Council (followed by **Commission Implementing Regulation (EU) No. 520/2012** and **Commission Delegated Regulation (EU) No. 357/2014**) aim at achieving **high standards of public health protection** for all medicinal products (Art 53), however they do not specifically deal with harm to human life/health deriving from the placing on the market of unsafe or defective medicinal products, nor to related issues of manufacturer liability.

Product safety and civil liability of the producer: harm, measures and penalties.

On a wider scope, the legal framework on product safety is aimed at protecting the consumer against unsafe products, whose placement on the market is able to trigger a liability regime for the manufacturer, provided the obligation for Member States to lay down effective, dissuasive and proportionate penalties.

Such (residual) civil liability applies despite the lack of any specific mention of i) medical devices or medicinal products or ii) food across the relevant legal documents (*supra*, in this Chapter).



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As mentioned, the applicability derives from the express reference to this regime made in certain legal tools dealing specifically with medical devices/medicinal products (eg, Directive 2001/83/EC).



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Chapter VI

Cases of Corporate Violence Victimization

Stefania Giavazzi

The data collection: a note on methodology

The primary purpose of this chapter is to provide a general overview of the case law, as well as an analysis of some leading cases concerning victims of corporate violence in Italy, Germany and Belgium.

First, the research on case law represents a first *testing ground* to substantiate some project's assumptions: victims of corporate violence are not a minority, they are vulnerable, and there is a lack of awareness of their victimisation.

Secondly, the identification and analysis of some relevant cases contribute to reach two of the project expected results:

- The *assessment of the needs of victims of corporate violence*, in order to develop tailored strategies, methodologies and tools to deal specifically with this typology of victims in compliance with the aims and contents of the Directive. In particular, the information achieved from the *case law* favours a better understanding of the following aspects: the victims' specific needs in accessing justice; victims' status within the criminal proceeding; problems related to victims' participation in the criminal

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proceeding; information and support received by victims before and during the criminal proceeding or reasons why their needs have not been satisfied;

- The *identification of individual victims or other target groups* to be involved in focus groups and interviews.

With the aim to find common *selection criteria* and a *comparable field of investigation*, the research team has established to screen - in a first phase - *all possible relevant cases*, and to select - in a second phase – about ten paramount ones (*leading cases*) according to the WS1 project's established criteria.

Therefore, the research was developed in accordance with two different rubrics:

- i) *A preliminary general survey on all the potential relevant cases.*

This part of the research implements the idea of extending the range of the preliminary investigation in order to embrace victims' experiences and perspectives, regardless of the existence of a criminal judgment, the type of offences under scrutiny, and the placement of the proceeding in one of the three countries. The criteria that have been used for this first screening are, therefore, quite general and may be summarized in the following: the relevance of the case in one of the three criminal sectors (environment, food, drugs), the existence of a criminal investigation, the involvement of a corporation and several potential victims. A brief summary of the findings of this preliminary survey will be illustrated in the following paragraph;

- ii) *Identification and analysis of the leading cases for the data collection output.*

According to the project description, the criteria for the identification of leading cases are the followings:

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a) severe cases having led to *criminal proceedings* for offences and having caused *death or harm to health* or other physical injury to individual victims;

b) *fields of investigation*: environmental crimes as well as violations of laws on food and drugs safety. Criminal offences have been singled out precisely in these fields as they exemplify the problems related to corporate violence, the potential conflict between a corporation and a large number of victims, the seriousness and widespread of harms.

c) *place of proceedings*: Germany, Italy and Belgium, where the research units are located;

d) the *definition of victim* complies with Article 2 of Directive 2012/29/EU, which reads as follows: '(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';

e) the definition of *criminal proceeding* complies with Recital (22) of Directive 2012/29/EU, which reads as follows: 'the moment when a complaint is made should, for the purposes of this Directive, be considered as falling within the context of the criminal proceedings. This should also include situations where authorities initiate criminal proceedings ex officio as a result of a criminal offence suffered by a victim'.

Data and information have been tracked through the **following sources**: desk research on databases of jurisprudence, direct contact with lawyers or other parties of criminal proceedings, and access to criminal proceedings files, when available (in particular, the complaint, the counts of the indictment, the claim of the civil party). Press reports or similar sources, when considered reliable, have been used to better frame the context of



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some cases and highlight their relevance, especially where no final judicial decision was available.

A **tailored template** has been developed to analyse the leading cases. The templates have been collected in the project's output *Data Collection on Leading cases*. For each case the template required to fill in the following entries:

- *Name of the case;*
- *Country* (the State where the case was prosecuted and whether the case has transnational features or deals with extra-judiciary procedures);
- *Project's field of research* (environment, food, drugs or medical devices);
- *Corporation(s) involved;*
- *Summary of the case;*
- *Accusation resulting from the counts of the indictment* (the offences charged to the corporation(s) or its/their representatives; the type of harm or other damages directly caused to victims by the criminal offence charged to the corporation(s) or its/their representatives);
- *Victims Involved* (the numbers of victims identified and involved in the criminal proceeding and the type of victims);
- *Stage of the criminal proceeding;*
- *Victims' participation in the Criminal Proceeding* (the template asked to specify, if known, the existence of a formal complaint reporting crimes made by victims, whether victims have the status of party to the criminal proceedings, numbers of victims having the status of party to the criminal proceeding, the level participation in the criminal proceedings);
- *Victims' requests to the judge;*
- *Decision/Outcome of criminal proceeding;*
- *Extra-Judicial agreements between victims and corporation (s) or attempts to find an agreement* (the type of agreement, the content of



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the agreement, whether the agreement implies the withdrawal of victims' rights to access to justice);

- *Existence of Associations, Civil Society Organisations, Victims Support Services* (the type of Victims Association or other service supporting victims' needs and rights before and during the Trial; whether the Victims Association itself has/had the status of party to the criminal proceeding);
- *Victims not participating in the criminal proceeding* (the template asked to specify, if known, whether the victims favoured a civil suit, whether the victims made claims or requests to non-criminal or non-judicial Authorities, whether the civil action was the only option provided by the national law, whether the victims filed a complaint but no criminal proceeding ever started, whether the victims were denied the status of party to the criminal proceeding, other reasons for victims lack of participation in, or withdrawal from, the criminal proceedings);
- *Additional information on Victims' position* (the template asked to specify, if known, any other information to better frame the possible implementation of Directive prescriptions. In particular, information on: the media exposure of victims during the investigation or during the Trial, the level of conflict with corporation before or during the criminal proceeding, the evidence of secondary and repeat victimisation, intimidation or retaliation, the reasons why victims' request to the justice system were not met or completely satisfied, whether victims or victims Associations are still demanding for justice after the Trial).

Remarks and results emerging from the preliminary survey on case-law

The selection process itself has offered hints/grounds to advance some remarks.

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As for the *environmental field* of investigation, for example, the category of so-called **disasters** (a calamitous event that causes human, material, and economic or environmental severe losses) raised some questions in terms of compliance with the notion of corporate violence. As a matter of fact, corporate violence is concerned only when the disaster may be ascribed to corporate or *corporate representatives' criminal behaviours*. Another line of demarcation is provided by/drawn according to the *effects* caused by the disasters. Therefore, only events that have *simultaneously* caused harms to *human life* and *environment* should be part of the research. This distinction, however, has proved quite difficult in practice. In fact, the double damage, when present, is not always charged in the count of indictment, and the accusation may indifferently charge criminal offences against human life/health, environmental or both of them. In addition, a disaster may have caused a significant impact/damage to the environment (public safety) despite the fact that no environmental crime is specifically charged; that is because the environmental offences may be absorbed in other more severe offences against human life. The final choice was to select only criminal proceedings where environmental damages were under consideration, or where at least public safety was concerned, even if not explicitly charged.

In the preliminary survey, some differences between the three countries under consideration have emerged. Concerning the environmental field, for example, a large sample of cases has been detected in Italy, while in Belgium and Germany the sample is less extensive, even in case of identical corporate behaviour and harms. One representative example relates to cases involving asbestos-related diseases. Italy counts several criminal proceedings in this regard: some already terminated, others still on-going. In Belgium, there have been civil proceedings and the issue has been addressed as a public health problem; similarly, to Germany, where no criminal cases have ever been started. These circumstances are quite important from the victim's perspective: in relation to the *same harm* suffered in a *similar context*, access to criminal justice system depends on the place where the victim lives. A different approach has been identified also with respect to the *role of associations* in the criminal proceeding. In

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Italy, victims' associations are largely admitted to participate as party in the criminal proceeding, while in Germany the participation is limited to victims as individuals. In Belgium and Germany victims may count on the victim support services, while in Italy such services do not exist yet. In addition, in Germany, victims' associations are supported both by federal and state funds, while in Italy no public funding is available to support similar associations or services.

In light of the general criteria highlighted above, the *first screening* has allowed to check approximately fifty cases concerning the three mentioned sectors. Some of these cases are particularly relevant in order to understand the context and frame of the notion of *corporate violence*, as well as *victims' vulnerability*, and *victims' needs*.

As for the *food safety field*, the research was able to trace very few cases that fitted the criteria. The reasons may be summarized as follows. First, the food sector seems to benefit, more than others, from the *precautionary approach*, which avoids the dissemination of diseases, as well as contamination on a large scale. As a matter of fact, in this sector it's possible to trace many frauds against consumers related to rotten or unsafe food - like in the horsemeat scandal or the disseminated cases of salmonella in the European countries - the majority of which raise issues of **food quality**, while causing only rarely severe harms to victim's health. Secondly, almost all cases of potential interest present two permanent characteristics, which limit the area of the investigation:

- a) harms affect a *single individual victim* or a *small group of victims* (so that they may not be considered as a severe offence, hardly causing victimisation);
- b) victims are often dislocated in different places within the same Country (therefore, several criminal proceedings are opened in different regions against different actors);
- c) defendants are often farmers or other *small operators* (non incorporated) or small firms belonging to a long supply chain. It's well known that the food industry has a long supply chain, in which industrial

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corporations normally occupy the final place; this implies that it's quite difficult to find out in which phase the contamination or the poisoning of food occurred, not to mention the related liabilities;

- d) some examples could be mentioned in this respect: the case of **Mad Cow** (see below a brief summary), and the case of poisoned wine (**Methanol case**)¹ which occurred in Italy in the '90s and in the Czech Republic in 2012².

Mad Cow case

The mad cow disease (BSE Bovine spongiform encephalopathy is the disease in cattle, while vCJD is the disease in people) was first discovered in the United Kingdom. From 1986 to 2001, a British outbreak affected about 180,000 cattle and devastated farming communities. In 1993 the BSE epidemic in Britain reached its peak with almost 1,000 new cases being reported per week. In May 1995, Stephen Churchill, 19 years old, became the first victim of a new version of Creutzfeldt-Jakob Disease (vCJD). By June 2014, 177 people in the United Kingdom, and 52 elsewhere, had fallen ill and died from the human counterpart to BSE. The BSE crisis led to the European Union banning exports of British beef with effect from March 1996; the ban lasted for 10 years before it was finally lifted on 1 May 2006.

¹ See the Italian Supreme Court decision: Cassazione penale, 16 Aprile 2004, n. 4426.

² In 2012, 38 people in the Czech Republic and 4 people in Poland died as a result of methanol poisoning and many others were taken to hospital. The poisonings continued for several years after the main wave, as of April 2014, there were 51 dead and many others suffered permanent health damage. The Czech government banned the sale of liquors with more than 30% alcohol by volume at food stands for several days. On 24 September 2012, the police announced that the source of the methanol-contaminated alcohol had been identified. Two main suspects were arrested: a businessman of Slovak nationality, and a small Czech company owner. On 21 May 2014, the two were sentenced to life imprisonment.





