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HELSINKI INSTITUTE
FOR CRIME PREVENTION AND CONTROL
AFFILIATED WITH THE UNITED NATIONS

ROLE OF THE VICTIM OF CRI
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Matti Joutsen

THE ROLE OF THE VICTIM OF CRIME IN EUROPEAN CRIMINAL JUSTICE SYSTEMS

A Crossnational Study of the Role of the Victim

Helsinki 1987

FOREWORD

During the autumn of 1983, the Helsinki Institute arranged a European Seminar entitled "Towards a Victim Policy in Europe". The Seminar was attended by representatives from some twenty European countries, as well as by representatives of the United Nations, the Council of Europe and the leading international organizations.

Two things became evident at this European Seminar. There is a common concern among experts and leading officials in the various criminal justice systems in assisting the victim of crime. On the other hand, the European States have adopted a multitude of approaches in meeting this challenge.

The European Seminar was part of the preparations for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, 26 August - 6 September 1985), where one of the five main topics was "Victims of Crime". The Congress was to adopt a "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power".

Senior Researcher Matti Joutsen, who was the Rapporteur at the European Seminar, subsequently assisted in the drafting of this Declaration. In the process, he became increasingly interested in the various ways in which the European States have sought to apply the basic principles noted in the Declaration in the legislation and practice of their own criminal justice systems.

His interest resulted in the present study of the role of the victim of crime in the criminal justice systems of Europe. The study seeks to approach the subject from two points of view. On one hand, it is a study designed to meet the requirements of a doctoral dissertation in criminal law. On the other, it seeks to meet the goals of the Helsinki Institute in promoting the exchange of information on crime and criminal justice among the various countries of Europe with different socio-economic systems.

As Director of the Helsinki Institute, is my pleasure to include the report by Senior Researcher Matti Joutsen in the publication series of the Institute.

Helsinki, 19 December 1986

Inkeri Anttila
Director
Helsinki Institute for
Crime Prevention and Control,
affiliated with the
United Nations

AUTHOR'S FOREWORD

The preparation of this study has been a pleasure.

There are several reasons for this. Although a feeling of pleasure is rarely if ever associated with victimization, it has been a pleasure to study ways in which the victim can be and has been assisted, and the different approaches to the victim that have been adopted in criminal law and criminal policy. I hope that this study will, in some way, contribute to the work on the prevention of crime and the assistance of victims.

Another source of pleasure has been my good fortune in advisors. First and foremost, I would like to express my appreciation to Professor Inkeri Anttila, Director of the Helsinki Institute for Crime Prevention and Control, affiliated with the United Nations, who not only made it possible for me to prepare this study at the Helsinki Institute, but also provided wise and warm advice in the organization and direction of the study.

My "Doktorvater" during the laborious stages of constructing and writing the study so that it forms a comprehensive whole was Professor Raimo Lahti, who has been unstinting in his efforts to maintain discipline over the manuscript. My warm thanks are due to him for the many pleasurable hours of discussion and for his many insightful comments.

As the preliminary inspectors appointed by the Faculty of Law of the University of Helsinki, Professors Pekka Koskinen and Per Ole Träskman have offered much constructive criticism of various versions of the manuscript. I would like to thank them for their most helpful comments.

It has further been a pleasure to meet some members of the international community who are concerned with victims, and discuss alternatives and experiences. Professor Cherif Bassiouni and Professor Zvonimir Paul Šeparović served as focal points in the arrangement of various international meetings on victims. Professor Irvin Waller and Dr. Jan van Dijk stimulated several lines of inquiry. A number of experts served as a check of my understanding of the laws and languages of the various countries covered by the study, trying to steer my way clear of the many shoals awaiting the unwary comparatist. The names of these experts are noted in section 1.5.; I owe them a great debt of thanks.

Out of the experts I have had the pleasure to meet, there are two who have provided important guidance at critical stages in the development of this study. Director Patrik Törnudd of the Finnish National Research Institute of Legal Policy has tried to hold in check some overly visionary flows of ideas. Professor LeRoy Lamborn, with his unfailing good humour, has not only made several suggestions for the honing of the details of the argumentation but has also helped immensely in making my English more readable.

Professor Peter Tak and Assistant Professor Károly Bárd suffered through early drafts of this study, and were unfailing in their support and suggestions.

Although the study has been largely written while I served as Senior Researcher at the Helsinki Institute, it has proven necessary to take various leaves of absence to concentrate on the preparations and the various drafts. In this, I have had the pleasure of financial support from two Finnish sources, the Finnish Cultural Foundation and the Antti Tulenheimo Fund, as well as the great pleasure of a scholarship to the Max-Planck Institute for Comparative and International Criminal Law (Freiburg im Breisgau, the Federal Republic of Germany). In Freiburg, I spent many long afternoons in pleasurable discussions with the staff and visiting scholars. I would like to express my particular gratitude to Professor Hans-Heinrich Jescheck, Dr. Karin Cornils, Dr. Thomas Weigend, Dr. Anton van Kalmthout and Dr. Eleonora Zielińska.

Throughout the process of the preparation of this study, I have enjoyed the support of my wife, Pirjo Valkama-Joutsen, and of my colleagues at work, Leena Koivu, Seppo Leppä and Terhi Viljanen. They made it all seem a particular pleasure; I hope they have not felt particularly victimized.

Helsinki, 19 December 1986

Matti Joutsen
Senior Researcher
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on the Bench)
Master of Political Sciences

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1. INTRODUCTION

1.1. The background to the study

This study deals with the position of the victim of crime in European countries. It will consider the question primarily from the point of view of criminal law and criminal policy. Since data will be presented from a number of countries, the study adopts a crossnational (comparative) approach.

The study originated with the interest of the author, as the senior researcher at the Helsinki Institute of Crime Prevention and Control, affiliated with the United Nations, in the different approaches that exist in Europe in determining the role of the victim of a crime in the operation of the criminal justice system.

The main purpose of the Helsinki Institute is to promote the exchange of information on crime prevention and control. The experience of one country with various mechanisms for improving the administration of justice may be of benefit to other countries faced with similar problems. This is true also of difficulties that may lie in the path of the victim of crime.

In the autumn of 1983, the Helsinki Institute arranged a European Seminar entitled "Towards A Victim Policy in Europe". The Seminar was attended by 40 experts from twenty different European states and various international associations. Despite the relative vagueness of the topic, a quite striking element was the amount of agreement not only on the need for doing something to assist the victims of crime, but also on at least the broad outlines of what should be done.

Such agreement was surprising for several reasons. One reason was that (with some exceptions that shall be noted later on) it had only been quite recently that the subject of victims has been raised in international connections. Despite the amount of victimological research that has been undertaken, considerable gaps remain in what we know about victimization, and about how to assist victims. Perhaps the most important reason for the surprise, however, was that the actual position of the victim in the different criminal justice systems, as described at the European Seminar, appeared to be very different.

Over the next two years, the author became involved in the drafting of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

During this process, the differences between the countries became even clearer. It also became clear that there were different approaches to the issue of victims. However, the feeling that something should be done on the international level was so strong that a wording was found on which all of the participants could agree.

As a result, on 11 December 1985, the General Assembly of the United Nations unanimously adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. (1) This Declaration established guidelines on such matters as access to justice, compensation from the offender to the victim, State compensation, and victim assistance.

This international document was not the only one to appear on victims during 1985. On 28 June 1985, the Committee of Ministers of the Member States of the Council of Europe adopted Recommendation No. R(85)11 on the position of the victim in the framework of criminal law and procedure. This instrument recommended guidelines in police procedure, prosecution, the questioning of the victim, court proceedings, enforcement, the protection of privacy and the special protection of the victim.

Already in preparation for the European Seminar organized by the Helsinki Institute, the author began to gather information on how the role of the victim has been organised in the different European countries. At this stage, the information was gathered in a very unstructured fashion: broadly speaking, the interest was in the law that determines who is defined as a victim of crime, what his responsibilities and rights are as a victim, and what his possibilities are of obtaining compensation for his loss. Since the best form of assisting victims is to prevent them from becoming victims, attention was also paid to the various ways in which States attempt to encourage crime prevention measures by individual citizens.

In connection with the drafting of the United Nations Declaration, the interest became more focused. The Declaration provides guidelines on a number of relatively specific subjects. The consensus achieved on the Declaration hid the fact that there were considerable differences in how the paragraphs of the Declaration could be understood and applied. It is possible that some of these differences reflect fundamental differences in legal, social, economic and political culture, and for this reason these differences will remain. It is also possible, however, that some of the mechanisms adopted by one criminal justice system may be of value to other systems that are dealing with similar problems. In any case, it is of interest to pinpoint what these differences are, and what they imply to the application of the Declaration to the various countries.

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(1) A/Res/40/34.

At the same time, the adoption of the United Nations Declaration raised the question of the effect of such international recommendations on the criminal policy of the Member States. The basic question is, do such recommendations make any difference? Some observers might assume that adoption of a set of guidelines by consensus implies that all Member States are earnestly seeking to turn "rhetoric into reality", and that the respective Ministries of Justice and the other authorities involved are busily preparing new legislation that will change the role of the victim.

Other observers might remain more sceptical of the ability of any international recommendations to alter centuries of development in the various criminal justice systems.

1.2. The purpose of the study

1.2.1. The point of departure

It was noted in the previous section that several questions can be raised in connection with the issue of the victim of crime. Specifically, the questions raised in different stages of the preparation of this study were the following:

1. What factors determine who is defined as a victim of crime?
2. What are the rights and responsibilities of the victim of crime?
3. What possibilities does the victim of crime have of obtaining compensation?
4. How can the prevention of crime by individual citizens be encouraged?
5. What is the significance of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power?

Such a list of questions contains a number of different elements. The definition of victims of crime may be approached from the point of view of, for example, the "man in the street" or of practitioners within the criminal justice system, or on the basis of, e.g., criminal law, procedural law, criminal policy or social policy. The question of the rights and responsibilities of the victim, including his right to compensation, may be answered on the basis of, e.g., criminal, procedural or administrative law, or from the more pragmatic view of criminal policy or social policy. The question of prevention again involves criminal and social policy, but also criminal law, criminology and victimology have a strong role. The question of the significance of international instruments raises issues of international criminal policy. Finally, when it is recalled that the interest spans the countries of Europe, comparative law enters the picture.

It was noted that this study originated in connection with the work of the Helsinki Institute for Crime Prevention and Control. This did not in itself determine the precise focus

of interest. The mandate of the Helsinki Institute, as defined by the Agreement between the Government of Finland and the United Nations on the establishment of the Helsinki Institute, is to "provide for the regular exchange of information and expertise in crime prevention and control among various countries of Europe with different socio-economic systems". (1) The definition of what is "crime prevention and control" has remained a very loose one on both the national and international level, and so far no attempt has been made to give it a more precise meaning in the work programme of the Helsinki Institute.

However, the connection with the programme of the Helsinki Institute remained a natural one. The issue of the victim of crime is a very topical one, and strong interest has been expressed in learning from the experiences of other countries. In addition, the facilities of the Helsinki Institute eased the task of gathering information on crime prevention and control matters in the various European countries.

As a result of these two factors - the personal interest of the author in the victim issue, and the performance of the study in connection with the work of the Helsinki Institute - the criminal law, criminal policy and crossnational elements came to predominate. Issues of procedural and administrative law, social policy and the views of the man in the street receded into the background, although no strict criteria for inclusion in, or exclusion from, the study could be laid down. In particular, procedural law defines many important aspects of the involvement of the victim in investigation, prosecution and adjudication, and it of course determines to a large extent how he can present his claims for compensation.

1.2.2. Defining the field of interest

Including such elements as criminal law, criminal policy and the crossnational (i.e. the comparative) approach within the scope of one and the same study raises the question of how these concepts have been understood, and what their interrelationships may be.

Criminal law is here understood as the entity of legal rules defining what the legal system in question regards as criminal and specifying the sanctions for criminal acts. The study of criminal law (the criminal sciences) is understood to encompass the juridical aspects of criminal law ("dogmatic" criminal law), criminal procedure, criminology and the history of criminal law. (2)

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(1) Agreements of Finland Series 42/82, article 1(3).

(2) Jareborg (1984, pp. 45 ff.) would also include the philosophy of criminal law and the theory of science in criminal law ("straffrätslig vetenskapsteori").

Dogmatic criminal law deals with the systematization and interpretation of the norms of criminal law; it deals with the law in force in a given legal system. More precisely, it seeks to clarify the concepts of criminal law and to state and discuss the law that determines whether any act is a crime or not, and, if it is a crime, what the sanctions are to be. In this, it also serves the interests of the organs of the administration of justice. (1)

Criminal procedure focuses on the body of law that regulates the process through which substantive criminal law is authoritatively applied in an individual case.

The term "criminology" literally refers to the scientific study of crime. In particular in the Nordic countries, it is generally defined as the study of crime as a social phenomenon. In its focus on the reaction of society to crime, it thus has much in common with the sociology of law. (2)

In this connection, reference should also be made to victimology, the study of victims. The scope of this field, and in particular its overlap with criminology, has been the subject of considerable discussion. Many eminent experts argue that victimology is concerned with all victims. (3) Others have noted that, if one were to define "victimology" as "what victimologists do" most researchers engaged in what they themselves term "victimology" work within or very near criminology. (4)

The history of criminal law is concerned with the development of institutions of criminal law in general, or within the limits of the law of a certain country. It seeks to understand the circumstances in which the provisions of law arose; this, in turn, may be of assistance in the proper interpretation and application of criminal law.

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(1) See Honkasalo 1965, p. 1; Smith and Hogan p. 3; Frände, p. 11.

(2) Anttila and Törnudd, pp. 15 and 20.

(3) See, e.g., Drapkin 1976 and 1982; Šeparović 1985, esp. pp. 8-9, 16, 23-24 and 28-29. Mendelsohn, for example (1982, p. 60; see also 1976 pp. 16-19) is emphatic in asserting that victimology as a science deals with all categories of victimization, and that victims of crime form only one category; this one category it shares with criminology.

(4) See Clifford, p. 256; Birkbeck, passim. See also Schafer 1977, p. 94. Hoyst, 1982 p. 82, neatly delineates this focus by referring to "penal victimology". Flynn (pp. 98-99) suggests that both approaches should be used, depending on the level of analysis.

There is less agreement on the definition of criminal policy than there is of criminal law. Broadly speaking, it has been considered by some authors to incorporate both the study of crime prevention and control (scientific criminal policy), and the practical measures required for this task (practical criminal policy). (1) Scientific criminal policy is interested in what measures can be used to achieve certain ends; it is then left to the decision-maker to decide, on the basis of certain sets of values, which alternative is preferable. (2)

Criminal policy has been described by some as the sector of policy that deals with the question of how criminal law should be directed in order to protect society. (3) They understand it to involve an examination of the system of criminal law in force and the development of this system in the light of certain established principles. (4) Here, the connections between dogmatic criminal law and criminal policy are quite close: the former develops a conceptual system and interprets the law, and at the same time may draw attention to the need for reform on certain issues, while criminal policy uses the results of dogmatic criminal law to guide further legislation.

However, criminal policy can and has been understood in a wider sense to include planning and decision-making not only in the drafting and approval of criminal law, but also in the application of law. (5) Examples of criminal policy measures related to the application of laws include the allocation of resources to the control of a certain type of offence (for example, a concentration on economic and envi-

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(1) See esp. Frände, pp. 11-21 for a summary of views of authors in the Nordic countries and in the Federal Republic of Germany. It may be noted that the "study of crime prevention and control" roughly corresponds to the field of applied criminology.

(2) Such a division of responsibility between the researcher and the decisionmaker is rarely a clear one. On the utility of research for decisionmaking, and on the role of values in research, see, e.g., Törnudd 1971, pp. 23-25 and 31-32.

(3) See, e.g., Jescheck 1967, pp. 16-17; Nelson 1985a, p. 16. This position has also been adopted by Frände, who views criminal policy as the work of the legislator designed to bring about changes in the entity of provisions on criminal behaviour (pp. 26-27). One may assume that Frände would also include the work of the courts in those countries where judicial precedents are important.