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In addition, it has to be noted that in other well-known food scandals, as the **Chinese milk scandal**³ or the **sprouts with E. Coli in Germany**⁴, perpetrators were located outside Europe or facts were committed or prosecuted outside Europe.

A final remark concerns the food safety field. The *lack of information* about the *risks* caused by consuming unhealthy food for a long period of time or on the *effects* caused by chemical substances in raw materials or industrial food may be often the reason for not filing complaints or not seeking access to justice. On this point, the *imbalances of information* between corporations and victims and therefore the vulnerability of the latter are unquestionable. Even when a complaint is filed or an investigation opens, it often proves impossible to demonstrate, according to the principles required by criminal liability, the *link of causation* between the intake of a substance at-risk and the harm to human health. The lack of evidence may be mentioned, for example, with respect to the **Glycoside case**. The issue is highly disputed in politics, and the European Governments take the position to allow the use of glycoside in the EU for some more years⁵. To our

³ The European Food Safety Authority warned that children who ate large amounts of confectionery and biscuits with high milk content could theoretically be consuming melamine at more than three times above prescribed EU safety limits (0.5 mg/kg of body weight).

⁴ As far as the victims in this case are concerned, 3.950 people were affected and 53 died, 51 of whom were German. The sprouts were linked to a German farm. After investigation, an institute of the German Federal Ministry of Food, Agriculture and Consumer Protection, announced that seeds of organic fenugreek imported from Egypt were likely to be the source of the outbreak.

⁵ In Germany almost 100 glyphosate-containing pesticides are permitted. The German Authority for risk assessment (Bundesinstitut für Risikobewertung) and its analysis of scientific studies sees no risk from the proper use of glycosate in agriculture to cause cancer. The found residues (eg. in German beer) are so low that they do not constitute a health threat. Insofar, no action needs to be taken according to this authority. Food is often tested on remains of glycosate by the authorities responsible for food safety. In about 4 percent of tested samples residues could be found in 2011, most of them not about the maximum level. The Federal Office of Consumer Protection and Food Safety (BVL) has set a limit on the use of glyphosate and glyphosate-containing products in May 2014. Within a calendar year glyphosate-containing pesticides may only be used twice with intervals of at least 90 days on the same surface; a maximum of 3.6 kg per hectare per year may not be exceeded. The late application on crops is limited to those areas in





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knowledge, there are no proceedings of civil or criminal nature that are based on glycoside and its causal relation to cancer or any other illnesses. With the present knowledge, the whole discussion still revolves around the possible risks or the threshold for accepting risks.

As regards the other two fields of investigation, it was instead possible to trace several cases in which corporations played a significant role. Some of them could not be selected as leading cases, despite the fact that they present a *high level of victimisation* and topic issues in *assessing the victims' needs*. Their exclusion from the Data Collection solely depends on the fact that a criminal proceeding never started, the criminal proceeding is at a very early stage, or the proceeding is not held in one of the countries of investigation.

The following cases may be singled out as examples of this category:

Thalidomide case

Thalidomide was originally prescribed as a 'wonder drug' for morning sickness, headaches, coughs, insomnia and colds. Thalidomide was also used against nausea and to alleviate morning sickness in pregnant women. Shortly after the drug had been sold 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% of the 10,000 survived. Thalidomide was pulled from the market in 1961. Despite the historical relevance of this case and thousands of victims all over Europe, there is no evidence of criminal judgements against the corporations. Many victims have only recently received compensation. In 1968, a large criminal trial began in Germany, charging several Grünenthal representatives with negligent homicide and injury. After Grünenthal settled with the victims in April 1970, the trial ended in December 1970 with no finding of guilt. As part of the settlement, Grünenthal paid 100 million DM into a special foundation; the German government added 320 million DM. The German corporation Grünenthal, which developed the drug, has only compensated the German victims. Civil proceedings are ongoing all over the world and particularly in Australia. In Belgium, a complaint against the State (rejected in the first instance and followed by an appeal) has been filed, and a

which weeds make harvesting impossible. The application for desiccation is only allowed if a harvesting without treatment is not possible (if cereals ripens unevenly); the use to control the harvest is prohibited.

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Parliamentary resolution adopted, in order to recognize the responsibility of the State and to partially grant compensation to victims. Almost the same process occurred in Italy, where the State provided funds for the compensation of victims. In the three Countries there is an association of victims, which is still active. In 2012, in a public event, the Grünenthal corporation partially recognized its liability, adding that '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.' The corporation, then, apologized for having failed to reach out 'from person to person' to the victims and their mothers over the past 50 years. 'Instead, we have been silent and we are very sorry for that'. (http://web.archive.org/web/20120901184544/http://www.contergan.grunenthal.info/grt-ctg/GRT-CTG/Stellungnahme/Rede_anlaesslich_Einweihung_des_Contergan-Denkmal/224600963.jsp)

Terra dei Fuochi (The Land of Fires) case

The case is one of the most significant environmental disasters in Europe. From a victims' prospective, it represents a topic case study of denegation of victims' needs and rights. It has been proven that for decades parts of Campania Region (the so called Triangle of death and, more recently, the Land of Fires) have been used for the illegal dumping, burning and disposal of toxic waste. The Italian environmental protection association, Legambiente, claimed in its 2014 Ecomafia Report that an estimated 11.6 million tons of waste, mainly residues from medical products, paints, used tyres, dioxin and allegedly even nuclear waste, was buried illegally in the region since the 1990s, all of which was coming from at least 440 businesses. An important part of the metropolitan area of Naples (a complex urban–rural system where more than 4 million inhabitants, agriculture, food production and industry coexist) was contaminated. Almost every day, still now, fired waste exposes population to smoke from burning garbage dumps. The connection between contamination and the arising of severe diseases (especially, cancer) remains contentious. In 2015 the Department of Public Health at Federico II University in Naples affirmed that: 'Further studies are needed to better define waste-related health effects, since updated data are still far from being conclusive.' (published in the International Journal of Environmental Research and Public Health). However, since 2004, previous studies led to different conclusions. On September 5th, 2004, an article entitled 'The Triangle of Death', published in *British medical journal Lancet Oncology*, showed a



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correlation between increasing cancer rates and the presence of landfill sites (both legal and illegal), and other polluted spots in the Campania region. It labelled this area 'the Triangle of Death' and depicted the Campania region as a poisoned environment with over 5,000 illegal waste sites and 28 breaches of European Union environmental laws. As for the period 2008 to 2011, a \$30 million study by the US Navy and Marine Corps Health Center concluded that US military and civilian staff living at US military bases in the area for more than 3.2 years would be exposed to serious health risks. More recently, the Italian National Health Institute has recorded a higher incidence of some types of cancer in the area when compared to the national average, specifically liver cancer, bladder cancer and cancer of the central nervous system. Other epidemiological studies show that birth defects here are 80 per cent above European average, and researchers have found that breast cancer rates in the region were 47 per cent above the national average.

As far as economic losses are concerned, the Italian General Confederation of Labour (CGIL) estimates that, in 2013 alone, four out of ten farmers in the region lost their job because of the media storm caused by the toxic waste scandal. The agro-economy of the region has been adversely affected by the allegations. In March 2008, dioxin was found in buffalo milk from farms in Caserta. Countries such as South Korea and Japan identified this pollution and subsequently banned imports of buffalo milk from the region. While only 2.8% of farms in Campania were affected, the sale of dairy products from Campania collapsed in both domestic and global markets.

Despite more than one hundred victims (as individuals or as Associations) have lodged complaints (the most of them for the smoking fires), and some investigations and criminal proceedings have been opened in the last two decades, an effective answer by the justice system is far from being obtained. Since 2001 there have been 33 investigations for organized activity of illegal waste trafficking conducted by the activity of the prosecutor of the two provinces. One of the criminal proceedings led the judges to issue 311 arrest warrants, with 448 people reported and 116 corporations involved. Luckily, some investigations have brought to light facts and crimes, but many processes end up with the statute of limitation. This is the mother of all investigations on trafficking of toxic waste, Cassiopeia, with 95 defendants, including many entrepreneurs in Northern Italy: it ended in a no prosecution judgement. The deputy prosecutor at the DDA in Naples, Alessandro Milita, therefore, declared: 'making a parallel between human body and environment, the situation can only be compared to infection with AIDS'; 25 years of records, 25 years of judicial investigations, 25 years of protests, and no one is responsible. Some new criminal proceedings are on-going.

No effective measure has been put in place by the State in order to restore the contaminated sites. Fires continue still nowadays, as mapped daily by the web-site <http://www.laterradeifuochi.it/>.

The incertitude and incoherence of epidemiological studies and scientific data, the lack of



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information, the absence of judgements and of effective access to criminal justice, in addition to the lack of compensation and remediation, are the concerns claimed by the victims in more than 20 years. The absence of information on the real risks as well as of effective answers from public Authorities increased the state of anxiety and fear within the population, and, therefore, the social conflict. In some periods, the social conflict became even quite violent. Over the years, diverse networks and alliances among local, national and international (zero-waste platform) activists formed. Popular Committees of neighbours, environmentalist groups and members of collectives of Social Centres engaged in sit-ins and numerous public assemblies, generating and disseminating information about the environmental problems caused by the waste treatment facilities. Victims are strengthening their relationships with local associations in a network and are starting to play an important role to reinforce their socio-political and judicial actions and to combat the illegal practices that can considerably affect their lives.

In June 2013, the European Commission decided to refer Italy back to the European Court of Justice for its long-running failure to manage waste adequately in the Campania region and implement sanctions. The European **Court of Justice** in July 2015 slapped Italy with another fine for failing to resolve waste management problems in the same region, ordering the country to pay 20 million Euros. The Court also imposed a daily fine of 120,000 Euros that Italy must pay for every day until the problems are adequately solved. In December 2014, the Court handed Italy a 40-million-euro fine for failing to combat illegal waste dumping in the area around Naples.

Poly Implant Prothèse (PIP) case

This case is extremely relevant for the project, even if it could not be included in the Data collection of leading cases, because the criminal proceeding is on-going in France and the case files and data are not available. In summary, the Poly Implant Prothèse (PIP) corporation has 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 (EU) market following an observed increase in implant ruptures, and confirmation of the use of substandard silicone in the manufacture of the implants by French regulator AFSSAPS (Agence Française de Sécurité Sanitaire des Produits de Santé). Later, AFSSAPS also found that the gel containing non-approved silicone was irritant to tissue, and leaks could give rise to inflammation and pain. According to the information available, PIP had declared using silicone gel approved for medical use in the conformity assessments of its product carried out by a notified body. It is not clear at what moment and during which periods PIP started using industrial grade silicone instead of medical silicone. On 15 May 2014, the Scientific Committee on Emerging and

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Newly Identified Health Risks (SCENIHR) concluded that there is currently no convincing medical, toxicological or other data to justify removal of intact PIP implants⁶. On 20 June 2014, the Employment, Social Policy, Health and Consumers Affairs (EPSCO) Council discussed a Commission Staff Working Document. This document contained a detailed analysis of the implementation of the joint actions taken by the Commission and EU countries, within the scope of the PIP Action Plan. It was estimated that up to 400 000 women received PIP silicone breast implants worldwide. These implants were available in nearly all European Union Member States - in particular they were widely used in the United Kingdom, France and Spain, where it was estimated that respectively around 40.000, 30.000 and 18.500 women were implanted with PIP silicone breast implants⁷. Implant removal in the absence of malfunction may be considered for women who are experiencing significant anxiety because they have a PIP breast implant. However, the decision to remove an intact PIP implant for this reason should be based, in the view of the Committee, on an individual assessment of the woman's condition by her surgeon or other treating physician after consultation.