(4) See, e.g., Ancel 1974, p. 270 and Ancel 1975, p. 7.

(5) Anttila and Törnudd, p. 22.

ronmental offences as opposed to "traditional" offences), the establishment of guidelines on how cases shall be dealt with (in particular, sentencing guidelines), and the organization of crime prevention campaigns.

The importance of including the application of criminal law within the meaning of criminal policy becomes clear when one considers the actual powers of the legislator (and, for that matter, of the judge in countries where he is a rule-maker) to prevent and control crime. Several factors affect the amount and structure of crime; the structure of criminalizations is only one such factor.

The criminal law of any country contains a lengthy list of acts that have been criminalized. The development of such a list is obviously one result of criminal policy: it is the result of extensive planning, drafting and other legislative activity. However, even the most refined criminal law on the books is subject to differing interpretation and application in practice.

For example, the definition of what actually constitutes "theft", "defamation", "assault" and "rape" may well vary from time to time and place to place, even if the definition laid down by law remains the same. Correspondingly, the definition of who is a "thief", "defamer", "assaulter" or "rapist" may vary; what is perhaps most important is that the views on what should be done with such offenders will also vary.

To turn, as a final example, to the victim of crime, it may well be that the law specifically stipulates what his rights and responsibilities are. However, the attitudes of the police, the prosecutor, the courts, the offender and the victim himself may vary from case to case. It is not the criminal law (or other legal provisions) that is the sole determinant of what happens to the victim. Such factors as the self-regulation carried out by the various authorities and the level of tolerance in society have a considerable role in determining how the act is perceived and defined at the various levels, and what is done. (1)

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(1) Anttila and Törnudd (pp. 93-97) use the concept of "self-regulation" to refer to the reaction of the authorities to either a sharp increase or sharp decrease in criminality. For example, the authorities may respond to a sharp increase in criminality by increasing the amount of police supervision and sharpening the level of punishments. The same authors use the concept of the "level of tolerance" (pp. 91-93) to refer to the level at which either the public (including the victim) or the authorities choose to define a specific act as criminal. See also Törnudd 1986, esp. pp. 347-348.

In sum, criminal policy shall be understood in this study to include planning and decision-making on the drafting, approval and application of criminal law. In this sense, criminal policy will be understood to be carried out by public authorities. Although it was noted that also the perceptions, definitions and actions of private actors (such as potential and actual victims) affect how the law is applied, such private actors will not be considered to be engaged in criminal policy. Their role shall be considered as the focus of the actions of the authorities; for example, the police may try to change the level of tolerance in society by organizing a campaign stressing that a certain type of behaviour (such as vandalism) is criminal, and should be reported to the police.

It was also noted that this study involves a crossnational approach. The purpose of such an approach (which could also be called a comparative approach) is to study the way in which different legal systems deal with similar problems. (1) This may be done in order to promote the search for truth which is the general purpose of all science. It may also be done for a definite legislative purpose; for example, the Ministry of Justice in one country may wish to know how a certain problem currently pressing in that country has been solved elsewhere. Finally, the crossnational approach may help in obtaining a better understanding of the functions and institutions of one's own law and system.

The crossnational approach brings with it the possibility of supplementing the discussion of (national) criminal policy with a discussion of international criminal policy. Through analogy with the definition of criminal policy outlined above, one could suggest that international criminal policy involves planning and decisionmaking on the drafting, approval and application of international criminal policy. (2)

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(1) The traditional concept here would be "comparative law". However, for example documents of the United Nations speak of a "crossnational approach" in order to avoid suggestions that two or more countries are being placed in an order of preference in accordance with some pre-established values. In this study, references to comparative law should be understood in such a United Nations "nonjudgemental" sense.

The functionalist view of comparative law (which focuses on how different systems deal with similar problems) is presented in, e.g., Ebert, pp. 28-29; Bartels, pp. 83 ff.; Bogdan, pp. 21-31; Kaiser 1975, pp. 82-84.

(2) On the concept of international criminal law, see Bassiouni 1980, esp. pp. 1-36. The same source contains a listing of the principal international instruments relating to international criminal law, as of 1980, on pp. XIX-XXX. See also, e.g., Träskman 1977, pp. 25-26 and the literature cited.

International criminal policy can also be understood as planning and decisionmaking on the drafting, approval and application of national criminal law, in those cases where this process includes contacts with foreign states. (1) Here, one can speak of international criminal policy when representatives of different states get together to search for a common approach to the prevention and control of crime, to harmonize legislation, and to develop forms of international cooperation. (2) It is this latter definition of international criminal policy that shall be used in the present study.

1.2.3. Specifying the purpose of the study

In the functionalist approach in comparative criminal law, the first stage is generally the specification of the problem in question. In this study, the problem arises with the commission of an offence against a victim. From the point of view of criminal law and criminal policy, the problem can be posed as follows. An offence involving a victim is generally considered to be of interest to both the victim and to society. The victim may have an interest in, for example, obtaining compensation for his loss. The State may have an interest in directing measures at the offender in order to promote the goals of criminal policy. The question ultimately is one of the best balance between these two interests; it is a question of criminal policy.

There are several criteria by which this balance can be sought. Much depends on the goals of criminal policy. If the State emphasizes offender-oriented crime prevention and control measures, it is possible that less attention is paid to the victim. As a simple example, imprisonment may prevent offences, but it rarely helps the victim to obtain compensation.

At the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders a Finnish formulation of the goals of criminal policy was adopted. These goals involve the minimising of the costs and suffering brought about by crime and the control of crime, and the just distribution of such costs and suffering. (3)

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(1) This is roughly the view taken by Lehtimaja; see, e.g., p. 209.

(2) Ibid. This is broadly how, e.g., Lopez-Rey has used the concept in speaking of the criminal policy of the United Nations; his listing of topics (Lopez-Rey 1985b, pp. 47-48 and ff.) is predominantly related to the national level.

(3) See the working paper prepared by the Secretariat, A/CONF.56/7, para. 184. The formulation is presented, e.g., in Lahti 1972, pp. 298 and ff.; Anttila and Törnudd, pp. 124 ff.

This general formulation leaves important questions open. It does not specify what the costs and sufferings are, nor does it specify the individuals, population groups or other parties among whom these are to be distributed. The definition of crime and the establishment of the values and interests to be protected by criminal law are also left open. (1)

Crime and crime control inevitably leads to costs and suffering to several parties. The State, the victims and the offenders come readily to mind as examples. However, also potential victims and offenders should be included, as well as, for example, the dependants of the victims and offenders, or neighbours and employers. The costs may be as tangible as the loss of a wallet, the need to buy a new lock or car, or the need to pay a medical bill. They may also be less tangible, such as an increase in a feeling of being at risk, and the costs of "avoidance behaviour". (2)

If the above formulation is accepted as an expression of the goals of criminal policy, it raises the question of the victim's share in the costs and suffering resulting from crime and the control of crime, as well as his possibility of relying on the State or some other party to bear a greater share of the loss than before.

Such considerations of redistributing the costs and sufferings can be seen in the background to the United Nations Declaration and the Council of Europe Recommendation. It is implicit in any discussion where it is asserted that the victim has been "forgotten" by the criminal justice system (3) or that he should be given more support by the State.

The tie between these two international instruments and criminal policy can be made even more closely, in a way that also raises the comparative element. Both instruments were adopted by consensus. This would indicate that all of those who approved them agree on their importance and on the way in which they were formulated. In effect, the two instruments form a measuring stick in assessing the role of the victim in the criminal justice system. All of the countries that took part in the adoption of the instruments agreed on certain goals; the question now is, what mechanisms do they have for attempting to reach these goals.

We can now formulate more precisely the questions that will be dealt with in the course of this study. All of the following questions will be dealt with from the crossnational point of view.

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(1) Mäkelä, p. 169.

(2) See section 4.3.

(3) See, e.g., McDonald 1976, pp. 17 ff.

The first question is, "What factors determine who is defined as a victim of crime by the criminal justice system?" The main factor, of course, is the criminal law of each country in question. This will be dealt with in section 6 of the study.

The second question is, "What are the rights and responsibilities of the victim of crime in the criminal justice system?" Once a person has been defined as a victim, this presumably has some implications both for the victim and for the criminal justice system. This question will be dealt with in particular in section 7, which deals with the processing of the case by the criminal justice system. The section on alternatives to the criminal justice system (section 5) will summarize some of the rights and responsibilities outside of the criminal justice system.

The third question is, "What possibilities does the victim of crime have of obtaining compensation through the criminal justice system?" For many victims who have suffered a loss, the most important question is, how can they obtain compensation. This will be considered in connection with sections 7.3.4. (on the presentation of civil claims in criminal proceedings) and in 8.2. (on the decision on restitution). The possibility of State compensation will be dealt with in section 9.

The fourth question is, "How can the prevention of crime by individual citizens be encouraged through the criminal justice system?" Traditionally, crime prevention and crime control measures have been directed primarily at offenders and potential offenders. However, victimological research has drawn attention to the possible involvement of the victim in the offence. In addition, many concepts of criminal law (such as consent and self-defence) require an assessment of the actions or negligence of the victim. This question will be dealt with in section 4.

The fifth and final question is, "What is the significance of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power for the criminal justice system?" Much discussion was devoted to the United Nations Declaration, and it is clearly regarded as important by a number of experts from around the world. However, it is possible that this instrument is not binding at all, and the Member States will choose to ignore its proclamations. This will be considered in section 3.2. It is also possible that the goals stated by this instrument are so vague that the Member States are permitted extensive discretion in their interpretation. As a result, it may not lead to any significant change in the role of the victim in the criminal justice system. This will be considered in the concluding section, section 10.

In connection with this fifth question, reference will also be made throughout the study to the Recommendation of the Council of Europe, although not all countries studied are Member States of the Council.

The specification of the purpose of this study in the above manner raises two questions, one concerned with the significance of civil, administrative and informal proceedings, and the other with the question of victims of abuse of power.

The use of the term "criminal justice system" is not intended to exclude arbitrarily any consideration of civil, administrative and informal proceedings. In many cases (as pointed out by adherents of the so-called minimalist and abolutionist perspectives in criminal justice) these proceedings are suitable, even preferable alternatives to criminal justice. Their importance will not be neglected in this study.

The second observation is that the focus of this study is on the victims of crime and not on the victims of abuse of power, who are also dealt with the United Nations Declaration. The background to the issue of abuse of power is noted in section 3.2. The issue was forcefully presented in the drafting of the Declaration, and it is duly noted both in the preambular and in the operative parts of the Declaration. However, no specific mechanisms for assisting such victims (comparable to those outlined for the victims of crime) are suggested by the Declaration. Paragraph 19 calls for the incorporation of provisions on such abuses into national legislation, which would therefore open up the mechanisms made available for the victims of crime. Paragraph 20 calls for the negotiation of multilateral international treaties on the subject, and paragraph 21 calls, very broadly, for making legislation and practices more responsive to the plight of the victims of the abuse of power.

1.3. The framework of the study

1.3.1. The flow of a case through the criminal justice system

The European criminal justice systems operate with much the same institutions, procedures and mechanisms. The similarity of these may easily lead to ready assumptions that they work in the same way; insufficient attention will then be given to the cultural specificity of crime and crime control. (1) Rheinstein has noted that identical terms rarely have the exact same meaning in different legal systems, and that seemingly the same institution may perform different functions. (2) This is especially true of such culture-

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(1) See, e.g., Lejins, pp. 200-201.

(2) Rheinstein, p. 245. See also Hall, p. 46: "Comparative study limited to the terms employed in penal codes finds common concepts among Japanese, European and American penal codes. But it is quite clear that the same formula may function differently in different cultures."

bound concepts as crime. (1)

With these reservations in mind, the framework of the present study will be provided by the flow of a case through the criminal justice system. (2) In any European country this flow may be described as a succession of decisions. (3) The main decisions in a case that proceeds to a final disposition are commonly held to be the following: a decision to report an offence, a decision to prosecute the offence, adjudication by the court or another authoritative tribunal on the guilt of the suspect and the possible punishment, and a decision on enforcement of the adjudicatory decision. These decisons correspond, respectively, to the criminal justice agencies of the police, the prosecutor, the court and corrections.

There are, however, a number of other key decisions that should be considered, beginning with the "decision" of the victim, a bystander or a policeman to interpret a specific act or circumstance as criminal. Each of the stages mentioned above involves a number of similar decisions related to perception, definition and selection of à suitable response. Furthermore, a victim might decide to invoke a system other than the criminal justice system; he may, for example, initiate civil or administrative proceedings. As is apparently very often the case, he may also deal with the matter totally outside of official channels.

In connection with any of these key decisions, the role of the victim can be either active or passive. His active role might involve the starting, interrupting or halting of the criminal justice process, the altering of its course, or the utilizing of an alternative process. In this, in effect it is he who makes the important decision. In his passive role, his behaviour or characteristics may be considered to the extent that they might influence the criminal justice process; in effect, the important decision is made by someone else, but with at least some reference to information regarding the victim.

This activeness or passiveness of the victim is not something that remains constant throughout the criminal process.

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(1) Even in law, the same terms may mean quite different things in different countries. This has been noted, for example, among the Nordic countries, where the differences have confounded the comparison of statistics.

(2) See e.g. Jescheck 1967, pp. 26-29. The similarity of the systems makes it possible to draw some over-all conclusions such as those presented in HEUNI 5, on the basis of a comparison of the operation of the criminal justice systems of 21 European States.

(3) See e.g. Hindelang and Gottfredson, p. 57.

In any one country, the victim may be required (or entitled) to be active at one stage and on one issue, but passive at another stage and on another issue. Thus, one may speak for example of different models of initiating the criminal process, different models of prosecution, and different models of providing compensation for crime loss.

As noted above, the framework for this study will be the flow of a case through the criminal justice system. The first stage considered will be prior to the commission of an offence; the focus is thus on prevention. Here, the victim may remain passive. However, it is also possible that the State may require that the victim take active preventive measures.

The second stage will be entry into the criminal justice system. An active role is involved in, for example, the institution of the complainant offence, where no prosecution is possible without the formal complaint of the victim. It will also be noted that the victim must often be "active" in the sense that he reports the offence to the police; passiveness here may mean that the authorities are not informed about the crime, and nothing is done.

The third stage will be the criminal proceedings. Here, there are many possible active and passive roles for the victim, such as in the presentation of penal demands and civil claims, and in the presentation of evidence.

The criminal proceedings are linked to the question of restitution. It is possible that the victim will receive no compensation at all if he remains passive. However, also here there are alternative models.

1.3.2. The delimitation of the geographical scope

The study is a crossnational one, involving the countries of Europe. Europe today includes 37 independent States, each with its own criminal justice system. Furthermore, the 26 cantons of Switzerland and the component republics of the Union of Soviet Socialist Republics and Yugoslavia each have criminal justice systems of their own.

Although many generalizations could be made about the criminal justice systems of the component parts of, respectively, Switzerland, the Union of Soviet Socialist Republics and Yugoslavia, and although the 37 independent States include the so-called microstates where the criminal justice system has been largely influenced by that of large neighbours, (1) it

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(1) Monaco's penal code of 28 September 1967 is modeled on that of France; Liechtenstein's penal code largely follows the Austrian Code of 1852, Luxembourg's 1879 penal code is indebted to that of Belgium, and pursuant to the 1929 Lateran Treaty the Vatican applies Italian penal law (Higuera-Guimera, pp. 13-14).

is clear that Europe offers a wealth of different approaches in criminal justice. The European states also offer a considerable number of different alternatives for arranging the position of the victim of crime. It was the countries in Europe that saw the first flowering of interest in criminology and victimology, and especially since the 1970s they have sought to apply the lessons of victimology in practice. Furthermore, European experts were heavily involved in the drafting of the Declaration, and thus its formulation can be assumed to reflect also the various European concerns and approaches. (1)

The framework into which victim policy is woven varies considerably from one country to the next. Discussions of legal systems in Europe often divide it into a common-law area, a Romano-Germanic area and a socialist area. Other researchers, in dealing with the orientation of the research in Europe that feeds the formulation of criminal policy, speak of a Southern European and a Northern European climate. Yet others have developed detailed classifications distinguishing between Roman, Germanic, Slavic and Anglo-American areas. (2) The implication is that the countries in each area share similarities and that it is possible to generalize about them, in ways in which one cannot generalize about all of Europe.

Such simplifications are forced to overlook the considerable, and in practice quite important, differences between countries that superficially may be very much alike. A case in point is the five Nordic countries of Denmark, Finland, Iceland, Norway and Sweden. They share a long cultural, economic, social and even political tradition. While Nordic cooperation in criminal policy is extremely close, the legislation, practice and research interests differ in many respects.

A second example is provided by the socialist countries, among which the differences in law and legal practice are at least as great. (3)

While a comparison of all of the countries of Europe is one possible approach to comparing criminal law in a European framework, this approach was rejected at an early stage of this study. Collection of data on all of the questions dealt with in this study from all jurisdictions in Europe

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(1) See section 3.2.3.

(2) See, e.g., David and Brierly, esp. pp. 22-31; and Malmström, passim.

(3) See, e.g., Bartels, pp. 10-17.

would have required an amount of resources out of proportion to the marginal value of the information obtained. (1)

A second possible approach, that of choosing only two or at most a few systems for comparison, (2) was also rejected. This rejection was not as self-evident as the rejection of the first approach. Comparative research on criminal law calls for a basic familiarity with the law of the countries being compared. Without this familiarity, the researcher will very likely fall into the trap of understanding foreign systems in the reflection of his own system. (3)

The availability of information from a number of European countries and above all the possibility of checking the author's understanding of this information with an expert from each jurisdiction in question made it possible to enlarge the scope of the study. Given this possibility, the author decided to compare the different legal cultures of Europe. As Ancel has noted, comparisons provide the most substantial results when radically different systems are compared. (4)

The solution that was ultimately adopted involves a middle road between comparing every country and comparing only a few countries. It was decided to develop for the purposes of this study a concept of core countries. These core countries shall be compared throughout the study. Other countries shall be brought into the scope of comparison when their inclusion is merited by special considerations.

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(1) The technical and linguistic problems involved in obtaining such data from each canton, component state and republic would have been considerable, and in practice it would not have been possible to ensure the validity of the data.

(2) See McClintock p. 149, in which he suggests that comparative studies should be restricted to a small number of countries or to countries within the same cultural setting. Also Zipf, p. 19, supports comparative research carried out between somewhat similar systems.

(3) Jescheck (1955, p. 38) warns of the danger of error or more bluntly of the danger of diletanttism in comparative law, as no one can know foreign law as well as his own. Sveri 1980, p. 157 underlines the importance of team-work in comparative research in order to minimize the possibility of misunderstandings.

(4) Ancel 1971, p. 66. Tumanov, p. 73, has observed that uncovering these differences enables one to see other solutions to a problem, to take account of what is best in such solutions or to be persuaded of the correctness of one's own solutions.

The choice of the core countries depended on the following two considerations. First, they were to represent the different legal cultures of Europe. More than one country was selected from each legal culture in order to avoid the dangers of assuming that one country exemplifies all other representatives of that culture. The second consideration was that the author could not only obtain information on the criminal justice system of the country in question, but also check the correctness of the information with a knowledgeable expert from that country.

The fifteen core countries selected are the following:

Nordic countries:	Denmark, Finland, Norway and Sweden
socialist countries:	the German Democratic Republic, Hungary, Poland and (as a representative of the Union of Soviet Socialist Republics) the Russian Soviet Federated Socialist Republic (abbr. RSFSR)
Germanic countries:	Austria, the Federal Republic of Germany and the Netherlands
Romanic countries:	France and Italy
common law countries:	England and Wales, and Scotland

The selection of Finland and the strong representation from the Nordic countries is due to the author's background. It is unavoidable that the legal system of Finland in particular and the Nordic countries in general establishes the author's frame of reference. It is also natural that the point of departure in considering the possibility of alternative approaches is provided by the present legal system in one's own country. (1) However, the purpose of the present study is to analyse alternative ways to organize the role of the victim of crime. It was not the purpose to build upon this data and develop recommendations for Finnish law de lege ferenda.

As noted, the core countries will be followed throughout the analysis. However, there are certain issues on which the

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(1) Malmström notes (pp. 138-139):
"With regard to strictly scientific methods of classification, it must be admitted that at the present stage of development of the science of comparative law, it seems difficult for any individual writer to realize unreservedly that ideal of complete independence from his own general cultural background which would allow him to write for a - necessarily fictitious - supranational and universal group of readers. The whole study, including the systematics, will almost inevitably be coloured by the author's own starting point, by his personal point of vantage."

criminal process of other countries is also of interest. An excellent example of this is the possibility of State compensation for crime victims. Such a scheme has been adopted in twelve European States. The limitations of these schemes as well as certain ideological points raised by them has been considered to be of such interest from the point of view of the central issue of this study that the general schemes of all these countries will be compared in section 9.

Also elsewhere, individual countries not included among the core countries may have features of more general interest. If so, also these will be referred to. (1)

1.4. The definition of terms

1.4.1. General remarks

Three key terms in this study are victim (and, in legal connections, the complainant, the injured party, the complaining witness and corresponding concepts) crime (or, more precisely, the victimizing incident), and the criminal justice system.

It should be noted that the terms "crime" ("offence") and "victim" are used in this study, in many cases, as shorthand for "alleged offence" or "alleged victim". One of the purposes of the criminal justice system is the authoritative determination of what actually has happened. Until such time as this authoritative pronouncement is given, it might be considered more proper to speak about the presumptive victim of crime. (2)

To adopt such an approach (the use of the qualifier "alleged") signifies that one has accepted the criminal justice system frame of reference. The (alleged) offender and the (alleged) victim may well have a different point of view of whether or not someone was actually victimized. Furthermore, studies of hidden criminality, and studies of the operation of the criminal justice system itself have indicated that the majority of cases never reach the stage of an authoritative pronouncement on "what really happened".

One further preliminary comment on definitions. As will be seen, there has already been lengthy discussion about the proper definition of "victims" and "crimes". It is appar-

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(1) The scope of this study has been limited to the European countries. Given the recent vitality of the victim issue in the United States of America and the possibility that American experiences may influence European developments, some references to the United States will be made in the footnotes.

(2) See, e.g., the discussion in Maisch and Schüler-Springorum.

ently not possible to provide a simple definition that would be useful in all possible connections. Definitions should always be given in relation to their purpose. For example, a rather narrow definition of victim seems appropriate for discussions on the rights of victims, but makes little sense for a discussion on the fear of crime. (1)

1.4.2. Victim

The study will focus on the victims of offences. The word "victim" is not one generally to be found in law. The legal terminology includes such terms as "the complainant", "the injured party" or "complaining witness". One is tempted to state that "victim" is the criminological term, while entry into the criminal justice system turns the victim into a "complainant" or the equivalent.

The essential elements of some offence definitions specifically state who is the victim of a crime with reference to this specific offence. Usually, however, attempts to define the victim on the basis of criminal law would require analysis of the various essential elements in order to find out whose legal interests are protected by each criminal provision. For example, if "theft" is defined as "the unauthorized taking of property belonging to another", it can be assumed that at least one injured party would be the lawful owner of the property.

From this point of departure, and bearing in mind that the present study is concerned with the role of the victim in the criminal justice system, one might assume that the search for penal provisions might be limited to those protecting private interests. Public interests may be ignored on the ground that, should society as a whole be considered to be the injured party, there would not be an individual injured party who would be accorded a role in the criminal process. (2)

Such an assumption would be unwarranted on several grounds. One ground is the rather general point that it is possible to develop theoretical constructs according to which even offences directed at the State as a whole victimize individual citizens. A more important criticism would be that, ultimately, no distinction can be made between public and private interests. (3) First of all, several provisions

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(1) See, e.g., van Dijk 1986b, p. 107.

(2) In the case of public interests, the public will generally be represented by the public prosecutor. Although there would thus be scope for analyzing his role in the criminal justice system as a representative of the public as victim, this will not be done in the present study.

(3) See e.g. Hov, pp. 23-28 and 42-43.

clearly have both public and private interests in mind. Pollution forms a health hazard for those in the immediate area; it is in their interests that pollution is criminalized. However, it is also in the public interest that environmental blight be prevented.

The defence of both public and private interests may not be as clear in other criminalizations. However, it would appear that provisions are not enacted only in order to protect either private or public interests. Instead, the importance of both interests may vary along a continuum. At one end, private interests are more important in a certain criminalization, and at the other, public interests are more important.

The second approach to defining the victim would be to resort to procedural law. From among the core countries in the countries of Europe, the following procedural provisions can be presented: (1)

> A party is a person whose rights or lawful interests have been violated or jeopardized by the criminal offence. (the Hungarian Code of Criminal Procedure, section 53)
>
> An injured person is a natural or legal person whose property or rights have been directly violated or threatened by a criminal act. A public or social institution, even when it has no separate legal personality, may also be regarded as an injured person. (art. 40(1)-(2) of the Polish Code of Criminal Procedure)
>
> A party is a person against whom the offence was directed or who was been endangered or suffered damage thereby. (the Swedish Code of Judicial Procedure, chapter 20, section 8(4))
>
> A party is a person who suffers moral, physical or material damage as the result of a crime. A citizen shall be declared a victim by decree of a person conducting an inquiry, an investigator, a judge or by ruling of a court. (art. 53 of the RSFSR Code of Criminal Procedure)
>
> Any person aggrieved by a criminal act is entitled to request criminal prosecution and to co-operate in criminal proceedings. In particular he is entitled to claim dama-

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(1) For Denmark, see Karnovs lagsamling p. 3219, footnote 102; for the Federal Republic of Germany, Jescheck 1978, p. 723; for Finland, Tirkkonen, p. 258, Honkasalo 1967, pp. 126-130 and Frände 1986; for France, Stefani et al pp. 200-209; for Norway, Hov. The particularities of the common law in the United Kingdom (e.g., the general right of prosecution and the strict separation of the civil and criminal process) serve to diminish the need for working out a definition of the victim in criminal procedure.

ges, offer evidence, be informed of final decisions and lodge complaints. (sec. 17(1) of the Code of Criminal Procedure of the German Democratic Republic)

Some general remarks may be made about the definition of the injured party in all of the core countries, based on statutory law and the literature. The injured party may be either a natural person or a corporate body, as recognized by the law of the jurisdiction in question. There are significant differences in the relative position of these two, differences that are important to the present study. For example, certain offences are possible only against natural persons, while a few are possible only against corporate bodies. There may also be important differences in the perception of criminal conduct and the extent to which suspected offences are reported to the authorities.

The procedural definition could also expand, in some countries, to include persons indirectly harmed by the offence. According to Polish law, an insurance institution may be considered an injured party to the extent to which it covered the damage suffered by the actual victim of the crime. (1) The same is true of indirectly harmed victims in general according to the law in the German Democratic Republic. (2) According to French law, also associations for the assistance of special categories of victims may be granted the status of partie civile. (3)

The offence violates the rights or lawful interests of the party. This is stated explicitly by the provisions cited above from Hungary and Poland. The Swedish provision states much the same thing by saying that the offence was directed at the person in question, or the latter was endangered or suffered damage thereby. The Russian provision refers to the suffering of damage, while the provision from the German Democratic Republic speaks of a party aggrieved by the act.

The operationalization of such terms may vary. This is due not only to the different ways in which the various countries define "rights and interests", but also to the looseness of such phrases as "endangers" or "is directed at".

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(1) Hołyst 1985.

(2) Sec. 17(2) of the Code of Criminal Procedure of the German Democratic Republic. See Luther and Weber, p. 15. In these cases the public prosecutor is also entitled to make an application; sec. 198 of the Code of Criminal Procedure. It may be noted that these "indirectly harmed victims" may include, e.g., insurance companies.

(3) Art. 2(1) - 2(5) of the Code of Criminal Procedure; see Stefani, Levausser and Bouloc, pp. 200-209; Vouin, pp. 495-496.

This study will be limited to those "victims" that the law of the jurisdiction (and in particular the procedural law) recognizes as potentially having a role in the criminal justice system. (1) This generally means that the victim is specifiable to the extent that for example his/her/its wishes are taken into consideration in dealing with a case.

It follows from the above limitation that victimless crimes will not be considered. One can conceive of victimless crimes in at least two senses. First, the argument can be made that in such offences as prostitution and narcotics abuse, the offender and the victim are both the same person. (This in no way obviates the point that the offender is often the victim of other offences.) Second, a number of crimes (such as most traffic offences and many forms of so-called economic criminality) are directed primarily against the State, the moral order, the "public interest" or some other larger collective or interest.

One might also note an important distinction between victims who have been victimized as individuals and those who have been victimized as representatives of a collective body. Special reference may be made to what has been called "collective victimization". (2) Collective victimization involves the victimization of groups or groupings of individuals linked by special bonds, considerations, factors or circumstances that make them the target or object of victimization. Examples of such victimization are war, genocide, crimes against humanity, apartheid, slavery and slavery-related practices, torture, unlawful human experimentation, piracy, aircraft hijacking, kidnapping of diplomats or other internationally protected persons, and the taking of civilian hostages. Many of these involve, or in themselves constitute, acts that have been criminalized within national jurisdictions. It is only to this extent that these forms of victimization shall be considered.

1.4.3. Crime

The focus of this study is on the victims of crime. The simplest definition of crime is that it covers acts and omissions criminalized by the States in question. (3)

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(1) Birkbeck (p. 272), for victimological purposes, gave the following definition: "A victim is any individual or institution harmed or damaged by others and recognized as such for the purposes of treatment or restitution by public, private or community agencies."

(2) See Bassiouni 1985a.

(3) In the present study, the terms "crime" and "offence" will be used interchangeably. It may be noted that in several jurisdictions, the term "crime" is reserved only for certain more serious violations of the criminal law.

This definition lies at the heart of one of the greatest drafting difficulties in preparing the United Nations Declaration. In referring to the incidents which befall a victim, one can adopt either a broader or a more limited perspective. According to the broader perspective, victims are to be understood as those who suffer as a result of acts that a) are a violation of national criminal laws, b) are a violation of international criminal law, c) are a violation of internationally recognized human rights, or d) otherwise involve an abuse of political or economic power. This is the view that was taken, e.g., by some of the drafters of the United Nations Declaration. The view has also been forcefully presented by several eminent experts on victimology. (1)

The narrower concept, itself propounded by eminent victimologists and ultimately decisive to the practical scope of the Declaration, (2) is that the incidents in question involve an act or omission in violation of the criminal law operative within a state. Criminalization in itself sets certain forms of behaviour into a special category condemned by the law. It is consequently this concept that primarily guides the scope of the present study, although reference shall be made to the broader concept where appropriate.

An important limitation on the scope of this topic is that victimization by society in general, or by the criminal justice system in particular, will not be considered. The radical perspective in criminology has pointed out the many ways in which the criminal justice system is used to defend the interests of those in power. The United Nations Declaration, in turn, has underlined the abuse of power issue.

1.4.4. The criminal justice system

A narrow definition of the criminal justice system would be that its structure is provided by the entity formed by the authorities working on the prevention of crime, the administration of the criminal justice system and the treatment of offenders, and its operation as guided by the norms of criminal law and procedure and the principles of criminal policy. Thus, the criminal justice system would be the framework for the activities of the police, the prosecutors, the criminal courts, and the authorities charged with the enforcement of criminal court judgments.

A broader view would be that the criminal justice system includes all authorities involved in the prevention of crime and the treatment of offenders. Authorities whose actions affect crime prevention include, for example, educational authorities in their role as teachers of the norms of socie-

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(1) See footnote 3, p. 5.