At least, three criminal proceedings are on-going in France, while one is on-going in Germany against the certification authority (which is German)⁸. The Court of Appeals in Aix-en-Provence, with a judgment issued on 2 May 2016, confirmed the conviction of Jean-Claude Mas and four other individuals involved at PIP in the main criminal proceeding who took place in Marseille. About 5000 victims (200 foreign women) asked to participate into the criminal proceeding as civil party. The Tribunal of first instance found that the claimants were entitled to damages. As the five defendants were not able to pay, it may ultimately be up to the French State to pay the damages awarded by the Criminal Tribunal

⁶ Opinion on the safety of Poly Implant Prothèse (PIP) Silicone Breast Implants, February 2012, available on http://ec.europa.eu/health/scientific_committees/emerging/opinions/index_en.htm.

⁷ Commission Staff Working Document, Implementation of the Joint Plan for Immediate Actions under the existing Medical Devices legislation, 13 June 2014, p. 4, <http://ec.europa.eu/transparency/regdoc/rep/10102/2014/EN/10102-2014-195-EN-F1-1.Pdf>.

⁸ In France, about 9000 victims had also suited a civil proceeding in Toulon against the French department of TUV certification authority. The Court of Appeal of Toulon has sentenced in 2015 that TUV has no liability in the affaire and, consequently, no compensation was accredited to victims. In Spain, a criminal proceeding had been opened before the Audiencia Nacional. Initially the Court dismissed the claims on the basis that there was no evidence of a crime, and directed the claimants to the civil courts. The victims appealed, and on 24 June 2013 the Court of Appeal granted the appeal and directed the first instance criminal court to commence a criminal case. There are over 400 victims asking compensation in this criminal proceeding.





through specific indemnity funds.

The case has been used as an example of *failure and gaps in the existing regulatory European framework on medical devices* in the Proposal for amending the Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009⁹.

The European Consumers' Organisation (BEUC) said the PIP breast implant scandal highlights the continuing absence of a *collective judicial option for victims* in the EU to jointly claim damages in their resident jurisdiction. Victims had to bring the compensation claims to France, despite the inherent costs and burdens. Monique Goyens, director general of BEUC, said the PIP case is blatant for consumers, not only incurring serious physical harm, but also being denied the means to claim compensation for harm and costs for medical treatment and surgery. 'The need to better protect all Europeans from cases like this has been clear for a long time. These products are sold across Europe and the victims come from across Europe, yet only very few have a chance of accessing redress'... 'The Commission remains undecided on whether to introduce Collective Redress for consumers and the victims of such EU market malpractice. It's efficient justice for victims and streamlined administration for our courts. Continued hesitation by the Commission while such scandals continue to occur is difficult to justify' Goyens stated.

Leading cases. Data and results.

According to the project's criteria, fourteen cases have been selected as leading: eight of them are Italian, three of them are German and three are Belgian. For each case, a detailed template has been compiled, mapping the voices, data and information detailed in the previous paragraph.

Set out below is a brief summary of the Italian cases:

- **Bussi sul Tirino case** (environment). *The case concerns the plant of Bussi sul Tirino owned by Montedison between 1963 and 2004 and it*

⁹ Proposal for a Regulation of the European Parliament and of the Council on medical devices, and amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 /* COM/2012/0542 final - 2012/0266 (COD).





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represents one of the most significant episodes of water pollution caused by industrial activities in Italy.

- **Eternit Casale case** (environment). *The case concerns thousands of people, who contracted asbestos-related diseases caused by 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 plants located in Cavagnolo, Casale Monferrato, Bagnoli and Rubiera between 1973 and 1986, as well as residents living in the areas, as a result of the wide spread of the material in the cities and in the buildings of infrastructures. The first criminal proceeding was closed in 2015, but a second criminal proceeding concerning the same facts is ongoing.*
- **Heart valves case** (medical devices). *Between 2000 and 2002 the units of cardiothoracic surgery based in the Hospitals of Turin and Padua started using new artificial cardiac valves produced by Tri-technologies Ltda. These valves have been used for more than 100 replacements. After the break of some valves, which caused the death of the patients, it was found that the quality of the materials was poorer than expected and inferior to the relevant legal standards. The criminal proceeding is closed.*
- **Ilva case** (environment). *One most notorious cases of environmental disaster in Italy. The case relates to the industrial activity which has been carried out since 1995 in a plant located in Taranto and to the effects such activity had on both the workers' and the population's health. The environmental disaster would have been produced by the dissemination of highly toxic substances in the air, in the water and in the soil, posing a threat to human beings, animal life and the environment. Its importance comes from the contrasts it created between corporations, workers, citizens and public institutions as well as from the wide impact industrial activities allegedly had on the environment. The trial is ongoing.*



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- **Ivrea Olivetti case** (environment). *The case is one of the several Italian criminal proceedings concerning harms to human health caused by the inhaling of asbestos fibre dusts generated during productive activities. Accusation, as in almost all these types of cases, is related to negligent behaviours of corporations, who failed to implement systems, measures, instruments and signals aimed at preventing illness and, especially, asbestos-related diseases. In the Ivrea Olivetti case, in particular, the inhaling of asbestos fibre dusts is supposed to have caused severe injuries and the death of several workers who, having worked without any protective disposals and without being informed about the risks, have been exposed to the substance for a long period of time. The trial is ongoing.*
- **Porto Marghera case** (environment). *Porto Marghera is the first significant criminal case concerning illicit corporate behaviours in managing a productive activity in Italy. Porto Marghera may also be considered a seminal case of historical pollution in Italy: after the Porto Marghera trial, many other similar cases were opened in the whole country. The investigation covered the industrial activity carried out at the Marghera petrochemical plant (in the Venice lagoon) over more than thirty years. Under scrutiny were, in particular, the damages caused to human health (mainly cancer diseases) by toxic chemical substances (Cvm/Pvc) as well as the damages caused to the environment by productive activities around the chemical complex. The criminal proceeding ended in 2006.*
- **Spinetta Marengo case** (environment). *The case concerns the commission of environment-related offences in the context of industrial activities linked to chemical production. The Spinetta Marengo chemical area, operating since the beginning of the XX century, includes plants for the production of plastic, rubber and fluorine lubricants. The chemical area is located between the residential area of Spinetta Marengo (a small town in the province of Alessandria) and river Bormida. In the region,*

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several lots are dedicated to agriculture and groundwater is largely drawn for both nutrition and irrigation. Accusation consisted in two counts: i) intentional water poisoning; and ii) failure to carry out clean-ups as required by the law. The First instance judgement was issued in 2015. The appeal is ongoing.

- **Tamoil Cremona case** (environment). *The case deals with the alleged production of site contamination due to the industrial activity of the refinery located in Cremona from 2001 to 2007, along with failures in waste management. Thus, the release of toxic substances has produced 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, as the waters of Po river. Allegations relate to the offence of ‘collapse of structures and other intended disasters’ and to that of ‘poisoning water or foodstuffs’. The criminal proceeding is now before the Court of Appeal.*

Set out below is a brief summary of the German cases:

- **Train accident of Eschede** (disaster). *In June 1998, the rubber-sprung wheel, type BA 064, of ICE 844 broke due to material fatigue at the speed of approximately 200-250 km/h six kilometres South of the village of Eschede. Three hundred meters ahead of a road bridge a switch became entangled with the damaged wheel at 10:59:06 causing the train to derail and enabled the point blades to redirect the train. The derailment resulted in a collision with the road bridge, which collapsed instantly. Human casualties summed up to 101 people, leaving 105 severely and slightly injured. The criminal proceeding ended in 2003.*
- **Holzschutzmittel-fall** (environment). *Some companies sold the wood protection agents ‘Xyladecor’, ‘Xylamon-Braun’ and ‘Xylamon-Echtbraun/Naturbraun’ since 1969 as adequate wood protection agents*

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for interior surfaces. These products contained pentaclorfenol (PCP) and Gamma-hexaclorciclohexan (Lindan) and certain production-related contamination substances like dioxin and furan. The people in authority did not react to the 4,000 written complaints by consumers and continued sales and distribution until 1983. They stopped the production of PCP in 1978, while continuing to sell the same products with the label 'for exterior surfaces'. The commercial production and sale of PCP was legal until legislation taken up in 1989. The estimate of people having suffered physically from contact with the substances is around 200,000. The criminal proceeding ended in 1995, but in 2014 several parliamentarians questioned the Government on the issue of the victims' situation in the Holzschutzmittel-case.

- **UB plasma case (pharmaceutical).** *The case concerns one of the most notorious scandals involving the pharmaceutical sector in most of European Countries. In 1985, the company UB Plasma GmbH based in Göttingen (Germany) had received the permit to produce industrial plasma (for further processing) and from 1 November 1989 until March 1992 it was even allowed to produce plasma for direct application to patients. The case relates to the contamination by the human immunodeficiency virus (HIV virus) of the plasma produced by the company and supplied to hospitals in Fulda and Frankfurt. In order to save money, UB Plasma had 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 had not been detected in time. Moreover, for financial reasons, the company did not apply and observe the standard quarantine period and storage of the blood plasma, which would have closed the so-called diagnostic window. The company's operating permit was eventually revoked and its laboratories shut down on 28 October 1993. Final judgement was issued in 1996, but people infected are still alive and demanding for justice.*

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Set out below is a brief summary of the Belgian cases:

- **Gas Explosion in Ghislenghien** (disaster). *The case concerns the biggest technological disaster ever in Belgium. In July 2004, an accidental gas leakage in a high pressure gas pipe created a persistent smell of gas. The gas pipe passed underneath the industrial zone of Ghislenghien, where construction work was taking place. Some employees of one of the factories alerted the fire-fighters. When the first crew of fire-fighters arrived, an enormous explosion took place, which instantly killed 24 people and wounded 132 others. An enormous flame rose up to 500 meters up in the air, the temperature at the disaster scene went up to 300°C. The heat of the fire was felt until 2 km from the explosion. Debris from the nearby factories was projected up to 6 km away from the epicentre of the disaster. The final judgement was issued in 2012.*
- **Waste Dump of Mellery** (environment). *The case concerns the dumping of illegally toxic waste at the waste dump of Mellery which caused the pollution of the water, ground and gazes on a big surface. Medical tests of the local population showed worrisome results; a saga of medical follow up followed. In 2006, the inhabitants refused to continue the medical follow up as it had not been done seriously. The final judgment was issued in 2003.*
- **UCO – textile plant** (environment). *Since 1976, neighbours of textile company UCO Sportswear have been complaining about odour nuisance. In 2001, an environmental inspection took on the case. In the period 2001-2005, complaints kept coming in, ongoing breaches of environmental regulations were identified, and external reports about the odour nuisance were ordered. The odour nuisance was very clearly established and further to environmental inspections carried out numerous requests to make the necessary technical changes to prevent the odours were raised. The company made promises but did not carry out the necessary changes. Finally, the case went to a criminal court.*

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Number of victims identified

A significant number of victims are involved in the selected leading cases of corporate violence. Figures demonstrate that corporate violence affects hundreds or thousands of individuals, and in many cases entire communities.