(2) See footnote 4, p. 5.

ty and of proper moral behaviour; social welfare authorities, in supporting individuals and families, and especially in attempting to prevent juvenile delinquency; labour authorities, in providing employment and thus legitimate means of income, as well as in supervising the legality of the working environment; general administrative authorities, in their role as supervisors of adherence to administrative norms in various settings; environmental authorities, in preventing offences leading to pollution, and so on. Authorities who have a role in the treatment of offenders, in turn, include in particular social welfare authorities and medical authorities. (1)

Even such a wide net, however, is not necessarily enough. In the discussion on criminal policy during the 1970s and the 1980s, attention has once again been drawn to the misconception that the prevention and control of crime (the essence of criminal policy) is something that rests - or even should rest - in the hands of the authorities. It is true that, for example, the police have an extremely important role in the prevention of crime and the treatment of offenders. Even so, it would be naive to believe that since society has assigned this task to the police the rest of the population can sit back idly and let the police deal with the matter on their own. (2) Similarly, although the social welfare authorities are charged with providing services to promote the welfare of the population, it would be equally naive to believe that the rest of us can rest assured that the social workers can solve and prevent all the conflicts arising from social deprivation.

It is for this reason that the role of the victim in the criminal justice system cannot be examined only in the light of the activity of the police, prosecutors, the courts and correctional authorities. Even an examination from the

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(1) This was noted by the delegation of the Federal Republic of Germany at the Seventh United Nations Congress, both in interventions and in the published report (Federal Republic of Germany report, p. 35). The latter notes that criminal law should be a last resort for the regulation of human relations. A wide range of provisions in public and civil law, in particular economic law, form a more significant body of precautionary measures against the abuse of economic and public power.

(2) A difference should be noted here between what members of the public believe and what they actually do. If asked in general who deals with crime, most respondents would presumably answer "the police". Victimization surveys have shown that a large majority of offences are in fact not reported to the police; some of these unreported offences are dealt with informally.

point of view of State (or local) authorities would not be enough. A discussion of the role of the victim must of necessity consider the activity and even attitudes of members of society at large - whether they are friends and acquaintances of the victim and/or offender, bystanders, people with no contact with the victim or even whether they are themselves offenders or victims.

However, as was noted in section 1.2.2., one of the key elements in this study is criminal policy, which was defined as planning and decision-making related to the drafting, approval and application of criminal law by the authorities. Thus, although the importance of private citizens, companies and associations in the prevention and control of crime will be noted where appropriate, the main attention will be concentrated on the authorities and on the formal criminal justice system.

1.5. Sources of data for the study

The present study deals with both the law on the books and the law in action. It will deal with statutory law and legal practice regarding the role of the victim in the criminal justice system, but it will also utilize criminological and victimological data showing how this law actually works, i.e. whether or not legal mechanisms are used, and if they are used, what functions they fulfill.

It is not possible to provide a full accounting of the law and practice of all European countries in relation to victims; certain allowances had to be made in balancing the interests of a comprehensive picture against the practical possibilities of research. However, three factors contributed to the possibility of carrying out research on the systems not only in the fifteen core countries of this study, but in a number of other European countries as well.

The first was that in preparation for the Seventh United Nations Congress, at which the Declaration was recommended for the approval of the General Assembly, the United Nations Secretariat sent questionnaires to all member States, on the basis of which it prepared a "Survey of redress, assistance, restitution and compensation for victims of crime. Report of the Secretary-General". (1) Twenty-two European States replied.

The second factor was that there are two major centres for information on criminal law and criminal policy in Europe and the resources of both could be tapped. One is the Division of Crime Problems of the Council of Europe and the other is the Max-Planck Institute for Comparative and Inter-

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(1) A/CONF.121/4. Dr. Irene Melup of the Secretariat has kindly provided some details of the replies that were not recorded in the Report.

national Criminal Law, located in Freiburg im Breisgau in the Federal Republic of Germany. Both centres have produced extremely valuable crossnational research on the question of the victim of crime.

The third factor is the advanced stage of international cooperation between researchers and government officials in the various European countries. During the preparation of this study, further material was made available in connection with meetings arranged by, inter alia, the Helsinki Institute for Crime Prevention and Control, the Division of Crime Problems of the Council of Europe, the United Nations and the World Society of Victimology. The materials as well as the personal and professional contacts emanating from these fora were assiduously tapped.

The material for this study was collected and systematized by the author on the basis of the frame of reference outlined above. With due respect to the high probability of error and misunderstanding involved in studies of comparative law (a probability which was borne out several times in the course of the study) the author sent out preliminary drafts of the study to experts in all of the fifteen core countries. The draft was accompanied by a request to check the validity of the information on the jurisdiction in question as of 31 July 1986. (1) As most of the sources and legislation used in the preparation for this study were in the original languages, with the translations into English by the author, this at the same time provided a method for checking the correctness of the translations.

1.6. Outline of the sections of the study

1.6.1. The development of the role of the victim

This study contains a number of elements, all revolving around the concept of the victim of crime. As the purpose of the study is to consider the role of the victim of crime in European criminal justice systems today, the traditional

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(1) I would like to express my thanks to Assistant Professor Károly Bárd (Hungary), Dr. Ewa Bieńkowska (Poland), Dr. Anton van Kalmthout (the Netherlands), Professor Hans-Jürgen Kerner (the Federal Republic of Germany), Dr. Marie-Pierre de Liege (France), Professor Horst Luther (the German Democratic Republic), Supreme Court Justice Helge Røstad (Norway), Dr. Joanna Shapland (England), Dr. Harald Tiegs (Austria), Dr. Jacqueline Tombs (Scotland), Dr. Thomas Weigend (the Federal Republic of Germany), Dr. Alexander Yakovlev (RSFSR) and Professor Valdimiro Zagrebelsky (Italy) for having checked my references. I would also like to express my thanks to Professor Jörgen Jepsen (Denmark) and Professor Knut Sveri (Sweden) for having assisted me in locating sources.

approach - and the one also called for here - is to prepare the groundwork by dealing with historical developments (section 2.1.).

Not only can an historical analysis provide us with a better understanding of why our present criminal policy has certain features, it can also provide the basis for comparing the solutions offered within the sphere of different criminal justice systems.

Section 2.1. will outline in particular two lines of development in the procedural position of the victim. The first relates to the initiation of proceedings. It will be noted that from roughly the 700s to the 1500s more and more offences became subject to public prosecution, with less attention to the interests of the victim in perhaps avoiding formal adjudication. The second line of development relates to the outcome of the procedure. The earliest forms of settlement, violent retaliation and compensation, had clear connections with the victim. The increased interest of the central authority led to forms of punishment that accorded more with the interests of the State (in particular, imprisonment, but also the change in the purpose of the monetary sanction should be mentioned here).

This study, however, is not an historical one, and section 2.1. will only provide the general outline of the development in the European region. Even so, these developments are important in understanding the cultural traditions linked to the operation of the criminal justice system.

Section 2.2. will provide a brief review of the development of the study of victims ("victimology") and of the so-called victim movement.

1.6.2. International developments and victims of crime

As noted, the focus is on the victims of crime, but from the perspective of the United Nations Declaration. To understand the significance of this instrument passed by the General Assembly, the role of the United Nations in international criminal policy must be dealt with (section 3).

It will be noted in particular that the recommendations of the United Nations lack any binding legal effect. In the light of Article 2 of the United Nations Charter, the United Nations is not authorized by the Charter to intervene in matters that are essentially within the domestic jurisdiction of any state. As the criminal justice system is very much a domestic matter, the absence of a binding legal effect in the case of a Declaration on victims of crime is particularly clear.

However, it will be noted in section 3 that the importance of the Declaration lies in a different area entirely, in its symbolic significance in the guiding of legal policy.

Although the Council of Europe with its twenty-one member States covers only a portion of Europe, the intensive work of the Council in legal problems as well as the strong tradition of the Council in formulating recommendations that have an immediate impact on practice signifies that its activity in victim policy is clearly deserving of attention in any analysis of this issue within a European framework. Its activity will be reviewed in section 3.3.

1.6.3. The role of the victim in victimization and crime prevention

Section 4 begins to take the analysis through the criminal justice system, by dealing with the period before a crime is committed. One of the primary goals of the criminal justice system is the prevention of crime; its importance is also noted in the preambular part of the Declaration. Section 4 will deal both with the philosophical issues of the victim-offender relationship and with the policy implications for crime prevention.

Crime prevention (and control) is generally assumed to be a matter for the community and the State. It will be noted in this section, however, that in many respects the victim has been assigned responsibility in this regard. The issue is a sensitive one. An analysis of the victim precipitation issue (the suggestion that the victim in some ways may contribute to his own victimization) will show that several commentators have seen in discussions of victim precipitation an attempt to blame the victim for his victimization.

A denial of the possibility of discussion of victim responsibility is a shortsighted reaction. The law of the European countries has taken and will continue to take into account the behaviour of the victim before the crime was committed. The analysis in section 4 will point out some of the ways in which this is done. After an attempt at defining the legally relevant modes of victim participation in crime, the analysis will note examples of the withholding of benefits (such as insurance), the reduction of the amount of restitution or compensation to be paid to the victim, reduction of the charges or the penalty (or even total release from liability) with reference to, e.g., provocation, self-defence, necessity and consent, and finally even punishment of the alleged victim.

The issue of the responsibility for the prevention of crime, however, is not limited to discussions of the role of the State, the community and the (potential) victim. Many of the countries of Europe assign a specific role to bystanders in the case of certain serious offences. This will also be considered in section 4.

1.6.4. Alternatives and services

Section 5 deals with the question of alternative processes and victim services. The victim of crime will not necessarily be dealt with by the criminal justice system. The matter may be dealt with informally, or, for example, through civil or administrative proceedings. Furthermore, there are a number of services that the criminal justice system can not and does not provide. Discussions of victim policy have pointed out at least emotional, financial, medical, psychological, information-related and legal needs. Alternatives in the delivery of such services in Europe will be considered briefly in section 5.

1.6.5. Entry into the criminal justice system

Section 6 will deal with the entry of the victim into the criminal justice system. The main question is whether or not the victim is defined as a victim (an object of an offence), and thus is to be granted a certain status within the criminal justice system (for example, that of complainant or complaining witness).

In this connection there are two victim-related types of analysis. One pertains to victim characteristics. Examples of victim characteristics that may be considered in determining the criminal nature of the interaction include age, sex, familial or social status, and occupation. The other pertains to victim behaviour, for example, to his possible provocative conduct or consent to the action. Although these questions have been dealt with in connection with the question of prevention (section 4), they will also be dealt with in section 6 from the point of view of their effect on the definition of the incident. One special area of interest is the so-called material concept of an offence.

Both types of analysis, victim characteristics and victim behaviour, are related to an assessment of blameworthiness. The question of blameworthiness is perhaps most apparent in connection with an analysis of victim characteristics. For example, assault of a child, or of a government official, may be considered more blameworthy than the assault of an adult. The decision to criminalize or decriminalize such acts, or to raise or lower the punishment, is a core one in criminal policy.

Victim characteristics are not considered by the Declaration in connection with criminalization or punishment. Paragraph 17 only notes, under "Social Services", that "(i)n providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above" (a reference to the anti-discrimination paragraph).

The question of criminalization and penalty-setting in accordance with victim characteristics is a broad and diffi-

cult one that the Declaration could not address. Furthermore, it would be an impossible task to attempt to enumerate European legislation referring to such characteristics. Even so, in the interest of a balanced discussion, the present study will briefly provide examples of such references to victim characteristics in criminal law.

The question of blameworthiness is also present in considering the behaviour of the victim in connection with the offence. While there is little that the victim can do to change his age or sex, and the scope for demanding that the victim change his status or occupation on criminal policy grounds alone would appear to be limited, there is room for maneuveur in assessing victim behaviour.

One special question dealt with in section 6 is the possibility allowed to the victim to determine himself whether or not the matter should enter the criminal justice system. It will be noted that almost all European countries characterize certain offences as "complainant offences", which can be prosecuted only on the complaint of the victim.

1.6.6. Processing the case

Section 7 assumes that the case has entered the system and considers various factors affecting the position of the victim in procedural law. The victim (who is called, e.g., the complainant or a witness for the prosecution, depending on the legal systems) has a clear procedural role to play in bringing the case to trial and seeing it through to its conclusion. The analysis will pay particular consideration to the principles embodied in paragraph 6 of the United Nations Declaration.

This section will deal in detail with several aspects of the role of the victim in the process. One is his right to receive information on what he may do at each stage and on what is being done. The European countries have attended to this need in many ways, ranging from benign neglect to a right to be informed on such matters at every stage.

The presentation of the views and concerns of the victim was one of the most hotly discussed issues in the drafting of the Declaration. It will be noted here that there are three main models of victim participation in Europe, with many shades and variations: full participation as a (supplementary) prosecutor, participation as a civil claimant, and participation as a victim. It will also be noted that, in some countries, little use is made in practice of some of the theoretical models.

Section 7 will also deal with a variety of other questions relating to the role of the victim in criminal procedure. Examples are his right to privacy, protection against intimidation, and attempts to minimize victim inconvenience.

1.6.7. Exit from the criminal justice system

Section 8 will deal with the role of the victim in the final resolution of the matter within the criminal justice system. One of the important matters here is the obtaining of restitution for any harm or loss caused by the offence. The second important question is what role, if any, the victim should have in the punishment of the offender.

Although the main subject of adjudication in modern criminal justice is the determination of guilt and the selection of the appropriate punishment for the guilty, the Declaration refers primarily to something that is often considered secondary in such adjudication: restitution to the victim. Punishment in modern criminal justice systems (fines, imprisonment, suspended sentences) is largely divorced from the interests or views of the victim. However, it will be noted that there are many different ways in which the court judgment takes note of restitution.

Section 8 will deal first with restitution in general, including the issue of the allocation of responsibility between the offender and third parties, and the form of restitution.

Section 8 will then continue with an analysis of ways in which the criminal justice system can facilitate early payment of restitution. The primary means for this is linking such payment with the waiving of measures; an example is the waiving of prosecution on condition that restitution is paid.

Should the case be brought to judgment, only a few countries provide for the possibility of a compensation order as the sole sanction for an offence. There are many problems involved in attempts to expand the use of restitution in this regard, but there does appear to be an increase of interest in such possibilities.

Section 8 will also deal with ways in which the views and concerns of the victim can be considered in sentencing. Primary attention will be paid to ways in which the interest of the victim in restitution can play a role in sentencing. Almost all the countries of Europe specify that the payment of restitution is to be considered a mitigating factor in sentencing. The payment of restitution may even lead to a waiving of punishment or, in some rare cases, to an absence of criminal responsibility (in particular if restitution is viewed as active repentance, "tätige Reue").

It will be noted that, at least in the countries covered by the study, the victim is accorded few, if any, possibilities of actively influencing the sentence.

1.6.8. State compensation for victims of crime

Section 9 will cover the question of State compensation to victims of crime.

The section will begin with an analysis of some of the theoretical questions involved in State compensation, as well as a review of the development of the schemes in the various countries of Europe.

Particular attention will be paid to the twelve countries of Europe that have adopted a general scheme of State compensation, as well as the degree to which they accord with the model scheme contained in the Council of Europe Convention on the subject. These schemes involve several problems that have been solved in different ways in the various countries. Examples are the scope (what offences are covered, and what victims are covered?), the minimum and maximum awards, whether the award is ex gratia or a matter of right for the victim, the extent to which the victim must cooperate with the authorities in bringing the offender to justice, and the headings under which the award can be provided.

One point that will be dealt with in particular is the significance (and definition) of victim involvement in the offence, or even in other offences. It will be argued that all of the State compensation schemes operate with an "ideal victim" in mind. An ideal victim is one who is totally innocent of any wrongdoing in connection with the offence; he took all reasonable precautions against the possibility of becoming a victim, and once he was faced with this possibility, he conscientiously attempted to resist. It will be noted that, in fact, the State compensation schemes must be applied to a great number of cases where the situation is not as clear-cut.

1.6.9. Conclusions

The study will conclude, in section 10, with an overview of the role of the victim in the criminal justice system. It will be noted in this section that today there is an increasing interest in finding alternative means of dealing with victimization, and these means will be considered from the point of view of both the victim and society.

1.6.10. The annexes

The annexes provide the text of the United Nations Declaration (Annex 1) and the Council of Europe Recommendation (Annex 3). Annex 2 contains a commentary on the Declaration. Annex 4 compares the contents of these two instruments, and refers the reader to the respective section in this study where the subjects are dealt with.

2. BACKGROUND COMMENTS ON HISTORICAL AND IDEOLOGICAL ASPECTS

2.1. Developments in the position of the victim

2.1.1. General remarks

The development of the position of the victim in any of the European countries is a subject replete with points of interest. Excellent monographs have been written which deal directly or indirectly with the position of the victim at certain critical stages in this development. (1) This historical section will not go into similar detail on the changes in this position in each of the European countries. Instead, the most important trends will be outlined, with the emphasis on State co-option of the criminal process, a development which had become evident throughout Europe already by the 1500s and 1600s. (2)

The development of organized society, according to the idealized view, is regarded as a continuous development of order out of chaos. According to this view, primitive man could rely only on himself for defence and vengeance. Society brought with it rules of conduct, enforced when necessary by some figure of authority. In particular, certain forms of conduct (such as taking property belonging to another, causing another person bodily injury) were condemned, and various forms of punishment awaited the offender. This mechanism of criminal justice was seen to deter crime, thus providing potential victims with the best form of protection. If, despite this deterrence, an offence did

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(1) von Bar, Conrad, Esmein, Radzinowicz and von Hippel are examples of general histories of criminal law. Berman, Langbein and Weisser are examples of monographs. Schafer 1977 includes one chapter which is thus far the most comprehensive treatment of the development of the role of the victim.

(2) Considerable caution is needed in generalizing about the practical reality of the law during earlier centuries. As Weisstub notes (p. 204):
"The job of assessing history for its pluses and minuses with respect to the daily life of its inhabitants is at best of times shrouded in the vagaries of our historical methodologies and personal predilictions. This is even more so in the case of legal history where we have a well-developed capacity to reconstitute historical reality according to the preordained design of legal justification."

take place, it was no longer up to the victim to see that the offender was "brought to justice": he was to turn to the agents of the central authority, who would perform this service for the victim. (1)

The above outline is paralleled by the view that the position of the victim has improved, since he has been provided with the possibility of turning to the central figure of authority for protection. Improving the administration of justice is seen to serve not only the interests of society at large, but also the interests of the victim.

Such an outline requires at least some modifications. The development of society, and the criminal justice system along with it, has not necessarily been paralleled by a steady strengthening of the position of the victim. While one can conjecture that the earliest history of mankind involved "criminal-victim relationships" that were "hardly anything more than a mutually opposed effort to secure power", (2) the development of the position of the victim can perhaps best be described as spotty. In some cases and under some systems it became easier for a victim to have his losses recovered. In other cases and under other systems he may have continued to have difficulties.

Indeed, some commentators have argued that the position of the victim may have retrogaded during the most recent period of development. (3) The development of the position of the victim is unavoidably tied to the over-all development of the criminal justice system, and of society in general. One of the predominant trends in this has been differentiation, specialization and stratification, a development from a "Gemeinschaft" society to a "Gesellschaft" society. In the process of social control, this entails a shift from a system where every person had an equal potential for exercising social control (subject, of course, to such factors as strength and mental abilities) to a concentration of control functions in the hands of agencies and individuals specifically entrusted with this task.

According to this view, the role of the victim weakens along with the development of the criminal justice system. The application of law becomes more and more complex, and consequently it is considered a matter that should be left to specialists and experts. Conflict situations are no longer

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(1) "There is perhaps no other branch of law in the history of which the progressive development of the social state and public authority, and the reconstruction of society, are so heavily traceable, as in criminal law." von Bar, p. 119

(2) Schafer 1968, pp. 8-9; see also Viano 1983, pp. 18-21.

(3) See especially Christie 1978 and 1981.

left in the hands of the persons immediately involved, and are instead turned over to agencies and individuals who have been trained for the task. Such experts, in turn, are in a position to use law and their expertise as a tool of social control. The interest of the victim in obtaining satisfaction for the offence is not necessarily the primary consideration of the criminal justice system.

This view therefore provides a more pessimistic view of the development of the role of the victim. The increase in State control not only limits the freedom of the individual: it also weakens the possibilities that victims have of directly obtaining redress.

2.1.2. Community law and state law

Both of the above views of the development of criminal law and of the position of the victim can be described in terms of a development from community law to state law. In this, community law is understood as a system in which the aggrieved victim is the central actor. It is he who bears both the responsibility for seeking satisfaction and the right to do so. In modern procedural terms, he retains control of the prosecution. Extrajudicial settlements are preferred to formal court action, and compensation rather than discipline is the optimum conclusion. In state law, on the other hand, an offence is considered to imply the notion of insult to the public. When this is the case, the State is seen to have a vested interest in the case, which leads to State control of prosecution, court action and sanctions. (1)

This view of development in effect draws two stereotypes, and suggests that one has replaced the other. (2) According to the stereotype of community law, the victim or perhaps the immediate circle of the victim decides on what measures to undertake on the basis of an offence. This might include ignoring the offence entirely (for example when the offender is obviously more powerful), exacting private or collective vengeance, or entering into informal negotiations on a possible settlement.

According to the stereotype of state law, which is seen to have replaced community law, once an offence occurs, it is an official matter. The offence is investigated, the alleged offender is prosecuted, and a adjudicating person or

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(1) See Lenman and Parker; Herrup. Weisser (pp. 53 ff.) refers to corresponding concepts in speaking of private and public criminal law. Both pairs of concepts are essentially based on the "Gemeinschaft" - "Gesellschaft" distinction originally developed by Max Weber.

(2) See Weisstub, esp. pp. 202 ff.

body applies various legal norms to determine what formal action, if any, is called for. The formal action often takes the form of punishment rather than of a call for compensation to the victim.

The development of the legal position of the victim in Europe shall be examined in the following in the light of the stereotypes suggested above. At the same time, the validity of these stereotypes will be considered. Before a more detailed discussion of this development, however, one caveat is in order. Discussions of the development of criminal law are hampered when one considers the view that there cannot be a crime unless there is criminal law. Thus, to say that the principle change in criminal law took place when the State co-opted the control of crime through the criminal justice system assumes that the concept of crime has remained more or less the same. However, it can be argued that the essence of the increased State influence lies in its control over the definition of crime. The important changes may therefore lie not as much in how crime is dealt with, but in what is regarded as crime.

2.1.3. The emergence of community law

At the earliest stage of development, the definition of wrongdoing, and the reaction, were left to the individual and to the family. There were no figures of authority to establish rules and command obedience. It is understandable that any subjective threat to one's own needs is viewed as wrongdoing. Above all, threats to one's physiological or security needs would therefore lead to a reaction. The involvement of the family in the definition and in the reaction would be due to the importance of the preservation of family members, one of the chief functions of the family. A threat to one member can easily be seen to be a threat to the survival of the family as a whole. (1)

Anthropological studies have indicated that the response of the family need not be directed at the individual who was behind the original wrongdoing. It can also be directed against any member of his family as a surrogate. (2)

Family involvement may then lead to a blood feud, a succession of assaults, each calling for a reaction in turn by the family affected. The general view of the function of such blood feuds is that they were intended for vengeance. (3)

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(1) Schafer (1968, p. 9) refers to the concept of collective responsibility; see also Viano 1983, pp. 18-21.

(2) See, e.g., Hoebel's seminal study.

(3) See e.g. von Bar, pp. 4-5 and 57-69; Ziegenhagen, p. 35.

Schafer (1) suggests that the blood feud is an expression of social defence and deterrence. If an attack is not repulsed (i.e. no retaliation is made), then the balance of power might be upset. If a family does not respond at all to an assault it might be perceived to be so weak that it will be subjected to continued assaults and the threat of total extermination.

The reaction of the family to perceived wrongdoing presumably did not always take the same form of violent retribution. (2) The family would have at least two other alternatives: moving away from the area of interaction, or choosing to redefine the matter as less serious. The reaction would depend, for example, on the population size and density and on social cohesion. Also, it is possible that the family of the wrongdoer itself would "punish" him, and in this way preserve the peace. The cultural norms on vengeance were presumably also an important factor here. (3)

For small social groups feuds are obviously an expensive way of reacting to perceived wrongdoing. As long as every family member is needed for food gathering, defence and other interests of immediate survival, the group can ill afford to lose a member. The costs would increase once the group settles down in one area, when there no longer is the easy alternative of moving away.

Once surplus wealth exists, however, yet another method of solving disputes exists. The wrongdoer or his kin may offer something of value to the victim or his kin as atonement, as "composition". (4) Surplus wealth exists for hunters and gatherers during good times. Once social groups settle down and begin to farm, the possibility of surplus wealth increases.

Composition is a preferable alternative to blood vengeance when the family values the life of the offending kinsman and has good reason to fear the power of the other family to retaliate with violence, either against this kinsman or another family member. Composition has one further significant advantage in the settlement of disputes: the size of the composition can be altered in accordance with a variety

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(1) Schafer 1968, pp. 10-11.

(2) MacCormack notes that the role of revenge varies from one primitive society to the next and that there is no evidence that the development of societies always begins with a revenge stage.

(3) See the examples cited in Ziegenhagen, p. 36. See also Roeder, pp. 132-137 and passim.

(4) See Hoebel, pp. 310 ff; Rohrl, p. 199 and passim; Jacob, pp. 45-46; Ylikangas, p. 14.

of factors. Violent retaliation on the one hand, and ignoring the wrongdoing on the other, were extreme responses. Composition provided a middle road. (1)

Presumably composition was first offered on a very ad hoc basis. The two kinship groups agreed in each individual case on the proper composition, with little attempt at establishing a tariff. In time, however, a variety of factors clearly came to affect the determination of the size and type of the composition. These factors included not only the nature of the offence but also, for example, the relative power position of the wrongdoer and the victim, the solidarity and behaviour of the kinship groups involved, and the geographical position of the kinship groups. (2)

2.1.4. The strengthening of state law

Even in early composition the settlement of the matter was largely in the hands of the two kinship groups immediately involved. However, subject to the consent of these families, it was possible that a third party might be accepted as a mediator. This involved some formalization of community interest in the outcome of the process. (3)

Both the formalization of community interest and the rise of the concept of crime were related to the strengthening of state law. What was essentially involved was that an of-

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(1) However, Berman 1977 (p. 558) notes the marked differentiation of payments for the slaying of persons belonging to different classes, the enormous size of the payments, the liability of kindred for wrongdoing regardless of fault and the fixed tariffs for injuries regardless of the actual cost to the victim. He argues that "bot was, in its origins, essentially punitive and only secondarily compensatory."

(2) Schafer 1977, pp. 11-15; Ziegenhagen, pp. 46-52; von Bar, pp. 67 ff. The earliest surviving leges barbarorum, the law of the Salic Franks issued by the Merovingian king Clovis in 465, listed monetary sanctions to be paid by wrongdoers to injured parties. Berman 1977, p. 556. The laws of Ethelbert (ca. AD 600) provided very detailed schedules of tariffs. See Berman 1977, pp. 556-559 and Berman 1983, pp. 53-55.

(3) Hoebel pp, 316 ff.; von Bar, pp. 60-61 and 121-122. Hoebel notes (pp. 302 ff.) that central Australian aborigines solve some problems by the council of tribal elders. However, they do not use compensatory damages but instead wounding or killing. Mediation is thus not always connected with a preference of composition over violence.

fence was gradually seen as an act directed not only against the victims but also against the community, or against the symbol of the community, its authoritative head. It was becoming a crime and no longer (solely) the subject of a private dispute.

Several reasons can be suggested for this development. Presumably at an early stage some actions (for example sacrilege or acts of cowardice in battle) were generally considered dangerous to the community. (1) The reaction to these may then have served as a model for dealing with what were previously purely private disputes.

The simplest explanation may be that the increased community interest in preventing and punishing undesirable behaviour corresponds to a new public conception of crime as an act that directly affects the entire community. It may be seen to offend against the values adopted by the community and thus call for some reaction. Why this is so may be related to an assessment not so much of the act itself, but of the possible repercussions: an absence of response may lead to a repetition of the act against another person (the need for deterrence). It may also be linked to the suggestion that some offences were considered so heinous that no atonement could be possible between the kinship groups involved. (2)

It is not an insignificant point that by taking over the processing of cases and by requiring adjudicated offenders or their kin to provide composition, a channel arose for the exacting of property to the benefit of the central authority. (3) At an early stage a distinction was made between payment to the injured party ("bot" or private fine), to the kin of a slayed person ("wer") and to the third party involved in the determination of the composition ("wite" or public fine). The present assessment is that the wite was originally intended as compensation to the third party for

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(1) Stefani and Levasseur (pp. 60-61) cite religious factors in this development; religion would form the basis for the cohesion of the wider group, and thus sacrilege would be considered a particularly heinous crime. See also Weigend 1985, note 59 and the accompanying text.

(2) Ziegenhagen, pp. 61 ff. Hoebel notes (pp. 293) that simple societies need little law: the relations between individuals are more direct and intimate, and the primary, informal mechanisms of control are more generally effective.

(3) Lenman and Parker note (p. 20) that for much of the 1200s, judicial fines (most of which were very small) made up to one-eighth of the royal revenue in England, and as late as the 1500s the income flowing through the courts "were a useful source of income in states from Italy to Scandinavia."

the trouble involved in bringing about a reconciliation. (1) Quite soon, however, it took on the nature of a fine, payable to the central authority.

At the same time it was certainly in the interests of the central power to assert its authority and intervene in disputes in order to secure a monopoly over the use of force.

The interest of the local lords in exerting their authority may have been buttressed by the growing merchant class during medieval Europe, which may have considered uncontrolled violence a threat to their interests. (2) Taking over the conduct of composition proceedings formed one method for achieving this end. This may have lessened the desire of individual victims and their kin for revenge; in any case the entry of the central authority in the field appears to have reduced blood feuding. (3)

The intervention of the central authority can also be understood on the basis that it had better resources for the effective preservation of the peace. With the spatial development of society and the increase in its members, there were understandably greater difficulties in ascertaining the responsibility for offences. As a matter of differentiation and specialization the State could assign certain individuals the part- or full-time task of bringing alleged offenders to justice.

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(1) Schafer 1973, pp. 108-109, 1976, p. 229 and 1977, pp. 13-14; von Bar, p. 61, footnote 14, and pp. 126 ff. See also Jeffery, p. 655; Hagan, p. 9; Heuman p. 16; Childres. Ylikangas (p. 16) notes that as late as the 1500s, this view of the nature of the fine prevailed in Finland.

(2) See, e.g., Lenman and Parker, pp. 37-38. Viano 1983 (p. 20) notes that "In medieval Europe the merchants, bankers, scholars and priests saw revenge as being inspired by a subjective, albeit collective perception of wrongdoing and as a threat to their interests and ideals. From their respective viewpoints, they saw it as disruptive of the public peace and stability needed for commerce to prosper, or as a challenge to their philosophical or theological vision of humanity."

(3) Ziegenhagen, pp. 61 ff. Roeder (pp. 135-137), however, argues that it is too simplistic to view State power as replacing revenge. He notes, inter alia, that formal law itself may be used as an instrument of private or public vengeance. To this extent, one could say that in Roeder's view the State power did not act to suppress violence but instead to control its use.

Finally, the increased State involvement can be seen parallel to the loosening of local control. Previously, most of the population generally lived their entire life within the confines of a small area. Under such circumstances, informal social control could remain effective. The growth of cities, the increase in internal migration and the increase in stranger-to-stranger contacts led to a situation where the prosecution of crime could no longer remain purely a local affair, as crime itself became less localized. (1)

The growing role of the central authority (the State) as well as the diminishing role of the victim were evident in two intertwined developments. The first was the change in the nature and goal of the proceedings. The second was the change in the method by which the proceedings were begun. Throughout much of Europe both developments can be said to have led to the dominance of the central authority over the individual victims by the 1500s.

The development in the nature and goal of the proceedings has already been dealt with to the extent that violent retaliation has been replaced by informal composition proceedings, which in turn have been replaced by more formal proceedings leading to both composition (bot or wer) and a sanction (wite). The next step was formal proceedings leading to a punitive measure, with composition (restitution) considered at the most as an ancillary issue.