The number of victims identified and involved in the criminal proceedings forming the sample, as well as the type of victims may be summarized as follows:

Eternit Casale case

The identified victims for the first charge were specifically: as for the Eternit Cavagnolo facility, 110 deceased individuals and 46 ill individuals (still alive in 2009); as for the Eternit Casale facility, 1379 deceased individuals and 412 ill individuals (still alive in 2009); 4 ill individuals among Eternit Casale suppliers; as for the Rubiera facility, 45 deceased individuals and 7 ill individuals (still alive in 2009); as for the Bagnoli facility, 394 deceased individuals and 190 ill individuals (still alive in 2009). The identified victims for the second charge, deceased or ill, were 2869, among workers and non-workers in the aforementioned Eternit facilities, listed also in the first charge. Specifically, the victims were: 110 deceased and 46 ill and living (in 2009) individuals as for Eternit Cavagnolo; 1378 deceased and 412 ill and living (in 2009) individuals as for Eternit Casale, 16 deceased individuals among Eternit Casale external suppliers, 4 deceased individuals among Eternit Casale Monferrato suppliers, 45 deceased and 7 ill living (in 2009) individuals as for Eternit Rubiera, 394 deceased and 190 ill and living (in 2009) individuals as for Eternit Bagnoli, 1 deceased person as a result of non-occupational exposure attributable to Cavagnolo Eternit facility, 252 deceased individuals as a result of non-occupational exposure attributable to Casale Monferrato Eternit facility, 2 ill and living individuals (in 2009) as a result of non-occupational exposure attributable to Casale Monferrato Eternit facility, 1 ill and living person (in 2009) as a result of non-occupational exposure attributable to Rubiera Eternit facility, 4 Eternit Casale workers' relatives, 2 Eternit Bagnoli workers' relatives.





Heart Valves case

There were approximately 40 victims involved in the criminal proceedings: relatives of the ten dead patients; 30 patients who suffered injuries since they had to replace Tri valves. All the other patients who were still alive and decided not to have a second transplant can be considered victims, as well. But, those persons hadn't the chance to become parties of the proceeding since their harms were not directly related to the specific crimes under judgment. Approximately 20 formal complaints were filed. Victims who had the status of party in the proceedings: family members of the dead patients and patients submitted to a second valve replacement.

Ilva case

The count of indictment identifies about 900 victims: workers and people living near the plant who suffered damages to their health or life, and in particular: a) Workers allegedly suffered health damages caused by long-term exposure to toxic substances; b) The population living near the plant allegedly suffered health damages caused by both the dispersion of toxic substances in the air and the consumption of dioxin poisoned cattle; Farmers who suffered economic damages arising from the contamination of their land and the poisoning of cattle; Environmental associations in relation to damages caused to the environment individual and entities. All 900 victims identified by the count of indictment filed civil claims within the criminal proceedings to recover damages, including several institutions and victims' association. Some of them withdrew their claims before the start of the trial.

Bussi sul Tirino case

All the people living the Pescara valley were potentially involved and harmed by the contamination of the area, but they could not directly participate into the criminal proceeding. More than twenty institutions/associations (representing collective and victims' interests) were admitted as civil party. Only two individual victims, who are owners in the same neighbourhood, were admitted to participate into the proceeding, but only for economic damages.





Ivrea Olivetti case

Fourteen individual victims have been identified by the count of indictment of the first criminal proceeding. Among these: two seriously injured; twelve died due to asbestos related diseases. Six individual victims are involved with the status of party into the criminal proceeding (one of them seriously injured; the others are family member of workers already died). Many entities and associations representing collective interest, including victims' associations, are also involved in the criminal proceeding with the status of party. In total, nine entities and six individuals are participating as party into the criminal proceeding. Other ten victims identified by the count of indictment (nine among family members of dead and one victim injured) have not the status of party within the criminal proceeding, as they entered in an extrajudicial agreement with the corporation before the trial opening or during the preliminary hearing.

Porto Marghera case

In the count of indictment, the Public Prosecutor identified 546 victims, including, in some cases, family members of people who at the time had already died. More specifically, out of the 546 victims: a) 478 cases concerned victims of involuntary manslaughter and injury offences; b) 157 cases related to deaths, while the others were cases where people had suffered serious injuries; c) 22 cases related to victims who were only 'indirectly affected by the defendants' alleged illegal conducts. In addition, 46 of victims (not included in the Public Prosecutor's list) participated into the criminal proceeding. Not all of the victims identified by the Public Prosecutor were legally considered as 'directly' affected by the behaviours under scrutiny, as too much time had run and the limitation period had already expired. The majority of individual victims identified by the Public Prosecutor (530) entered into extra-judicial agreements with the corporations involved. Around 12 individual victims decided to take part into the criminal proceedings as parties. Among them are the family members of the worker who, at first, lodged the complaint. Other entities, as workers' associations, stayed in the criminal proceedings.





Spinetta Marengo case

About 90 individual victims and several entities and associations claims within the criminal proceedings. The individuals who filed civil claims are residents in Spinetta Marengo, plant's workers and heirs and family members of people who allegedly died as a consequence of the crime.

Tamoil Cremona case

Potential victims are all the citizens living in the area. Victims' instances have been fostered by associations, which aim embraces the social interests that allegedly have been offended. the Cremona Municipality decided not to make any request to join the proceeding as a party. This decision precluded the private person's legitimating to be considered a party in the proceeding as well. Only one private person, citizen included in the election district of Cremona, decided to claim on the behalf of the whole Municipality.

Train accident of Eschede

More than 100 Victims and descendants joint the criminal proceedings as so-called Private Accessory Prosecutors in first instance. 14 Private Accessory Prosecutors in second instance represented by one lawyer. Type of victims: victims who suffered bodily harm and family members who lost a relative. Not all victims participated in the criminal proceedings.

Holzschutzmittel-fall

The prosecution in Frankfurt received 2,700 criminal complaints. 800 complainant families were registered. The prosecution selected 171 people after investigating their health status and the likeliness of their links to the wood protection agent to compile the indictment, which were organized in 69 different household units (family/couples). 19 of these units served as backup cases to counteract possible statutory limitation and were not introduced to the proceeding. 33 Joint Plaintiffs took part in the criminal proceedings. The complainants were either suffering physically themselves or economically because of





their relatives' afflictions.

UB Plasma case

Potential victims are all patients who received infusions from the blood products infected by the HIV virus and which supplied to hospitals in Fulda and Frankfurt. At least two patients in hospitals in Fulda and one in Frankfurt a.M. were tested HIV positive after having received infusions with the said plasma and died after a few weeks to months, however, due to their underlying diseases. The district attorney charged five persons for aggravated battery in 71.303 cases as well as in 3 other cases and for continued fraud. Victims or their heirs did not seem to participate in the criminal proceedings.

Gas Explosion in Ghislenghien

600 civil parties were involved in the trial.

Waste Dump of Mellery

The victims involved in the case and in the legal proceedings were citizens living in the neighbourhood of the waste dump of Mellery.

Victims' access to justice

The most important, general remark emerging from the analysis of leading cases is that the number of victims *potentially injured or harmed* by the crime does not equal the number of victims who *could effectively have access to justice* or participate into the relevant criminal proceedings. This output would appear to depend on a number of factors, most of which may be considered typical of criminal contexts involving corporate violence.





Trying to summarize the reasons which affect this result, we can underline the following issues:

I. The opportunity to access justice implies the *identification of victims*, and the decision to access justice assumes that *victims are aware of being victims*. Leading cases show that the lack of identification may result in a lack of victims' awareness of their status, and vice versa. The identification of victims usually depends on the Public Prosecutors' activity. Except for the disasters (e.g. the **gas explosion in Ghislenghien** and the **train accident of Eschede**), where victims are clearly identified as people harmed by the event, in other cases a complete identification of all potential victims by *public authorities* is only partially possible at the time in which the investigation starts. This is true in almost all the Italian cases for diseases related to pollution or contamination having led to harms to people over a long period of time - etiopathogenesis takes very long periods, and often effects are even latent – or producing widespread damages in extended areas of land. Difficulties in identifying victims often also lead the Prosecutors to start additional investigations and new proceedings over time against the same perpetrators and charging the same offences, just because they discover new victims.

II. The media may play a significant role in informing the victims about their status, in making public the existence of an investigation or in giving voice to complaints or journalistic independent investigations. It can be affirmed that sometimes the media are the just ones informing people about a safety or environmental problem, that they never even suspected of.

III. As for victims' rights to be informed, the three national legal systems under our consideration recognize some fundamental rights to victims from the start of the investigation (the right to be informed of dates and deadlines, the right to observe the timeframes to be summoned; the right of his or her defence counsel to access the files). The modalities and the





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extension of these rights, of course, vary according to each national criminal procedure system. The Leading cases analysis has shown that at least five categories of obstacles and barriers, listed below, may affect the victims' *awareness of their status and right to be individually informed*:

- a) individual victim's needs blend in with the others (often, dozens or hundreds) in a kind of *collective action*. The large number of victims potentially or effectively involved inhibits the chance to take care of individual needs and rights;
- b) the nature of certain crimes charged to corporations – danger crimes or crimes with no result - requires only the evidence of a collective damage (e.g. crimes consisting in the exposure to a pollution or a contamination cause by industrial activities) and not that of the individual harms. Regardless of the fact that the evidence of damages to life or health is an imperative requirement in order to charge these offences, individual victims are not admitted to claim for their personal damages. This consideration, again, creates some distance from the single person's needs and rights and the scope of criminal proceeding;
- c) victims' needs sometimes blend in with the reasons and aims of the accusation, which may, with no intention, prevail on the single victim's right to receive adequate assistance and to be protected from further victimisation and further distress when they decide to take part into the investigation process;
- d) the accusation usually concerns corporate actions or omissions, whose evaluation entails scientific topics and the understanding of complex legal issues, very far from the victims' wealth of knowledge or direct control;
- e) the trial file is almost ever composed by thousands of documents and not accessible to victims without the support of lawyers or experts;
- f) the *type of crimes* charged to corporate representatives and the *time span* covered by the criminal behaviours are often unclear or, at least, not intelligible by citizens, workers or consumers. Victims can find the facts under investigation confusing and overwhelming, having no chance to understand the link between the criminal behaviours and

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their diseases. Therefore: the *awareness to be a victim* may arise *too late*, when statute of limitation or the procedural deadlines to take part into the criminal proceeding have already run out.

Examples of all the three underlined issues may be provided by the following cases:

Eternit Casale case

A complete identification of all victims was only partially possible at the time of first investigation and trial. Victims who didn't file any complaint, who weren't identified as victims by the associations, or who were not informed or led by the associations to ask for compensation had no chance to access to justice. This 'black hole' has not been remedied even later, when a second criminal proceeding (the so called 'Eternit bis') opened in relation to deaths and diseases discovered after the beginning of the first trial. It may be argued, therefore, that not all the victims have been identified yet nowadays.

Ilva case

Potential victims may be many more than those who effectively joined the criminal proceeding still ongoing at the time of this report. Damages to environment under scrutiny, in fact, cover the whole area surrounding the plant, threatening the health of all the people living nearby it, and damages, as well as potential victims, are still partially unknown. Further to the filing of several criminal complaints on the part of citizens and environmental associations, the Prosecution Service of Taranto appointed experts in Chemistry and Epidemiology to draft two separate reports on the impact of the plant activity on the environment. The chemical report showed a significant dispersion in the air of substances damaging both human health and the environment, as a consequence of the plant activity. Among these substances are powders, nitrogen dioxide, sulphur dioxide, hydrochloric acid, benzene, and dioxin. The latter, in particular, would have contaminated farmlands and made grazing impossible within a 20 km range from the plant, therefore seriously harming the farming activities in the area. The epidemiological report, which takes into consideration a seven-year time span, highlighted 11.550 deaths due to cardiovascular and respiratory issues and 26.999 recoveries due to cardiac, respiratory and cerebrovascular issues. The report also finds that 'continuing exposure to the toxic and polluting substances dispersed in the air as a consequence of the plant activity had caused





and keeps causing a decline in the population's health conditions (affecting different parts of the body), resulting in illness and death'.

Ivrea Olivetti case

It's quite sure that the fourteen victims identified within the current criminal proceedings are only a limited part of the potential victims. Experts and Public Prosecutor Office underlined that many other deaths are expected for the period between 2017 and 2020. A representative of the Public sanitary office during her testimony have declared that in the last 15 years they have identified 85 victims directly injured or died. Just a small part of them is participating into the current criminal proceedings. In fact, additional investigations have already been opened (*Olivetti-bis* and *Olivetti-ter* cases), taking into account other victims, and further investigations are expected to be opened. Victims are potentially hundreds in a long-term perspective according to the expert's reports, because all workers exposed to asbestos inside the plant and in the outside are at-risk. But also some of the already identified victims could not participate into the criminal proceeding due to the fact that the offences were already time-barred.

Bussi sul Tirino case

Ascertained damages to environment cover a large area, so that all the citizens living there may have been potentially harmed. As the judgment decision lets emerge, surface waters and groundwater in that area are to be considered as certainly polluted because of the verified presence of toxic substances. Thus it can be estimated that pollution has been carried for 40 years and potential victims could be around 700.000 people, by computing the number of persons who have been using water in the contaminated area along the considered timeframe contaminated water.

The charged offences were focused on the danger caused to the whole local community, that is the public safety instead the individual one. Personal and individual concerns are only a limited portion of the offences charged, which must be perpetrated against public health and collective interest. Therefore, none of the individual victims could be strictly considered 'victim' according to the type of offences charged to the defendants, except for two owner of areas closed to the plant for economic damages (not for harms to health). Therefore, no individual victim was admitted as civil party in the criminal proceeding.





Heart valves case

All the patients who were still alive and decided not to have a second transplant can be considered victims, as well. But, not all those persons had the chance to become parties of the proceeding since their harms were not directly related to the specific crimes under judgment.

Holzschutzmittel-fall

The estimate of people having suffered physically from contact with the substances is around 200,000. The victim's organization IHG (Interessengemeinschaft Holzschutzmittel-Geschädigter) received a total of 60,000 inquiries and documented about 10,000 cases of damage. In the trial, only 29 of the alleged 44 personal injuries were found attributable to the products.

The prosecution in Frankfurt received 2,700 criminal complaints. 800 complainant families were registered. The prosecution selected 171 people after investigating their health status and the likeliness of their links to the wood protection agent to compile the indictment, which were organized in 69 different household units (family/couples). 19 of these units served as backup cases to counteract possible statutory limitation and were not introduced to the proceeding.

The complainants were either suffering physically themselves or economically because of their relatives' afflictions.

IV. *The role of associations, organizations and other entities in supporting victims*

Differences between the three countries are evident on this topic. In Italy, associations and local entities play a relevant role both in enhancing access to justice and in providing support to the victims, also during the criminal proceeding. In Germany these entities are not allowed to take part into the criminal proceeding, while in Italy and Belgium they are admitted. None of the Italian associations is public, even if they play a role similar to that of the victims' support services provided by the Directive.





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The role of associations is not only interesting for the understanding of victims' needs, but also for what concerns the modalities of their access to justice. It is a fact that victims' access to justice in itself is often possible only due to the *intermediation of third parties*, which might not always approach victims with a full awareness of their rights and which may have private interests to participate in the criminal proceeding (in Italy and Belgium these associations can claim for the compensation of damages to the association in itself). It is also a fact that often it is only thanks to investigations or research conducted by the environmental associations or the labour unions that victims realize to be harmed by an environmental crime or to have been exposed to toxic substances produced by a productive plant.

Here, some examples of the role played by these private or public associations in the leading cases:

Train Accident of Eschede

Several days after the incident the Deutsche Bahn named an Ombudsman and provided him with further staff for victims support and also created an emergency fund of 5 Mio. German Mark. Ombudsmann appointed by Deutsche Bahn was responsible for victims for 10 years. Victims association 'Selbsthilfe Eschede' was founded by the victims that negotiated with the Deutsche Bahn on compensation issues.

Victims claims were mainly driven by the activity of one lawyer (Dr. Rainer Geulen), who was not only the legal representative for most victims in the court proceedings but also the speaker of the 'Selbsthilfe Eschede' (victim's association). Selbsthilfe Eschede' (victim's association) fought publicly for an official apology of the company.

Holzschutzmittel-fall

Victims founded the Interessengemeinschaft Holzschutzmittel-Geschädigter (IHG) e.V. in May 1983. The organisation helps: Gathering and evaluation of information on issues concerning chronic and acute health damage attributable to wood protection agents and related substances; Capacity building of victims and affected persons in terms of detection of the damage and verification of links to the harmful substances; Counseling and assistance in medical, toxicological, legal and fiscal matters as well as object





decontamination.

Eternit Casale case

The Victim Association Afeva provides an assistance in victims' identification, establishing a direct contact with them, coordination, legal information and legal assistance through their own lawyers. In addition, the Association also asks for compensation in the proceeding. The Turin Court of First Instance endorsed this approach in its ruling of 1 march 2010, holding the Asbestos Victims' Relatives Association was damaged by the crime and rejecting the request of its exclusion from the trial filed by the defendants. It is worth mentioning that, besides this organization (surely the most relevant one), there were other organizations asking compensation as well, with a partly similar role of assisting and informing victims, such as Italian Unions or *Medicina Democratica*.

Ilva 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. A number of institutions and associations joined the criminal proceedings as civil parties.

Ivrea Olivetti case

Many entities and victims' associations representing collective interests, such as labour unions, participated in the criminal proceeding with the status of party. Two victims' associations supported victims before and during the trial. Their representatives have been heard as persons of interest.

Porto Marghera case

The investigation started after a complaint lodged by one single victim, supported by a





labour association. Labour unions and other associations/institutions representing victims' interests were admitted as party in the criminal proceedings since the beginning and until their end. Some of these unions and associations played a relevant role in supporting victims, especially during the investigation phase. These entities requested compensation for damages caused to workers, residents and the environment. Some of these associations decided to stay within the criminal proceedings, even after the majority of victims left the proceedings to join the extra-judicial agreement.

Spinetta Marengo case

The Regional Institution for Environmental Protection filed the criminal complaint, further to which the Prosecution Office started a criminal investigation. The labour association *Medicina democratica* played a very important role. The association not only filed several criminal complaints with the Prosecution Office, but also published fliers and letters addressed to the population living in the area surrounding the plant, encouraging whoever deemed to have contracted diseases from water pollution to file civil claims for damages against Solvay and the other companies operating in Spinetta Marengo. *Medicina democratica* also supported, at a political level, the promotion of epidemiological studies and monitoring activities in the area (see for instance the initiative called '*Osservatorio della Fraschetta*'). Extensive information on the case was also provided to the public on the web. It is worth noting that information spread by *Medicina Democratica* comes from a party to the proceedings and appears very much affected by a unilateral perspective and, therefore, as such, it is to be carefully evaluated in the absence of a final judgement on the case.

Tamoil Cremona case

The criminal proceeding started since a formal complaint was exhibited by the association 'Ambiente, territorio società', concerning the contamination of the groundwater and of natural resources, and particularly of waters along the Po river. The local newspaper 'La Cronaca' dedicated articles and dossiers on the environmental contamination of the area surrounding Cremona: in particular, it was assumed that the groundwater was contaminated until 20 meters, and even 60-70 meters in depth, because of the presence of hydrocarbons and MBTE (an oil additive). Victims' instances have been fostered only by associations, which aim embraces the social interests that allegedly have been offended. Consistent with the campaign conducted by Legambiente and the activities oriented to





promote the community awareness on the site contamination, the environmental association constituted in 2008 the 'Comitato contro l'inquinamento Tamoil'.

Gas Explosion in Ghislenghien

The NGO 'Solidarité Ghislenghien' collected money for the children of the victims and to cover the costs related to funerals of victims, transport to hospital etc. The association of victims of Ghislenghien supported victims during all the case, giving a place where victims can meet, share their stories and organize mutual support.

Waste Dump of Mellery

A non-governmental organisation was founded in 1988 and called CADEV, Comité d'Action pour la Défense de l'Environnement à Villers-la-Ville. Cadev filed a civil law suit at the court of Nivelles and started a criminal law suit in Antwerp. Cadev also struggled to get organised and funded a medical follow up of the population living in the neighbourhood of the waste dump. The organisation pushed for and obtained the cleaning up of the site and contributed to the development of more adequate environmental legislation. Now many years after the discovery of the scandal, Cadev still exists and has adopted the larger mission of tackling other environmental problems, focusing more on territorial planning, protection of biodiversity and mobility.

V. The access to criminal justice or, as alternative, to *civil or administrative justice* basically depends on the legal system to which the victims belong. In Italy, access to *criminal justice* seems to be the preferred choice, while in Germany and in Belgium civil lawsuits seem to be an option to which victims revert more frequently, as an additional course of action or as an alternative to the criminal justice system. The reasons underlying such a different approach are complex and may not be investigated here, but it is a fact that bringing civil lawsuits in separate proceedings (i.e. not within the criminal proceeding) is an exception in the Italian cases, while the opposite





conclusion may be drawn for almost all the Germany and Belgium cases, as exemplified below:

Train Accident of Eschede

As the criminal proceedings ended without judgements, no decision on victim compensation was taken. A civil law suit was therefore the only remaining legal possibility. After the Deutsche Bahn spontaneously paid the material and immaterial damages, six victims filed a civil legal test case (that was joined by at least 50 more victims) at the Landgericht Berlin in order to be paid higher *immaterial compensation*. The claim for additional damages was denied by the court (Landgericht Berlin 18. September 2002). This decision was not further challenged by the victims.

Holzschutzmittel-Fall

Before and after the trial, civil suits by victims participating and not participating in the criminal proceedings were filed, but have not been successful.

Gas Explosion in Ghislenghien

Besides the criminal proceedings victims also filed separate civil lawsuits on the basis of Art 1384 Civil Code, this is the responsibility for the harm caused by things/objects for which one is responsible. Civil parties wanted to hold Fluxys responsible for the harm caused by the gas pipe and Diamont Boarts for the construction site they owned.

Waste Dump of Mellery

Besides the criminal law suits, civil law suits were engaged in 1990 and lasted for many years. In 2003, when the criminal suit ended in an acquittal of all the accused persons, the civil law suits were concluded by a 'conciliation'. The victims side perceived the conciliation as a 'bad agreement', but they are tired of years of procedures.