In many areas of Europe, the transition from informal to formal composition proceedings took place along with the growth of feudalism, from ca. AD 700 on. (2) The liege lords and bishops gradually replaced the kinship groups as the recipients of the compensatory payments and the scope allotted for feuds was gradually eliminated. (3) By the 800s and 900s a feud was generally permitted only if composition had been requested and refused. (4)

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(1) Weisser, p. 90.

(2) Jeffery, p. 656. Already Roman law had a highly developed system of adjudication and distinguished between offences against private individuals and offences against the State. It also recognized a distinction between civil and criminal procedure, a distinction which would not return to European law until several centuries later.

(3) Weigend 1985, section IIC4.

(4) Jeffery, p. 655. Refusal to pay compensation may have been considered grounds to declare the malefactor an outlaw. This can be considered an extension of the feud, as anyone could kill an outlaw with impunity. In England, this stage was reached during the reign of King Alfred (849-899; Harding, p. 7.)

The continued development from composition-oriented proceedings to punitive proceedings can be seen during the "Landfrieden" period, which saw the conceptualization of offences as being directed against law and order in general and not only against the interests of an individual victim. (1)

The gradual increase in the role of the central authority led to an increased emphasis on State-ordered punishment and to a lessened focus on composition in the proceedings. This development was clearest in the common law countries, where a distinction rose between torts and crimes. (2) In these countries composition (restitution) was taken out of criminal law entirely and aborbed by the law of torts. The development of two fields of law brought with it differences in adjudication: the common law now requires that crimes, as offences against the State, be proved "beyond a reasonable doubt", while the corresponding tort only requires proof on a "preponderance of the evidence".

The second line of development was in the prosecution of crimes. The development here can be roughly summarized as having gone towards increased public prosecution and correspondingly decreased private prosecution.

In at least some areas of Europe, public prosecution of offences was possible already in feudal times. (3) In feudal France, for example, this was possible in the case of an offender caught in the act, when a murdered man had no kin to put forward the accusation, or in notorious cases. It was also possible when the accused submitted to public prosecution. (4)

The latter half of the 1100s saw an increase in centralization, especially of judicial life. These were the years of the acme of Papal power following the Gregorian reforms and its repercussions. (5) These years saw an increased interest in the rationalization of administration and internal structural differentiation. (6) Up to this time adjudica-

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(1) von Bar, p. 99.

(2) On this distinction, see Weisstub, pp. 204-209.

(3) Hoebel (pp. 303-304, 311 and 319 ff.) notes that certain offences were considered to be public offences already in primitive times.

(4) Esmein, pp. 61-68, 79-80 and 94 ff; Berman 1977, pp. 574-575.

(5) See Berman 1983, pp. 85-119.

(6) Langbein, pp. 134-135. For comments on the relation of penances to compensation of the victim and to folk law, see Berman 1977, pp. 577-586 and Berman 1983, pp. 68-76.

tion had been heavily dependent on oaths or the ordeal if no confession was forthcoming. Now, however, as the Papal power felt threatened by the perception of an increase in heresy, new methods of inquiry had to be found. (1) Heresy was an offence where there was no individual victim who could shoulder the burden of presenting the accusation and carrying through the prosecution. The alternative that was developed was the inquisitory procedure. By 1215 it had developed to the extent that the Fourth Lateran Council proscribed the use of the ordeal. (2)

The key features of the inquistorial procedure are the "Offizialprinzip", according to which the proceedings are conducted by the authorities ex officio, and the "Instruktionsmaxime", according to which the authorities were to gather the evidence. (3)

The Church was an added stimulus to the increased State role in crime control and in criminal proceedings in another sense. The dangers presented by feuding and private warfare led the Church to establish several "Gottesfrieden". These originally were sworn pacts by knights to keep the peace. The Church used the institution to place particular persons in particular places under its protection. The next step (taken for example in Germany in 1023) was general pacification: all persons were placed under special protection on a holy day. Later during the same century breaches of the peace also led to secular sanctions. (4)

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(1) Langbein, p. 137.

(2) Langbein, pp. 134-136; Esmein, pp. 80 ff. The importance of the ordeal was undermined by the increased involvement of church or public officials on the side of the "prosecution"; such officials would naturally be chary of becoming one of the parties competing in the risks of an ordeal. The importance of the oath, in turn, was undermined when, at an early stage, prosecution was directed against outsiders, who lacked the necessary community ties for the oath to carry sufficient weight.

Berman 1983 (passim; esp. pp. 50 ff.) views the creation of professional courts, bodies of legislation, the legal profession and the literature, the primary impulse of which came from the assertion of Papal supremacy, as a "revolution".

(3) The inquisitorial procedure, however, was not based on the principle of mandatory prosecution. See Langbein, p. 130.

(4) Langbein, pp. 134-135; see also von Bar, pp. 122-123. Berman 1977, p. 570, argues that the Church originally did not oppose blood-feuds. It only held that these could not bring salvation.

The ecclesiastical peaces were succeeded by secular "Landfrieden", which were territorial compacts to be renewed every few years. (1) The public proscription of at least serious offences was gradually incorporated into customary law. Breaches of the public peaces generated crude forms of public proceedings that were not dependant on initiation by the victim; these added to the gradually expanding list of public offences.

Prosecution without a private complainant appears with increasing frequency during the 1300s. In France by this time many statutes specified public interest in prosecution and assigned supervision of it to the procureur de roi. (2) By the 1500s only the procureur could demand punishment. The victim could only claim damages. However, as the partie civile (as the victim claiming damages is called in French procedure) bears the risk of shouldering the costs of the litigation, the State had nothing to lose in encouraging him to pursue the matter. (3)

Similar encouragement of victim participation in the initiation of the process was evident in English law up to the time of Henry VIII (1491-1547). For example, the owner of stolen goods forfeited them to the Crown unless he had been responsible for apprehending and convicting the thief. (4)

A related development in prosecution was from the right of private prosecution to an obligation (in many cases) of private prosecution. As noted in the foregoing, certain offences were considered so heinous that they were "botless". No private settlement on compensation was permitted for these. In Sweden, for example, the laws of the 1200s already prescribed punishment for those who released a thief before the matter had been dealt with at the assizes; later, secret agreements between the offender and the victim were prohibited. (5) At common law the role of the court was si-

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(1) Weigend refers to this period as the time of the "Verstaatlichung" of criminal law; Weigend 1985, IID4a. Similar developments are noted in England by Jeffery, pp. 656-657, in the Nordic countries by von Bar, pp. 127-129, and in Spain by Esmein, pp. 297-300.

(2) Langbein, p. 217 and Esmein, pp. 114-121.

(3) Esmein, pp. 121-124 and 143; Langbein, pp. 217 and 225.

(4) It was only the Theft Act 1968 which changed the law according to which an owner could reclaim property from a third party only if he prosecuted the thief to conviction. See Hodgson Committee, p. 13.

(5) Träskman 1980, pp. 22-23. See also Lenman and Parker, pp. 27-33.

milarly strengthened by making it a misdemeanour for the victim and the offender to reach a private settlement on certain offences. (1)

This tendency did not extend to all countries or to all offences. Vestiges of community law remained throughout Europe. Examples can be given from Spain, France and even Elizabethan England of authoritative exhortations to victims and offenders to seek a resolution of their conflict outside of the court system. (2)

Such vestiges notwithstanding, by the 1500s the State can be said to have assumed control of prosecution in many areas of Europe. In Germany the Constitutio Criminalis Carolina (1532), which is considered the instrument of the reception of Roman-canon procedure in Germany, did indeed permit private prosecution but subjected it at the subsequent stages to ex officio proceedings. It was therefore the officials who controlled the process. (3)

Also in England private prosecution remained possible. However, it was recognized that in England (as elsewhere) private prosecution did not always follow even in the case of serious crime. The Marian committal statute (1555) served to activate the justice of the peace into a role that today would be associated with that of the public prosecutor, the role of an examining magistrate. (4)

In France the Ordonnance sur le fair de la justice promulgated in 1539 (commonly called the Ordinance of Villers Cottegets) standardized the use of the inquisitorial process in all French courts. The King's prosecutor became a party to the suit. The victim could become a party to the criminal case only by filing a joint civil suit. (5)

The 1500s thus saw related developments in various parts of Europe. The criminal justice system that emerged by the end of this century still had a considerable way to go before a twentieth century criminologist or criminal justice practi-

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(1) Laster, pp. 24-25. This development led to the offence at common law called compounding a felony.

(2) Lenman and Parker, pp. 21-22. For example, title XXV, art. 9 of the French Criminal Code of 1670 forbade the courts to interfere further in a case not subject to corporal punishment or banishment once the parties had formally composed their differences.

(3) Langbein, p. 178; Weigend 1985, IIE3.

(4) Langbein, pp. 23-34 and 34 ff.

(5) Terrill, p. 138; Esmein, pp. 148 ff; Weisser, pp. 95-99; Laingui, pp. 46 ff.

tioner would feel at home within it. One very marked absence when compared with modern systems was that there was no agency charged with the prevention and detection of offences. The first police forces would not be established until the beginning of the 1800s. Thus the detection and apprehension of offenders remained largely a matter for the individual citizen. A central authority would react to an offence that came to its attention only if it regarded this as particularly noxious to its interests.

The State had gradually replaced the individual victim as the prosecutorial force. The period from the 700s to the 1500s saw a general increase in the importance of the central authority in proceedings and a growth in the official nature of criminal justice. This State take-over of the proceedings thus deprived the victim to a large extent of his ability to determine the course of the proceedings. The initiation of the proceedings was more and more considered a public matter, to be left to a representative of the central authority. (1) The goal of the proceedings also changed. The replacement of composition by the fine often even deprived the victim in practice of the possibility of obtaining restitution. Weisser has noted (2)

> "By the sixteenth century, criminal law had completely emerged from its personalised, medieval format. Its functioning no longer rested upon familiarity and its aim was no longer to adjudicate private disputes between particular individuals. With the appearance of the State as the sole source of prosecutorial energy, the criminal act could no longer be viewed as an attack by one person on another; it was now an offence committed against society at large."

These comments should not be understood to imply that the 1500s marked a complete break with the path. Already before the 1500s several types of offences had been considered to be directed at society at large, and were thus subject to what could be called public prosecution. Furthermore, the State takeover was not total in any of the countries, and in some areas or in some cases the victim retained control of the prosecution, or at least a significant role in the criminal process. (3) However, the over-all impression re-

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(1) Langbein argues that the Marian statute only confirmed and made uniform prior (dispositive) practice among magistrates in petty cases for over a period of 200 years. The first mention of such a role for justices of the peace was in a statute on vagabonds enacted in 1385. Langbein, pp. 63 ff.

(2) Weisser, p. 100.

(3) In Sweden, for example, the victim retained his general and primary right of prosecution, the prosecutor

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mains one of State interests in criminal justice superceding those of the victim in obtaining compensation and vindication.

2.1.5. Continued development in Europe since the 1500s

The development from the 1500s to the present can not be outlined in general terms that would have such an immediate connection with the role of the victim. This is due to the dominance that the State had achieved in criminal justice: the continued development was dictated by State interests, in which the victim was primarily regarded (if at all) to the extent that he could be of help to the State in bringing offenders to justice.

Some of the important developments should be noted, however, from the point of view of their indirect effect on the role of the victim.

One such development was in the choice of punishments. The fine, as noted, was an offshoot of composition. The adoption of certain other forms of punishment made composition either difficult (e.g. imprisonment) or impossible (capital punishment). Capital punishment came to be used quite widely, even for offences that (according to modern standards) are relatively petty. For many offences the offender's property was forfeited to the Crown. Early vestiges of imprisonment can be seen in a tendency to impose fines so severe that the offender was unable to pay and may have lost his freedom. (2)

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could initiate prosecution, but primarily only if the victim himself did not prosecute. Träskman 1980, p. 24. The French 1670 Code cited in footnote (2) on page 45 another example. A French royal decree in 1670 simplifed the proceedings at no cost to the accuser; see Lenman and Parker, p. 39. The general right of prosecution in common law countries is a third example; see, e.g., Philips, esp. pp. 179-180.

(2) Geis 1977, pp. 150-151. Langbein 1983 (pp. 36 ff., esp. pp. 40-41) deals with the large number of offences for which capital punishment was possible. However, both he and Lenman and Parker (p. 14) argue that in practice, capital punishment was rarely enforced. -In respect of the impossibility of compensation if the offender is executed, note must be made of the theoretical possibility that part of the offender's property would be forfeited to the victim. However, no data was uncovered that would indicate that this possibility was used.

A second development was in the ideology of crime control. Once the State had come to dominate the control of crime, it was very offender-oriented in its actions. The use of corporal and capital punishment, as well as the use of torture to extract confessions, were not intended to benefit the victims directly, but to solidify State control. (1) The ideologies of crime control which emerged during the 1700s and 1800s (first classical criminal law, then positivism) continued to have a clear offender-orientation. According to classical criminal law an offence was a violation of the moral order and the legal system in an act of free will on the part of the law-breaker. Victim participation in criminal justice was anathema to some utilitarian spokesmen of classical criminal law. They believed that the victim should not participate at all in criminal justice decisions about prosecution and adjudication. The basic view was that an offence is always directed against society and thus it was the State that was to use reason and calculation in deterring crime. (2)

The rise of the individualistic (positivist) orientation during the late 1800s and early 1900s continued the focus on the offender to the detriment of consideration for the victim. The offender was believed to suffer from a disorder that may be hereditary, biological, psychological or sociological. Sociologically oriented positivism argued that the offender should be viewed against his social background; biologically oriented positivism stressed primarily a medical approach. Both orientations emphasized the need to protect society, once again to the neglect of individuals. (3) The measures to come out of positivism - mandatory treatment, juvenile prisons, institutions for recidivists, various forms of primary crime prevention, social therapy and so on - were rarely designed with the interests of the individual victim in mind.

This is not to say that classical criminal law and the positivists neglected the victim entirely. Attempts were made by some reformers during the late 1800s and early 1900s to incorporate restitution into punishment, and the idea was discussed extensively at international congresses at the

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(1) See, e.g., Foucault for an analysis of the relationship between punishment and State control; for criticism of Foucault's view see, e.g., Ignatieff, pp. 182-187.

(2) Hagan, p. 11. See also the discussion on the ideologies of classical criminal law and treatment, in section 5.2.

(3) See e.g. Schafer 1976, p. 230.

turn of the century. (1) However, these attempts did not lead to any appreciable concrete results.

2.1.6. A review of the development: the predominance of State law

It has already been noted that the development outlined above should not be interpreted to mean that the trend has consistently been towards increased State participation and correspondingly decreased victim participation. This is due to the following points.

First, even before the entry of the central authority into criminal justice the victim could not one-sidedly determine what was to be done in respect of the wrongdoer. To a large extent it was a larger entity - the kinship group - that played the determining role.

Second, even after the State had largely taken over the operation of the criminal justice system the victim still retains some support of the State in seeking compensation, as will be noted below (see section 8). The primary development here (in particular in England) has been the drawing of a distinction between criminal and civil proceedings.

Third, even in respect to criminal proceedings, there has been no clear trend toward State monopoly of prosecution. Although such a monopoly exists de lege or de facto in some European countries (as will be noted in section 7), there is no monopoly in many other countries, at least in respect of offences that directly affect the victim.

Fourth, even the overall development from community law to state law noted above has not been complete. Even today the criminal justice system cannot be said to rest on state law alone. While this point can be made by referring to such anomalies as the continued existence of blood feuds in pockets of Yugoslavia (2), it can equally be made by referring to the continued discretion that the victim has de jure and or de facto in the definition and prosecution of an offence.

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(1) Schafer 1976; Jacob; Childres; Schneider 1982, pp. 11-12. Jeremy Bentham suggested restitution as an additional punishment, Bonneville de Marsengy suggested a combination of restitution and State compensation and Raffaele Garofalo suggested restitution as a means of 'social defense' against the lawbreaker.

(1) See Šeparović 1985, p. 83. Grönfors has written about feuding among Finnish gypsies.