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VI. Victims' access to justice is frequently *negotiated with the corporation outside the criminal trial*, where victims' needs and rights may not always be guaranteed. Leading cases show that the existence of a criminal proceeding does not preclude, but, on the contrary, seems to favour attempts to reach at least a monetary compensation during the investigations phase, before the trial. Many cases confirm the primary role of *extra judiciary negotiation* in defining the conflict between victims and corporations, at least for what concerns the economic compensation. In fact, the number of **extrajudicial agreements** between victims and corporations entered into *during the investigation or at the very beginning of the trial* is significantly high. When the agreement is closed in the initial stages of the proceeding, the risk to close an 'unfair deal' is borne by both the parties. In fact, neither victims, nor corporations are aware of the outcome of the final judgment. Consequently, these agreements guarantee a compensation to victims even in case of acquittal or in case of no prosecution sentences. Obtaining compensation at an early stage may also represent an advantage for victims, because proceedings may last several years, with a high probability to incur in the statute of limitation.

Even if both parties risk to close an unfair agreement, it may be assumed that also in this context victims are more vulnerable, especially because of the asymmetry of information about substantially all the data which would support a critical evaluation of the proposal. Victims' needs to receive appropriate support and access to compensation should be guaranteed also in this context, as these agreements undoubtedly imply significant withdrawals of some of the victims' rights: in particular, in exchange of the economic compensation, victims withdraw their right to participate into the criminal proceeding as a party or withdraw their lawsuits as civil party when already brought. Their decisions about entering or not entering in the negotiation, accepting or not accepting the proposal, and the meaning of the withdrawal of their rights should require legal and psychological support, as well as in the context of a criminal proceeding.



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Some examples of this kind of negotiations may be found below:

Eternit Casale case

In 2008, it was submitted a so called proposal of 'indemnification' (in order to avoid any admission of liability), with a maximum limit of 60.000 Euro per capita, reduced according to the period of employment and the type of disease. The 100% of the sum was granted only to those victims who worked exclusively during the Eternit Swiss Group period, between 1973 and 1986, and contracted a mesothelioma. The *majority of the victims accepted the proposal*. The proposal is actually still valid after the Court of Cassation ruling in the first Eternit trial; the intention is to prevent civil actions in the 'Eternit-bis' proceeding.

A year after the beginning of the trial, the defendant offered 30.000 Euro to every Casale citizen (deceased or ill) who was living in Casale during the aforementioned Swiss group period and contracted a disease since 1 January 1988 and at least fifteen years after the beginning of his residence in Casale. The proposal was reformulated on 11 July 2015 and, thus, is still valid after the Court of Cassation ruling in the first Eternit trial: the intention is to prevent the civil actions in the *Eternit-bis* proceeding.

It's quite important to note that many victims could not entered in these agreement, because in 1986, when Eternit went bankrupt, some workers reached a settlement with the company. Despite the fact that the agreement did not explicitly included the occupational diseases resulting from Eternit activity, the Turin Court of Appeal held that this settlement precluded any chance to ask for compensation, since it formally stated that the workers 'no longer had any claim' against the company.

Ivrea Olivetti case

Some victims withdrew from the criminal proceeding having entered into an extrajudicial agreement with the corporation for compensation of damages. The negotiation with other victims is still ongoing.

The content of the agreement is unknown. The press reports that the total compensation allocated until now is around 2 million Euros, 150.000 Euros for each individual victim.



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Porto Marghera case

With respect to the individual victims of involuntary manslaughter, injury, and health disaster offences, an extra-judicial agreement was entered into before the trial opening. More precisely, 530 victims entered into the agreement. The total compensation allocated was equal to 63 billion of Italian liras (approximately 34 million euro). With respect to the environmental offences, before the first instance judgment another agreement was entered into between one of the two corporations involved and the Ministry of Environment. The agreement entailed the payment of a compensation of 550 billion lire (approximately 300 million euro) on the part of the corporation to the Ministry in exchange for the withdrawal of victims' participation into the criminal proceedings.

UB Plasma case

Since 1987, negotiations between German haemophilia societies, corporations producing blood products and their liability insurances took place with the aim of compensating HIV infected haemophiliacs. Only material damage of the victims and their spouses was compensated for. In this context, the victims had to sign a settlement agreement in which they waived all further claims also against possible third-party joint debtors (Gesamtschuldner). The vast majority of victims did consent to this agreement because of a series of legal challenges which made speedy compensation rather unlikely. On average the victims received 60.000 DM (total above 100 Mio. DM). The financial support provided (pension scheme) to the victims is comparatively moderate. The assets of the foundation were already exhausted by 2010.

In the *environmental field*, remediation activities are sometimes negotiated between the *corporation* and the *public authorities*. Even in this case, the 'bargaining chip' is the withdrawal of public entities' rights to participate in the criminal proceeding. In the **Tamoil Cremona case**, for example, the Cremona Municipality and the corporation agreed on remediation procedures which the corporation should activate. Such an agreement included also 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 into the criminal

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proceeding. In the **Eternit Casale case**, in 2011 the defendant offered to the Casale Monferrato Municipality 60 million Euros. The Municipality declined the offer in 2012, a few months before the Court of Turin issued its judgment convicting the defendant in the first instance trial, in which the Municipality was awarded compensation for a similar sum (on a provisional basis). The refusal of the offer was also motivated by the official assurance from the Italian Government of a direct economic intervention. As a matter of fact, at the end of the trial, after the Supreme Court ruling, the Italian Government provided to the Casale Monferrato Municipality an amount of money almost equivalent to corporation's offer.

VII. Victim's position inside the criminal proceeding

According to the three national procedural systems, victims have the right to take full part in the criminal proceedings as directly injured party (or as family members of a victim), depending on three conditions: 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. The participation implies the right to make a declaration, to present evidences, to access to the court files, to disclose and file supporting documents, to interview witnesses, to appeal, to be informed about decisions, to participate in inspections, and the right to be duly summoned to the main trial.

The victims' role inside the criminal proceeding is not minor. Victims usually actively participate as witnesses, and, in general, they provide active support in the gathering of evidence. For example: in the **Spinetta Marengo case**, all of the victims who joined the proceedings had the possibility to effectively exercise their rights in court and exercise their role as 'party' through their defence counsel and expert witnesses. In the **Tamoil Cremona case**, the judge in person recognized a very active participation of the victims standing in the process, especially by promoting witnesses' examinations and experts' involvement. In the **Eternit Casale case**, victims participated

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into the proceeding by writing deeds (act of appearance before the Court, closing arguments) and by participating to the activity of evidence gathering during the hearings of the trial. Some victims also appointed private experts to draft technical reports. In the **Porto Marghera case**, in the investigation phase, victims, their associations, environmental associations and their experts worked side by side with the Public Prosecutor. In the **Ilva case**, victims played a very important role, both during the investigation phase and during the trial. The trial file, in fact, contains several complaints filed by citizens and associations, flagging the emission of anomalous smoke from the plant, as well as by farmers who had to kill dioxin-poisoned cattle. Furthermore, the victims actively collaborated with the Prosecution service in the reconstruction of the relevant facts also through interviews since 2008.

It is also remarkable that in many leading cases individual victims *continue to participate to the hearings regardless the fact that they entered into extrajudicial agreements*. They do not participate as plaintiffs, but as audience or as witnesses. This need to be involved and to participate goes evidently beyond the aim of obtaining economic compensation, and it should probably be seen as a need to follow, step by step, the ascertainment of the truth. In fact, extra judicial agreements are limited to the *economic compensation* issue: no establishment of the facts, admission of liability or other form of reparation are usually covered by the negotiation between victims and corporations. However, the physical attendance and emotional involvement of victims may not always be a positive factor, even from the victims' prospective. In fact, some leading cases show that the presence and voices of victims in the trial hall can transform the trial in a sounding board of the conflict and it may expose victims to the stress of the conflict between Prosecutor and defendants.

Appropriate access to compensation

I. Victims' requests to the criminal justice system

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Victims who participate into the criminal proceeding primarily claim for *economic and moral damages* directly caused by the crime. The dimension and the object of damages claimed depend, of course, on the type of offence and its consequences. It is quite notable that in case of corporate violence the economic losses may concern an entire community and that moral damages may also take the shape of *fear to be harmed in the future*. Some interesting examples on this issue are the following:

Tamoil Cremona case

The recreational associations located in the area have requested for material and moral losses related to the crimes. Actually, according to their claims, two different profiles can be distinguished: patrimonial harm, which has been suffered because of the water pollution (particularly concerning the Po river), since pools and other recreational structures could not even be used; moral harm, inasmuch as people felt fear to be personally contaminated and still running the risk to get sick, because of the human exposure to toxics;

Only one citizen has been admitted to participate. This participation depends on the decision of the Municipality to give up its right to stand. Thus, this citizen's claims have to be intended as requested on the behalf of the whole Municipality and not for his personal harms. The citizen participating as civil party claimed, on one side, for *economic loss* suffered by the *local community* related to the necessity to provide administrative measures, so that the agenda has been altered and significant amounts of money have been redirected on that purpose; on the other side, he claimed for *moral damages* suffered by the Municipality due to the severe pollution of surrounding areas, intended as *fear to be personally contaminated* and still running the risk to get sick, because of the human exposure to toxics. Such fear depends also on the awareness that under those circumstances the etiopathogenesis (as the secondary effect of environmental resources contamination) consists in very long periods, which often are even latent. That under consideration has to be intended as a case of victimisation related to danger, rather than to damage. The Judgement recognized to the citizen one million of euro for damages to the citizen representing the community and 40.000 euro for legal expenses.

Eternit Casale case

Two parties asked also for compensation of a non-material damage (fear they could





contract a lung tumour because they are (or were) Eternit workers or Casale citizens.

Spinetta Marengo case

In the full opinion, the Court expressly stigmatized the strategy consisting in the filing of civil claims in relation to damages which will never be ascertained in the context of a certain criminal proceedings (because unrelated to the charges), stating that it only fosters victims' expectations which are going to be frustrated, thereby causing additional pain to people who already suffered significant losses.

The Court anyway affirms the principle that the right not to be alarmed on one's own health conditions and not to spend a lifetime with health concerns arising from polluting activities is a need deserving legal protection, in that it is part of the broader right to health, which includes also the right to 'psychological peace and quiet'.

II. *Reasons why compensation has been denied or not obtained by victims*

In many leading cases of corporate violence, the criminal proceeding does not provide for compensation to victims.

Generally, it may be said that there is often *a significant lag between the initial expectation of justice and the effective output of criminal proceeding.*

This result is due to different reasons, which may be summarized as follows:

- a) Individual victims are prevented from participating into the criminal proceedings for *restrictive procedural burdens,*
- b) The type of crime or the lack of strict/direct link between the crime and individual harms; c) Victims may not be parties to the criminal proceeding because they already entered into a extra-judicial agreements with the corporation before the trial;
- c) Under certain conditions, final judgements may be issued even regardless of the ascertainment of the facts and liabilities and therefore with no response to the victims' requests;





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- d) Defendants decide not to go to trial, choosing, for example, *plea agreements or other kind of settlements with public authorities* which do not involve victims' compensation.

Three additional remarks deserve to be underlined.

First. Many victims or potential victims do not have the chance to claim for compensation, as they cannot prove a *direct damage* at the time and place where the trial takes place. In these cases, some victims' interests and rights are represented by associations or other collective entities; some others, are not represented at all.

Second. As far as damages are caused by the normal management of the industrial activities, access to justice is often denied to individual victims because the crimes charged protect only *collective interests* and not *individual losses*. In these cases, despite the fact that the crime has also caused harms to human health, individual victims have no chance to participate in the criminal proceeding claiming for a personal compensation, because *individual harms* are not related to the *type of crime* charged to the defendants. Of course, individual claims are included in the collective damages, which are instead under scrutiny. But, an effective damage on a large scale is quite often difficult to be proven.

Third. Also when manslaughter or injuries are charged and victims can claim for individual damages, relevant problems arise in terms of evidence to be provided on both the *causation link* between the corporation's actions or omissions and individual harms, and *personal intention or negligence* in having caused individual harms. Acquittal due to these arguments are very common especially in cases of health diseases with a long period of latency or when epidemiological data are not available or consistent. The uncertainty on the outputs of final judgement does not only affect victims' claims in the single proceeding, but it may also lead to an unequal treatment of victims harmed by identical corporate behaviours with identical consequences on human health (Italian leading cases on asbestos-related diseases is the typical example). In fact, victims may receive a different judgement just depending on accidental factors: the circuit Court where trial

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takes place, the Prosecutor's ability in collecting the evidence and in identifying victims, the availability of epidemiological data, the experts' position on the importance of epidemiological data. This disparity of results is not easily understandable by victims, who reasonably expect to have the same compensation obtained by other persons in exactly the same situation.

Examples of proceedings where, despite the fact that harms or danger of harms were ascertained, *compensation was not obtained* are the following:

Bussi sul Tirino case

As the judgment decision shows, surface waters and groundwater in that area are to be considered as certainly polluted since October 2002, because of the verified presence of toxic substances. The structure of one of the charged crimes is premised on water poisoning, rather than on water contamination. That is: in order to prove the crime itself, it is necessary to prove an effective (and not only a potential one) danger for people health. No individual victim could claim for damages because they could not be strictly considered 'victim' according to the type of offences charged to the defendants. Personal and individual concerns are only a limited portion of the offences charged, which must be perpetrated against public health and collective interest; accordingly, public safety – rather than personal health – has been alleged as damaged.

Judges also pointed out that, although contaminated, it's not proved that the waters for human supply were poisoned. At the time of proceeding, any personal harm - in terms of diseases or pathologies certainly related to the contamination - was proved as to allowed a conviction. This circumstance is due to the latency of pathogenesis of the expected diseases: the evidence of a certain correlation between the exposition to toxics and the occurrence of harms to health (think, for instance, to the occurrence of cancer due to such a exposition) is often tricky to ascertain. At the time of proceeding, no epidemiological research and no cancer register were created; so data on disease occurrence and on the incidence of the contamination on human health were not available.

Recent epidemiology findings on the incidence of the increase in cancer cases in the area contaminated are now available. A report of ISS (National Health Institute) dated 30 January 2014, which was filed in criminal proceedings by the Ministry of environment, led to the conclusion that there are objective evidences to configure a significant risk to health of the population exposed to toxic wastes. Anyway the report has not demonstrated a correlation between pollution and the increase of cancers pathologies. Two other surveys have failed to demonstrate that the residents of the municipality of Bussi sul Tirino's





exposure to environmental pollution has led to an increase of malignant tumours, although it does not rule out the increased incidence of the verification risk in the years to come.

Spinetta Marengo case

The Court found that, although the plant's industrial activity had certainly seriously polluted the surrounding soil and groundwater – threatening public health – both the water supplied to the plant workers and that drawn for nutrition by those resident in Spinetta Marengo and Alessandria were in line with concentration levels of drinkable water. The Court nonetheless ascertained that the environmental matrices (soil and groundwater at different levels of the aquifer) had been seriously affected by the pollution generated by the plant. Individual victims who had requested damages arising from death and injuries as a consequence of the alleged poisoning saw their claims rejected because the defendants were never charged with these offences and, therefore, no causal connection between the defendants' conducts and the death/injuries has ever been ascertained.

Individual victims who had filed civil claims for damages arising from the exposure to poisoned water were not awarded damages because, at the end of the trial, no one could prove to have 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. The Court, however, found that the right not to be alarmed on one's own health conditions and not to spend a lifetime with health concerns arising from polluting activities is a need deserving legal protection; it is part of the broader right to health, which includes also the right to 'psychological peace and quiet'. On this basis, approximately 25 individual defendants were awarded damages for an amount of euro 10,000 each and 5 individual defendants were awarded damages to be determined in separate proceedings. Among these, there are people who had worked in the plant, or who had filed with the Court blood analyses showing the presence of several metals in their blood, or who had reported to have changed their life habits as a consequence of the Chromium Emergency scandal (e.g. who used to flush their home vegetable garden with water drawn from wells connected to the plant and had to stop and start drinking only mineral water);

Individual victims who had not been heard in Court were not awarded damages, because the Court found that – since the claims were very general – it had not been possible to ascertain even just their actual 'suffering' from the awareness or the fear to be exposed to toxic substances, which could have justified the award of damages.





Tamoil Cremona case

The proceeding currently stands before the Court of Appeal, and so far the second degree decision is not yet available. All the defendants, but one, have been sentenced guilty with the judicial decision of first instance. The charged offences have to be considered as focused on *the danger caused to the whole local community*.

Despite the fact that for all the victims (associations representing victims' interests) taking part to the proceeding compensations have been recognized, it's quite interesting that epidemiological data have not been considered as relevant for the decision, since they were deemed as unrefined and the charged crimes are characterized only for the occurrence of danger to the public (and not individual) safety. In fact, the proceeding lets emerge the outcome of a research fostered by the Local Sanitary Agency, although it has not been considered consistent with the facts under investigation. The research concerned the cases of leukaemia occurred in the neighbourhoods of the allegedly contaminated areas during the period 1998-2007: they were assumed as the double than the average in the region; the triple, considering the specific pathology named 'acute myeloid leukaemia', which is consistent with the exposure to benzene. Conversely, the defence expert argued that such data were not trustworthy, as epidemiological study had been conducted on a not extended cohort and the outcome had not been submitted to peer review, so that the study itself could not be intended as scientific.

Therefore, victims requested (and obtained) compensation for the fear to get sick, because of the exposition to toxic substances.

Train accident of Eschede

The termination of proceedings was agreed upon on first instance, as the degree of the guilt of the accused was low and the accused consented to a cash settlement of 10,000 € each.

No decision on damages was taken by the courts in the criminal proceeding. Compensation according to the Opfererschädigungsgesetz (OEG) was not accessible because the case did not meet the legal preconditions (intentional crime – prosecution was for negligent injury and negligent killing)

Deutsche Bahn consented without a legal decision to treat victims as if the company had acted with guilt and compensate the victims accordingly (otherwise compensation would have been limited according to the applicable Haftpflichtgesetz). Injured victims received material and immaterial damages (single payments as well as annuity payments) in





accordance with generally used tables for damages in German law Deutsche Bahn AG paid 30,00 DM compensation for each dead. In total, Deutsche Bahn AG paid 32 Mio. € until the end of 2008. After the Deutsche Bahn paid the compensation/provided for compensation, six victims filed a civil legal test case (that was joined by at least 50 more victims) at the Landgericht Berlin in order to be paid higher *immaterial compensation* (Schmerzensgeld). The claim for additional damages was denied by the court. This decision was not further challenged by the victims.

Holzschutzmittel-fall

After a conviction in first instance, the Bundesgerichtshof overturned the conviction on appeal and ordered a retrial at the Landgericht Frankfurt. The Landgericht Frankfurt terminated the proceedings according to sec. 153a StPO due to the bad health of the accused and the length of the proceedings and as the following agreement was reached: Solvay S.A. and Bayer AG agreed to spend 4 Mio. DM on a research chair at the University of Gießen called 'Toxicology of interior air'; the accused paid 100,000 DM to the treasury each.

As the criminal proceedings ended without judgments, no decision on victim compensation was taken.

Before and after the trial, civil suits by victims participating and not participating in the criminal proceedings were filed, but have not been successful.

The main problem for victims was to establish a *causal link* between their illnesses and the sold product. The Bundesgerichtshof in the criminal case found no clear causal connection between damages and the sold product as the scientific basis was not sufficiently clear. Equally civil proceedings denied the necessary causation link.

Gas Explosion in Ghislenghien

The question of the financial compensation of the civil parties was a very complicated one. The amounts of compensation to be paid was estimated by some professionals up to 1 billion euro. Many parties were potentially co-responsible for what happened, and thus also many insurance companies were involved. Because the attribution of responsibility was not clear at all, the insurance companies wanted detailed investigations and they were not keen on paying provisionally before the outcome of the court case. In order to decide about the compensation of the civil parties after criminal responsibility had been determined, a panel of experts was created who started to work immediately after the





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decision on the criminal responsibility was taken by the court of appeals.
Ten years after the disaster not all compensation cases had had a final decision.

Waste dump of Mellery

Medical tests of the local population show worrisome results; a saga of medical follow up follows; it drags on and is not thorough; the funding is problematic, in 2006 the inhabitants refuse to continue the medical follow up as it has not been done seriously. the criminal suit ends in acquittal, the civil law suits are concluded by a 'conciliation'. The victims perceive it as a 'bad agreement', but they are tired of years of procedures. In April 2008 the ECHR sentences the Belgian State to pay financial reparation of 30.000 euro to one of the accused persons for the unreasonable length of the procedure.

Despite evidence of the perpetration of offences harming victims, **procedural obstacles or statutes of limitation issues** may preclude a judgement on the corporate representatives' liability and, consequently, on victims' requests for compensation. In a significant sample of cases, the final judgement acquitted the defendants or stated that they should not be prosecuted, due to the fact that the crime was time-barred.

Some examples of this output are the followings:

Eternit Casale case

The Italian Supreme Court, in 2015, established that the charge of disaster ceased to be perpetrated when the spread of asbestos dust and production waste – caused by the facilities managed by the defendant – ended; thus, *tempus commissi delicti* was considered to be June 1986, when Eternit bankruptcy was declared. The limitation period for the crime, which is 15 years, started therefore in 1986 and so it expired before the first degree sentence, in 2012. Under Italian Criminal Procedural Law, this prevents plaintiffs from asking the compensation of damages awarded by the previous judgments before the Civil Court Judge, since the conviction judgment must occur before the expiring date.





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Heart valves case

The corporation officers were convicted in both the proceedings just for few cases (some were statute-barred and for some cases of injuries it was not possible to prove the necessity of a second replacement). So, just victims submitted to a second valve replacement obtained compensation and reimbursement of expenses. Since the defendants were charged with manslaughter and injuries (related to second replacements) all the patients alive who hadn't submitted to a second operation weren't allowed to be parties of the proceedings. Some of them started a civil suit. Before the Supreme Court decisions, many cases reached statute-barred periods. Two main reasons why some victims' requests have been rejected: effect of statute-barred provisions; type of crimes alleged, which are focused on the victims who directly suffered relevant injuries (or who died). Thus, for these cases there was no decision on victims' request.

Porto Marghera case

Victims' requests for the conviction of the defendants were not met (except for the limited conviction established by the Court of Appeal) for many reasons: causation not being easy to prove in court, limitation periods applicable to the relevant offences, and epidemiological data not being evident.

For almost all the cases under examination, the Court's findings could not lead to conviction because the injury charges had become time-barred.

Labour unions and environmental associations never obtained compensation, nor through the criminal proceedings, nor through extra-judicial agreements.

Holzschutzmittel-fall

Compensation claims were often denied by the courts because of limitation of time as the victims raising claims in the 1990s (probably due to extensive media coverage) for acts committed in the 1970s/early 1980s.



Ilva case

None of the corporations involved could join the proceedings as party civilly liable for the payment of damages. With respect to Ilva S.p.A., this was due to the fact that on 21 January 2015 the company was admitted to an insolvency procedure and, as a consequence, according to Italian insolvency law, claims for damages must be filed within such procedure. With respect to Riva F.I.R.E. S.p.A. and Riva Forni Elettrici S.p.A., they were both excluded from the criminal proceedings as party civilly liable on procedural grounds.