In this connection, article 231 of the RSFSR Penal Code may be cited:

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Fifth, and perhaps most importantly, the victim remains the "gatekeeper" par excellence of the criminal justice system. While it may be true that the State effectively controls the processing of a case once the case enters the system, it should always be recalled that the victim has considerable control over what cases actually enter the system. It will be noted in sections 5 and 6 below that a considerable majority of victims do not report the offence, and either ignore it entirely or deal with it informally. The recent and strong interest in the social history of crime (1) has underscored that the courts were means of last resort to the local communities even after the rupture during the 1500s.

Societies emerge, develop and disappear without there being a consistent and uniform pace or pattern of development. In the preceding, the overall trend from community law to state law (i.e. to increasing formal control) has been described as a succession of amorphous stages, but this should not be understood to say that the emergence of community law, for example, will be followed by state law or that community law is condemned to disappear.

2.2. The appearance and influence of victimology and the victim movement

The two writers who are commonly considered the earliest to deal with victimology as a separate concept are the German criminologist Hans von Hentig and the Romanian psychiatrist Beniamin Mendelsohn. (2) In 1941 von Hentig published in the United States an article called "Remarks on the Interaction of Perpetrator and Victim" calling attention to the dynamic nature of the genesis of crime, in that the victim may be an active subject. The ideas were developed in his "The Criminal and His Victim", published in 1948.

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> "Evasion of Reconciliation. The evasion by a slain person's relatives of refusal to engage in a blood feud with the slayer and his relatives, when the refusal is carried out in accordance with the procedure established by the statute on reconciliation proceedings in cases of blood feud, shall be punished by exile for a term not exceeding two years or by banishment for a term not exceeding three years."

(1) As examples of the literature, see, e.g., Gatrell et al, and especially the articles by Sharpe, and Lenman and Parker.

(2) Fattah 1967 (pp. 120-122) notes early reference to the victim in fiction and even in scholarly research. Schafer 1977 (pp. 1-2, 48) cites Lombroso, Garofalo, Ferri, Tarde and von Liszt as "early victimologists."

Mendelsohn coined the term "victimology" in a lecture entitled "New Bio-Psycho-Social Horizons: Victimology", delivered before the Psychiatric Society of Bucharest on 29 March 1947. He has defined the concept of "victimity" as "the whole of the socio-bio-psychological characteristics, common to all victims in general, which society wishes to prevent and fight, no matter what their determinants are (criminals or others)". (1) For this reason he tried to find bio-psycho-social traits common to all victims.

The science of victims emerged quite slowly, first in scattered articles and papers from the 1940s. Victimology then became a very popular science during the 1960s and the 1970s. Among the factors behind this were a converging of the interest of researchers, activists and public officials. Among the interested researchers were criminologists and physicians. The activists included (above all) those in the feminist movement, but also, for example, those in the consumer movement. (2)

Victimology led to the opening of new research perspectives. (3) It gave the prospect of more reliable measures of crime, and new insights into factors contributing to crime. The results of the research (for example victimization surveys, victim precipitation studies, studies of the effects of victimization, studies of mediation and conciliation) were then marshalled by the victim movement and criminal justice practitioners as arguments for reforming the operation of the criminal justice system.

It has been noted that victimology was originally a "victimology of acts" and is now a "victimology of action" concerned with affirmative action for victims of crime. (4) Others have preferred to distinguish between victimology as a discipline and the victim movement as a political force. Such a distinction makes it easier to understand the many different ways in which victimology has been used (and, according to some observers, misused).

The victim movement has not taken the same direction in all of the European countries, nor have all practitioners (or researchers) interpreted the results in the same way. According to a recent analysis of the manifestation of the victim interest in criminal policy (5) four ideologies can

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(1) Mendelsohn 1974, p. 27.

(2) On the role of the feminist movement in giving political force to the victim issue, see, e.g., Taub, p. 154; see also Pagelow, pp. 261 ff.

(3) See, e.g., Anttila 1973.

(4) Fattah 1979, pp. 198-199.

(5) van Dijk 1983, pp. 7-15 and 1986a, esp. pp. 9-11.

be found. The first is the care ideology, which believes that the community should assist the victim in his stress, psychological trauma and financial need. The second is the rehabilitation ideology, which is geared towards restitution and mediation, and thus reintegration of the offender into society. Third is the retribution ideology, which calls for punishment in proportion to the damage inflicted. The fourth is an abolitionist or minimalist ideology, which calls for a lesser role for the criminal justice authorities and correspondingly a stronger role for victims.

The care ideology is in keeping with the welfare orientation of modern states, which attempt to assist all persons in need. Victims of accidents and illnesses are dealt with in much the same way as injured victims of crime. Persons in need of psychological support, rehabilitation or various forms of counselling can generally turn to the social welfare system regardless of the original cause of their distress. To this extent, the victim movement has added nothing new.

What is new is that the care ideology in the victim movement is calling attention to victimological research which points to more hidden or longer-lasting injuries which had not been dealt with, in the opinion of the proponents of the ideology, in an appropriate manner. The "hidden" injuries may be psychological difficulties which are not noted even when a victim is detected by the criminal justice system. The remedy for this is generally better training of social service workers and others who come into contact with the victim. Perhaps more importantly, the injury is hidden in the case of those victims who never report the crimes to the authorities. Shelters for the victims of domestic violence, crisis services and so-called hot-lines have consequently been established in several cities and areas. Other services are considering "out-reach" programmes in order to notify "hidden" victims of the availability of services.

The care ideology also notes that victims of crime may have financial needs not covered by existing services. The first significant law reform associated with the victim perspective in any European country is commonly held to be the adoption of a system of State compensation for victims of crime in England in 1964. While the scheme was in fact not the first State compensation scheme in Europe, (1) it can be clearly attributed to victim policy (as opposed to crime policy) arguments.

Within the criminal process, the care ideology is one factor in proposals for victim advocates such as those in Scandinavia (see section 7.1.), for increasing the respect of privacy of alleged crime victims and for improving the enforcement of compensation awards.

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(1) See section 9.2.

The rehabilitative ideology can be regarded as a grafting of the victim movement on the social defence movement. Its major contribution to reform of the criminal process in European countries is the recent increase in interest in conciliation and mediation schemes, primarily in Northern and Western Europe. Plans for increasing the possibility of restitution from the offender to the victim are generally justified with care ideology arguments, but also with rehabilitative ideology argument. (1)

The retributive ideology, in opposition to the liberalism of the care and rehabilitative ideologies and the radicalism of the abolitionist ideology, has a predominantly conservative tendency. It is perhaps not as visible in European countries as in the United States, where the responsiveness of elected political decision-makers to "what's in the air" as well as to influential spokespersons of victim groups may lead to raised minimums or maximums for certain offence, to the redefinition of some offences, or to entirely new criminalizations. Two quite different examples here are the offences of rape and environmental pollution. The proponents of such reform may acknowledge the limited instrumental value of, for example, raised minimums. What may be more important is that the situation of the victims is dramatized. (2)

The abolitionist or minimalist ideology has called for increased victim and community control of the solving of conflicts, and less State intervention in what the proponents of the ideology consider to be essentially private matters. (3) It is a strong force behind the movement towards reconciliation and mediation in many Western European countries.

One aspect of the victim movement which is not singled out by van Dijk and yet is of considerable importance can be called the preventive ideology. This is, of course, an underlying current in all four of the other ideologies and is generally regarded as a self evident goal. It is worth noting, however, that in particular in the socialist countries the emphasis in this area is on prevention. (4) Also, some of these ideologies may run counter to the over-all goal of prevention. For example, the retributive ideology

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(1) See section 8.

(2) See, e.g., Henderson, passim. Lamborn 1985a, passim, analyses more generally the influence of the victim movement on American criminal law and procedure.

(3) See section 5.3.

(4) See, e.g., Ostroumov and Frank, and also Toth, passim.

may hamper prevention, as it focuses on the aftermath of the offence and on increasing the punitive costs. (1)

The tracing of the above developments runs the risk of over-emphasizing the significance of the victim movement. This is due to two reasons.

First, the popular reference to the "forgotten victim of crime" is a clear exaggeration. The victim does indeed have difficulties in many countries in obtaining compensation for his loss. He may not be able to influence the processing of the case to the extent that he may wish. It has also been repeatedly observed that the treatment of many victims by criminal justice agencies in itself is insensitive and a source of victimization ("secondary victimization").

However, all criminal justice systems pay considerable attention to the victim in many respects. Certain characteristics of the victim (e.g. age, sex, relationship to the offender, occupation) are specifically considered in the essential elements of offences. His characteristics and behaviour are very much relevant in the determination of the proper punishment. In many countries the victim may also obtain compensation in connection with criminal procedure.

Second, the various pressures within the victim movement in respect of the involvement of the victim in criminal justice may work at cross purposes. This is the case, for example, in respect of the retribution and the abolitionist ideologies.

Third and most importantly, the victim movement, and victim-related factors in general, is only one element influencing the prevailing criminal policy. While it is true that official criminal policy in Europe in general has for a long time focused on the question of what should be done with the offender and not what should be done with the victim, this does not mean that the rise of victim movement will lead to a swing in the other direction. It has been repeatedly noted in declarations of victim policy by decision-makers that the improvement of the role and position of the victim should not take place at the cost of due process for the offender. Attempts to raise the punishment for certain offences may run counter to a more general effort to lower the level of severity of punishment. It is equally obvious that the interest of the State in the prevention and control of crime will not permit an unlimited role for the victim.

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(1) Fattah 1986, p. 4.

3. INTERNATIONAL CRIMINAL POLICY AND VICTIMS

3.1. The development of international interest in criminal policy

International cooperation in crime prevention and control can be said to have begun in earnest during the mid-1800s. The first statistics had been published, fueling the impression that crime was on the increase both in one's own country and elsewhere. Comparative criminal law and criminology began to arouse interest, as did the first reports of penitentiary innovations in the United States. (1) One of the earliest concrete results of this international co-operation were the extradition treaties which were signed with increasing frequency since the mid-1800s. (2)

The first major international congress, the International Congress of Penitentiary Science, was convened in Frankfurt am Main in 1846. The deliberations focused on solitary confinement. Young offenders were the subject of the second major international congress, held the very next year in Brussels. (3)

Other international congresses following in short order also paid attention to the position of the victim. At the International Prison Congress in Stockholm in 1878 Sir George Arney and William Tallack proposed a general return to reparation in criminal justice. The matter was dealt with by Garofalo in Rome in 1885. It came up again in St. Petersburg in 1890 and Christiana in 1891. At the Paris congress in 1895 and the Brussels congress in 1900 it was one of the items specifically noted on the agenda. (4)

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(1) Ancel (1975, pp. 7-8) refers to a "movement of natural internationalization" when a crime problem is no longer viewed as one of legal technique alone, but as one related to the improvement of the system of social reaction to crime. "The shift in point of view or enlargement of perspective has been very much dependent on the invocation of foreign experience and on a systematic process of comparison."

(2) W. Schneider, p. 9.

(3) Røstad 1985a, pp. 79-80.

(4) See Tallack, pp. 5-6; Jacob, p. 49; Raffaelo Garofalo, passim; Schafer 1977, pp. 17-19.

The third major congress, in London in 1872, led to the establishment of the first major international association in crime prevention and control, the International Penitentiary Commission. (1) Other associations soon followed. (2)

Since its establishment, the International Penitentiary Commission was active in arranging international meetings on crime prevention and control, including major international congresses every five years.

The establishment of the League of Nations in the aftermath of the First World War did not serve to strengthen international cooperation to any significant extent. Although the International Association for the Protection of Children was placed under the direction of the League, the activity remained limited. The member States preferred to continue to seek bilateral agreements on the international ramnifications of crime, or support the work of the more scholarly international associations.

Following the Second World War, a new effort at securing multilateral international cooperation was made with the establishment of the United Nations. The Economic and Social Council (ECOSOC) was mandated to deal with, among other issues, the prevention of crime and the treatment of offenders. In these and related questions ECOSOC was to be assisted by a subsidiary body, the United Nations Temporary Social Commission.

At its first session in June of 1946, the Commission proposed that the United Nations should consider assuming global responsibility for international cooperation in the prevention of crime and the treatment of offenders. Already at this stage there was a clear interest in assisting the least developed countries. This was in marked contrast to the predecessors of the United Nations in this field, notably the League of Nations and the International Penal and Pentitentiary Commission, which had been considerably Western Europe oriented. (3) The Temporary Social Commission developed its own criminal policy programme, which was

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(1) Since 1929 the International Penal and Penitentiary Commission.

(2) Among these were the International Association for the Protection of Children, the Union Interationale de Droit Pénale (1889; the forerunner of the International Association of Penal Law), the International Society of Criminology (established in 1937), and the International Society of Social Defence (established in 1949). A brief review of the activities of the major associations is given in the articles by Rø-stad, Hünerfeld and Fattah, in HEUNI 6, pp. 79-89 and 98-106.

(3) Alper and Boren, p. 78; see also Lopez-Rey 1985b, p. 1.

adopted at its third session in 1948. (1) This programme and the Preliminary Report on the Prevention of Crime and the Treatment of Offenders show a heavy orientation towards "social defence" in criminal policy, with an emphasis on the prevention and treatment of juvenile delinquency and the treatment of adult offenders. The orientation is understandable in the light of the contemporary discussion of criminal policy in Europe and North America. (2)

In 1950 the General Assembly of the United Nations passed Resolution 415(V), "Transfer of Functions of the International Penal and Penitentiary Commission", which in effect disbanded the International Penal and Penitentiary Commission and transferred its activities to the United Nations. The Resolution established an ad hoc advisory committee of experts to assist the Secretariat; this committee was to develop into the Committee on Crime Prevention and Control. The United Nations was to organize ad hoc expert regional meetings and promote various means of analysis and dissemination of relevant data. Further, the Resolution called upon the United Nations to continue the activity of the IPPC in arranging international congresses on the prevention of crime and the treatment of offenders. (3)

The entry of the United Nations into international criminal policy changed the nature of the discussion. Previously, the discussions had primarily remained on a scholarly level, and had been oriented to the immediate interests of the developed Western countries. With the expansion in the number of member States in the United Nations, the interests of the developing countries received increasing emphasis.

The fact that the United Nations itself was an intergovernmental organization sharpened the political ramnifications of the discussions. It may be argued that the work of the United Nations in crime prevention and control has not been as politicized as some other issues. However, for example the direct participation of official delegations from Member States at the quinquennial congresses has clearly brought with it a potential for political conflicts that does not exist to the same degree at international meetings attended

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(1) Doc. E/799, 1948. See also Report of the Social Commission, First Session, 1947, Doc. E/CN5/3, 1947, and the International Review of Criminal Policy 1952.

(2) Doc. E/CN5/30, Rev. 1, 1947; Lopez-Rey 1985b, pp. 2-4 and 48-49. Lopez-Rey 1974 (p. 490) notes that of the 24 member States in 1950, only six were non-European: Argentina, Egypt, Japan, New Zealand, the Union of South Africa and the United States of America.

(3) See López-Rey 1985a, pp. 113-121. The resources of the International Penal and Penitentiary Commission, in turn, were transferred to the newly founded International Penal and Penitentiary Foundation.

by individual experts. This could be seen for example in the discussions on the victim issue, dealt with in section 3.2. below.

The United Nations has not replaced the activity of the international associations, nor other bilateral or multilateral contacts between governments. The so-called "Big Four" international associations in the field of criminal law and criminology (1) continue to organize scholarly international congresses. Many other important international associations have a particular interest in criminal policy; one, the World Society of Victimology, has played a key role in the development of the United Nations Declaration.

Interest in international criminal policy is also evidenced by the activity of inter-governmental associations, and various bilateral and multilateral arrangements. For Western Europe, by far the most influential vehicle for the improvement of international cooperation in criminal policy (as well as in many other policy sectors) has been the Council of Europe (section 3.3, infra).

3.2. The role of the United Nations in victim policy

3.2.1. The organizational basis of United Nations criminal policy

The United Nations consists of six organs: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat. Of these organs, the ones that are primarily engaged in the formulation of criminal policy are the General Assembly and, under it, the Economic and Social Council.