Due to all these obstacles, no compensation at all could be guaranteed to victims by the criminal justice.

III. It is quite interesting to note that in case of *acquittal* or *non-prosecution judgements*, but eventually also in case of obtained compensation, **victims continue to demand for justice**. Their requests are almost always the same: information, support and, in case of ascertained environmental disaster, also the recovery of contaminated land. This data indicate that victims need to be supported even *after the criminal proceeding*, especially in the context of corporate violence and when the judgement was not able to answer to victims' requests. In some cases, where the criminal proceedings could not lead to compensation, victims address their requests **to the State**, through appeals, petitions, press releases, Parliamentary questions, or active web-sites. That is very interesting from the victims' perspective, also in an extra judiciary context: access to national/public compensation funds may prevent victims from attacking the corporation. It may be said that in some cases States instead of 'encouraging' offenders to pay compensation to victims play a subsidiary role in advancing alternative, public compensation. This is true especially when a convicted offender fails to provide compensation or the final judgment does not decide on the victims' requests.





Some examples of actions put in place after or besides the judgement, as well as of public initiatives are the followings:

Porto Marghera case

After the first acquittal, the judges and 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. Press reports said judges had also been intimidated. Victims, victims' family members and all of the associations involved never stopped demanding for justice. The level of conflict between victims, their representatives, their lawyers and the corporations was very high, even after the signing of the compensation agreement. During trial hearings, the conflicts between the two parties (Public Prosecutors, associations and their experts on one side; lawyers and experts of corporations on the other side) never faded. It appears quite important to notice that this reaction occurred despite almost all of the individual victims had obtained compensation (entering the extra-judicial agreement with the corporations).

Many initiatives and demonstrations took place in the days following the judgment.

The public sentiment arose despite corporations' attitude and approach had not been particularly aggressive. Corporations offered compensation, which was accepted and considered equitable. As a matter of fact, corporations offered and paid a consistent amount of money as compensation, which, due to the final acquittal and to the relevant statute of limitations, they did not have to pay. At the same time, it is important to underline that corporations never admitted their liability.

Eternit Casale case

The outcome of the trial clearly generated discontent and disbelief, because of the lapsing of the offence by statute of limitation.

It was difficult to understand for the victims why the mere passing of time could make not punishable such a serious felony. Besides, media didn't report the reasons of time-barring in a proper way. The trial wasn't too long, as wrongly reported; the charges were considered to have been already expired when prosecution took place, because they are not permanent, as alleged by Public Prosecution. This is, however, a very technical matter, as hardly comprehensible for the layman as all the conditions of the charges and the necessary trial assessments. Victims' demonstrations and behaviour were pacific and non-violent and never exceeded the edge of legality, but the conflict with the corporation has





always and it is still high. A tricolour flag, with a black 'Eternit' writing over it, was brought in Court during the hearings and hung to the balconies of Casale Monferrato.

Bussi sul Tirino case

After the decision, as according to the victims' perspective, an access to justice was denied; therefore, the social debate arose to a conflicting level, still present. Citizens' concerns and fear don't seem baseless, especially nowadays. Recent epidemiology findings on the incidence of the increase in cancer cases in the area contaminated are now available.

Heart valves case

Victims involved are still demanding for justice, even through media.

Train Accident of Eschede

Victims claimed that the Deutsche Bahn AG delayed the process of compensation for years and made it unnecessarily bureaucratic. The 'Selbsthilfe Eschede' (victim's association) fought publicly for an official apology; only in 2013, on the 15 year anniversary of the company, the Current Chairman Rüdiger Grube apologized of the tragedy on behalf of Deutsche Bahn AG at the place of the victim's memorial.

Holzschutzmittel-fall

The Coalition against BAYER Dangers publicly campaigns against the Bayer company e.g. in the Holzschutzmittel-case especially by publications and protests in the annual shareholder meetings.





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Bussi sul Tirino case

After the judgement of acquittal and non-prosecution, the investigation about the extent of the contamination due to the corporation activity has been committed to a *Parliamentary Committee*. In 2014 a 'Parliamentary Commission of Inquiry on illegal activities and environmental crimes related to the cycle of wasting' has been established. In the period 2014-2016 the Commission conducted several analyses and initiatives including: parliamentary hearings of the delegates of environmental associations, local institutions and members of the I.S.S. It has also been established a Commissioner for the management of economic, social and environmental crisis occurred in all the basin of the river Aterno-Pescara. In December 2015, a call for tender for the drainage of the polluted areas was published. The procurement procedures are still ongoing.

Holzschutzmittel-fall

In 2014 several parliamentarians of the left wing parte (DIE LINKE) questioned government on the issue of the victims' situation in the Holzschutzmittel-case (BT-Drucksache 18/3691 of 19 December 2014), that was answered by the government in 2015 (BT-Drucksache 18/5499 of 9 February 2015). The government mainly 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 (EU) No. 528/2012 of 22 May 2012). Any damages out of such products are considered to be sufficiently covered by private law product liability regulations.

UB plasma case

On 6 October 1993, the president of the German Health Authority (Bundesgesundheitsamt) and a ministerial officer had to step down due to pressure by the Federal Minister of Health. They were criticized for a poor information policy on HIV infected blood products. On 29 October 1993, the German Parliament (Deutscher Bundestag) set up an inquiry commission 'Inquiry Commission on HIV Infections through blood and blood products' according to Art 44 German Constitution (Art 44 GG); its main focus was to inquire if and to what extent the federal government and administration bore (legal) responsibilities and accountabilities in the context of the scandal. The commission





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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 victim's interest to the legislator. A last point was to assess the safety of blood and blood products and what needed to be done to improve those. The final report by the inquiry commission, which was criticised for its weakness and softness on the pharmaceutical industry and for not having vigorously challenging the legal status quo, was published on 25 October 1994. One of the main outcomes for victims was the institution of a foundation (Stiftung Humanitäre Hilfe für durch Blutprodukte HIV-infizierte Personen) in 1995, in parts modelled on the Contergan Foundation. This foundation Humanitarian Help was financed by the federal government (100 Mio DM), the German States (50 Mio DM), the German Red Cross (9,2 Mio. DM) as well as by the pharmaceutical industry (90.9 Mio. DM), namely: Bayer AG, Immuno GmbH, Behringwerke AG, Baxter Deutschland GmbH, Armour Pharma GmbH and Alpha Therapeutics GmbH. The federal law (Gesetz über die humanitäre Hilfe für durch Blutprodukte HIV-infizierte Personen (HIVHG)) implementing the foundation stipulated some restrictions among others that all further claims stemming out of this subject matter against the federal government, the Red Cross as well as the pharmaceutical corporations, which had financed the foundations, extinguished. The financial support provided (pension scheme) to the victims is comparatively moderate. The assets of the foundation were already exhausted by 2010 and needed to be stocked up due to new medical drugs which significantly improved the life-expectancy of HIV infected persons.

Today, the question of how to sustainably support the victims is still unresolved. The funds will be exhausted again in the near future.

Persons with a hepatitis C infection through contaminated blood products have until today not received financial compensation in Germany.

Gas Explosion in Ghislenghien

A number of initiatives were taken outside and after the context of the criminal trial, which provided recognition to the victims: two large donations by gas company Fluxys to compensate the victims; as a consequence of the disaster of Ghislenghien, a law was adopted according to which victims of a technological disaster are compensated for physical damage without them having to wait until the legal responsibilities have been determined in legal procedures. It was a response to the complaints of many victims who 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.

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Every year a commemoration is held at the site of the disaster.

Waste Dump of Mellery

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. The commission explicitly and logically avoided interfering in questions of individual responsibility, which were treated by the courts. However, the final 9 page political report of the commission, published in 1994, was quite general and weak and avoided pointing out political responsibilities.

In some cases of corporate violence, public interests may also have a direct impact on the outcome of criminal justice. The most significant example is the **Ilva case**. In 2012, despite the persisting dangerousness of the plant, freezing orders previously issued by the judicial Authority were revoked by the Italian Government, thereby allowing the restart of the industrial activity and the sale of a number of products, which had also been previously subject to the freezing. However, the restart of the plant activity was made subject to the adoption of measures apt at protecting the environment. The decree was subsequently challenged, but the Italian Constitutional Court upheld it. The relevant opinion highlights that the Court deems 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 hand, taking in due consideration the need to protect occupation. The press recently reported that the case was brought before the European Court of Human Rights. In particular, between 2013 and 2015 about 180 people filed complaints, contending that they 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 criticize the Government's decision to authorize the restart 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

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health of the people living in Taranto and in the plants' surroundings from the harmful substances dispersed by Ilva S.p.A.

Victims' exposure

In many leading cases of corporate violence victims received a high public exposure, before, during and even after the criminal proceeding.

Leading cases show a need to protect victims' dignity not only *within* the criminal proceeding, but also beyond it. Due to the fact that corporate violence may affect entire communities, extensive regions of land, or strategic productive activities, the corporation can be a central economic player or an important provider of jobs, and the plants can be part of people's daily life, public opinion is always concerned and involved and public issues are always concerned. In some cases, victims' associations, through their web site and their local activities, are the authors of a dissemination of information on the case.

As for example:

Eternit Casale case

Victims received an overexposure in media. Despite being a geographically restricted case, it had a national impact from the beginning, because it's one of the biggest environmental disasters ever happened in Italy.

Porto Marghera case

Media exposure was enormous since the very beginning of the investigation. Public opinion was constantly informed about the proceedings by press reports, associations, web sites and local and national media. Victims' request for justice was strongly supported by many parties, the Public Prosecutor, the associations representing their general interests, but also the local public authorities and the general public.



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Spinetta Marengo case

Media approach was very aggressive and substantially lined up against the defendants. Most websites refer to the case with words such as 'scandal', 'ecological bomb' or 'ecocide' and report the first instance judgment as 'disappointing' and 'worrisome' (mainly because the penalties to which the defendants were sentenced are perceived as too low and environmental criminal law as generally ineffective).

Ivrea Olivetti case

Hearings are on line. the public sharing of information, testimonies and proceeding files come from the proceeding actors.

Tamoil Cremona case

Local media played a significant role, not only at the beginning of the proceeding, but also along its development. The point is consistent with the case, as it can be considered eminently local, with reference to the contaminated area and the immediately victimized community.

Bussi sul Tirino case

Media exposure was very significant during and after the proceeding. After the acquittal, according to the victims' perspective, an access to justice was denied; therefore, the social debate arose to a conflicting level.

This public interest, as well as the dissemination of victims' experiences or criminal proceeding outputs, have advantages and disadvantages, which are too complicated to be deeply analysed here. But some considerations may be pointed out. On one side, public opinion and media participation are instruments of information, but also instruments of 'good pressure' on



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public authorities, as well as on corporations, in terms of reputational damages. On the other side, victims are involved, consciously or unconsciously, in the storytelling of their lives: consequently, it is not always possible to balance privacy, personal integrity and personal data of victims with the freedom of expression and information, as well as to guarantee that victims are protected from secondary victimisation. The most significant example of this undesirable result is the German **UB plasma case**, where surviving victims or their heirs did not participate in the criminal proceedings and did not want to testify in Court (probably because of the HIV stigma).



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CSGP is the coordinator of the project. CSGP is a research centre on criminal law and criminal policy, committed to promote theoretical and applied interdisciplinary research, aiming 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, 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.



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