The General Assembly has rarely initiated discussions on crime prevention and control matters. The few exceptions involve such a hot issue as apartheid. Its role in criminal policy is primarily limited to the endorsing or adoption of decisions adopted by other bodies of the United Nations. (2)

In practice, ECOSOC has a more important position than the General Assembly in the formulation of policy. Although also it seldom initiates action on substantive criminal justice issues, it does call for studies and reports and

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(1) The International Penal and Penitentiary Foundation, the International Association of Penal Law, the International Society of Criminology and the International Society of Social Defence. These four are also increasing cooperation among themselves, for example, in the form of joint congresses during the year immediately preceding the United Nations Congresses on Crime Prevention and Control.

(2) Kerrigan 1984, pp. 9-11; Lopez-Rey 1985b, p. 12.

passes recommendations directed at Member States or the General Assembly.

The United Nations has several specialized agencies and commissions, many of which consider items of direct relevance to crime prevention and control. Examples are the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, the International Labour Organisation, the United Nations Childen's Fund, the Office of the High Commissioner for Refugees, the Committee on an International Agreement on Illicit Payments, and the Commissions dealing, respectively, with human rights, narcotics, statistics, population questions and the status of women.

The major preparatory work is carried out by the Secretariat, specifically through the Crime Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs. (1)

Much of the limited resources of the Branch is directed towards the organization of the quinquennial United Nations Congresses on Crime Prevention and Control. Such Congresses have been held regularly since 1955. One of the outputs of the Congresses have been Resolutions which are then forwarded to ECOSOC and the General Assembly for action. (2)

The Secretariat had worked with the assistance of ad hoc committees of experts since 1949. General Assembly Resolution 1584/L established the United Nations Committee on Crime Prevention and Control as a permanent body. Its first session was held in 1972. This Committee has taken over some of the responsibilities of the Secretariat. From the beginning it has sought to establish the basic parameters for the work of the Secretariat in this field. With the adoption of GA Resolution 19 in 1979, it has also taken over the responsibility for preparing and organizing the quinquennial Congressess, adopting and forwarding its own recommendations and resolutions in criminal policy, and developing standards and guiding principles. Since 1984 the Committee has reported directly to ECOSOC. (3)

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(1) Shikita lists as the functions of the Branch the assistance of member States at their request in crime prevention and control; the collection, analysis and dissemination of relevant information; assistance in the development of norms and guidelines for Governments; and the promotion of collaboration between Governments (Shikita, p. 25).

(2) For a summary of the deliberations of the Congresses between 1955 and 1980, see Kerrigan 1984, pp. 23-64, and Lopez-Rey, 1985b.

(3) Cotič, pp. 42-43; Lopez-Rey 1985b, pp. 14-20.

The work of the Secretariat is supplemented by the regional and interregional institutes on crime prevention and control, and by the interregional advisers and the national correspondents. At present there are regional institutes for Asia and the Far East, for Latin America and the Caribbean, for Europe and for the Arab countries. The interregional institute in this field is the United Nations Social Defence Research Institute in Rome. (1)

3.2.2. The significance of the role of the United Nations in criminal policy

One of the purposes of the United Nations is to promote international understanding in the area of social and humanitarian questions. This is evident in Article 55 of the Charter. (2) The simple exchange of information, which is made possible inter alia through the work of the Secretariat and the quinquennial congresses, is one way to do this. The promotion of international understanding is also made possible simply through the establishment of a forum where decision-makers can meet their counterparts from other countries, and through the establishment of an informal network for the exchange of information and experience.

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(1) The United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) in Tokyo was established in 1962. The United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD) in San Jose, Costa Rica was established in 1975. The Helsinki Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI) in Helsinki was established in 1982. The Arab Security Studies and Training Centre in Riyad was established in 1982. This last Institute, while not officially designated a United Nations Institute, has been referred to as a "de facto" regional institute (Shikita, p. 26). The United Nations Social Defence Research Institute was established in 1968.

(2) "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and (c) universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language, or religion." See Bokor-Szegö, pp. 21-24.

Social and humanitarian affairs, however, are value-laden. The mere fact that decision-makers can meet does not necessarily mean that they will agree. Also, the exchange of information often becomes a ritual unless sufficient attention is given to what kind of information is needed.

The exchange of information and the promotion of contacts should therefore be seen as instrumental and not as substantive goals. The substantive significance of United Nations criminal policy is more difficult to assess. The United Nations can rarely have a direct effect in this field; Article 2 of the Charter explicitly states that the Charter does not authorize the United Nations to intervene in "matters which are essentially within the domestic jurisdiction of any state."

The General Assembly has at its disposal the possibility of adopting conventions, covenants, declarations and recommendations. The conventions and covenants are subject to ratification, while the other instruments are adopted in order to guide Member States in their own formulation of policy.

The position of conventions and covenants is fairly straightforward. They are binding on their signatories, subject to any reservations that may have been made.

The question of whether or not General Assembly resolutions can be binding on Member States has aroused some debate among experts in international law. Some commentators have argued to the effect that Member States have approved the goals of the United Nations on becoming members and are thus bound to observe the recommendations of the General Assembly. Other commentators have pointed out that although the goals of the United Nations may meet with general approval there may well be disagreement over the proper methods of achieving these goals.

Articles 10 through 13 of the United Nations Charter refer only to recommendations. The general understanding of what is implied by "recommendations" in this connection is in accord with the everyday meaning of the term: such documents are regarded as only an invitation to their addressees to apply the contents, and not as an imperative exhortation to undertake a certain course of action. (1)

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(1) Castaneda, pp. 7-8. However, in the practice of the United Nations, the "recommendations" have had very heterogenous contents. For example, several recommendations of the General Assembly have been directed not at Member States but at subsidiary agencies of the United Nations. Such decisions can, indeed, be considered binding on the addressees. Castaneda, pp. 14 ff.

In respect of crime prevention and control in particular, Article 2 of the United Nations Charter effectively eliminates the possibility that the United Nations can adopt recommendations that would be seen to be legally binding on Member States. It would, furthermore, be difficult to conceive of the willingness of the political decision-makers of most States to surrender their sovereignty in such internal matters as criminal justice to the extent that they would bind themselves in advance to following Resolutions that may be passed by a majority vote. (1)

Even assuming the willingness of Member States to be bound by recommendations on criminal policy, there would be considerable difficulties in drafting a recommendation that would take sufficient account of the different legal systems, ideologies in criminal policy and criminal justice practice, that it could be accepted as legally binding on a number of Member States. The increase in the sheer number of Member States and in particular the clear shift in focus from the developed countries of Europe and North America to the countries of Asia, Africa and Latin America have added to the complexities of the search for common formulas in criminal policy.

It would therefore appear quite clear that the United Nations cannot create norms in criminal justice that would have immediate application within national jurisdictions.

The significance of United Nations recommendations would instead appear to lie in their potential to guide development. For example, although the Universal Declaration of Human Rights is not binding from a strictly legal point of view it contains elements that can be regarded as an expression of a common ideal. (2) The draftsmanship that is involved in the preparation of the recommendations also involves a process of formulating ideas and concepts that may then be incorporated, by the draftsmen acting in their respective countries, into national legislation.

The ideas embodied in the recommendations may also be on the way to becoming binding international law. This is the case with treaties, as already noted. It is also the case when the recognition and declaration of certain principles or

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(1) But see Lopez-Rey 1985b, p. 39:
"In principle all resolutions have a binding character, the extent of which may vary according to what has been decided upon. It is expected that resolutions will be adopted in accordance with the purposes and principles of the UN. Unfortunately, confining ourselves to UN leadership in criminal policy, this is not always the case..."

(2) Castaneda, pp. 193-195.

even detailed rules brings them within the realm of customary international law. (1)

The resolutions may guide development in criminal justice not only in the conceptual sense noted above but also in an instrumental sense. They may be used as telling arguments by decision-makers in individual jurisdictions in defending certain courses of action that they would have preferred regardless of the existence of the resolution. In the drafting of law, a process that involves the selection of various alternatives in seeking a certain end, they may therefore defend their choice by referring to a United Nations resolution.

Recommendations and resolutions will therefore not create criminal policy. Even in the best of cases they may only guide it. Given the different circumstances in the formulation of criminal policy in the various countries in the world, it may also be argued that the potential for United Nations instruments guiding the criminal policy of developed countries (such as the fifteen countries in Europe covered by the present study) is less than that of other countries. The criminal justice systems have developed at a different pace in various countries. The goals of a Resolution may, by and large, already be accomplished in some States at the time the Resolution is passed, but they may remain distant in other lands. One important case in point is the Standard Minimum Rules on the Treatment of Prisoners. Application of most of the provisions of these Minimum Rules was within reach of many European countries at the time of acceptance, but they remain difficult for many developing States to apply even today.

3.2.3. The drafting and adoption of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The victim of crime has been the subject of a number of United Nations reports and initiatives. It was implicit in discussions on for example genocide, war crimes and crimes against peace and mankind, traffic in women and children, and slavery. However, it was not until the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 that the topic of victims was dealt with as a subject in its own right.

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(1) Skubiszewski; Castaneda, pp. 19 and 168; Kerrigan 1984, p. 22. According to Castaneda, pp. 168-169, "the purpose of incorporating these customary rules or general principles into resolutions is not to attribute legal value to them (in the sense of converting into a rule or a binding principle something that previously was neither) but rather to fix, clarify, and make precise their terms and scope."

The raising of the issue before the United Nations had roots somewhat different from those of victimology or the victim movement. As noted in section 2.7., the rapid spread of interest in victimology can be traced for example to a search for more accurate indicators of the extent of crime, and an attempt to find out more about hidden crime and the dynamism of the offender-victim relationship. The victim movement can be attributed largely to those concerned with domestic violence, sexual abuse and, in general, so-called conventional crime. (1) For the United Nations, however, the victim issue came on the agenda in a clearly more politicized context, in connection with the abuse of power and transnational crime.

Crime as business on the national and transnational level was dealt with at the Fifth United Nations Congress in 1975, at which the least developed countries were strongly represented. These countries drew attention to the large victimological significance of such crime. Furthermore, item five on the agenda of this Congress dealt with the economic and social consequences of crime, which once again drew attention to the victims.

One of the main items on the agenda of the Sixth United Nations Congress in 1980 was "Crime and the abuse of power: offences and offenders beyond the reach of the law". Considerable attention was drawn to the needs of the victims of such abuses. (2) Resolution 7 of the Sixth United Nations Congress called for the United Nations "with special concern for the needs and interests of developing countries" to "continue to gather, analyse and disseminate to Member States information ... concerning abuse of economic and political power"; the United Nations should "continue its present work on the development of guidelines and standards regarding the abuse of economic and political power". (3) The fact that this was the first United Nations crime congress to be held in a developing country undoubtedly contributed to the interest in the point of view of such countries.

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(1) The term "conventional crime" (also "traditional" or "ordinary" crime) has been widely used to refer to offences within the ordinary use of the word (for example assault, robbery, theft, rape and homicide). Depending on the user, it may be opposed either to crimes that only recently have become the focus of attention (for example economic crime) or to (non-criminalized) abuse of power.

(2) Working paper, A/CONF.87/6.

(3) A/CONF.87/14/Rev.1, p. 10. See Lopez-Rey 1985b, pp. 112-116.

The United Nations Committee on Crime Prevention and Control discussed the victim issue at its meetings in 1982 and 1984. It was at this time that the conflict between two lines of thought became evident, a conflict that was to remain evident throughout the preparation of this agenda item. On one hand, the interest within the United Nations framework had begun with the issue of the abuse of power, and those involved in laying the groundwork for the discussions did so with this in mind. On the other, the promise of discussions on "Victims of Crime" attracted those with a narrower interest, focusing on victims of traditional offences.

After extensive discussions the Committee tried to incorporate both views by mandating that "while major attention should be paid to victims of illegal abuses of power, especially of a large-scale nature, consideration should also be given to victims of traditional crimes, particularly offences involving violence and brutality." However, in drawing attention to specific groups, the Committee also emphasized the need to give special attention to "traditional" offences that did not involve "violence and brutality"; examples of this that might be cited include street crime (which often does not include these features) and various economic crime, such as consumer fraud. The mandate given by the Committee, therefore, was somewhat unbalanced in calling first for one focus, and then another. (1)

While this discussion was continuing within the United Nations, work on the actual drafting of an international instrument related to victims began elsewhere. At the Fourth International Symposium on Victimology in 1982 (Tokyo and Kyoto), a Committee on a Code of Conduct for the Protection and Assistance of Victims was established by the World Society of Victimology. In the course of the work of the Committee a "Draft Declaration on the Protection and Assistance of Crime Victims" was prepared by Irvin Waller. This draft was submitted to the World Federation of Mental Health, which endorsed it at its 1983 Congress.

At this time the interest of the United Nations was guided by Resolution 7 of the Sixth United Nations Congress, on abuse of power, as noted above. LeRoy Lamborn was requested by a member of the Secretariat to prepare a draft that would incorporate this aspect. The result was a "Declaration on Crime, Abuses of Power and the Rights of Victims".

Following discussion of the two drafts in both national and international meetings, the two drafts were merged, together with some further input from the participants, by a working group at the ad hoc United Nations Interregional Meeting of Experts in Ottawa, July 1984. The goal was a draft that could be approved, ultimately, by the General Assembly of the United Nations.

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(1) See E/AC.57/1984/18, paras. 84, 88.

In the work on the draft in Ottawa (with one notable exception), there was substantial agreement on the matters that should be included; the primary difficulties were in finding a wording on the scope of the Declaration that would meet with general approval.

The draftsmanship of the basic documents, which were in English, exhibited an unintended orientation towards Anglo-American law. The need to enlarge the scope beyond the framework of Anglo-American law, and the fact that the draft had to be produced in a three-day period, resulted in a draft which the working group itself acknowledged as requiring further stylistic work. (1)

One feature of the Ottawa draft that did not satisfy all the participants was that it dealt with both victims of crime and victims of abuse of power. Some would have preferred a draft which focused solely on the victims of acts regarded as criminal in the jurisdiction in question. Article II(1) of the Ottawa draft defined a victim in terms of persons suffering various, specified forms of harm as a result of conduct

a) in violation of national penal laws; or
b) deemed a crime under international law; or
c) constituting a violation of internationally recognized human rights norms protecting life, liberty and personal security; or
d) i) which otherwise amounts to an "abuse of power" by persons who, by reason of their position of power or authority derived from political, economic or social power, whether they are public officials, agents or employees of the state, or corporate entities, are "beyond the reach of the law", or which
   ii) although not presently proscribed by national or international law, causes physical, psychological or economic harm as severe as that caused by abuses of power constituting a crime under in-

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(1) See Report of the Interregional Preparatory Meeting, A/CONF.121/IPM/4, para. 77: "Following the adoption of the draft Declaration, several experts made suggestions for the re-arrangement of certain articles of the Declaration and for certain textual or drafting modifications, designed to introduce clarity and precision in the provisions concerned. In the end, the meeting gave a full mandate to the Secretariat and the Rapporteur to effect all the necessary adjustments and customary editorial revisions in the preparation of the final version of the draft Declaration." In general, it may be noted that most drafts of this level of complexity intended to serve as the basis for discussions at the United Nations Congresses undergo a considerably more rigid process of preparation.

> ternational law or a violation of internationally recognized human rights norms and creates needs in victims as serious as those caused by violations of such norms.

As a result of the above definition the articles that followed in the Ottawa draft (such as those on State compensation and access to justice) were also intended to benefit the victims of an abuse of power which, prima facie, was not a criminal act. (1)

It is against this background that the dual focus of the discussions at the Seventh United Nations Congress can be understood. While some participants spoke of the position of victims of crime in the traditional sense, others referred to the victims of abuses of power, especially when these abuses were not criminalized in the jurisdiction in question.

The reasoning of those in favour of a more limited Declaration were based on three considerations in particular. One was that the Declaration should be a modest and concrete one, focusing on what the States could do immediately to assist victims. The second consideration was based on the view that the Declaration, if and when approved by the General Assembly, would be at least morally binding on the States. It would be an excessive burden on a State to provide inter alia services, State compensation and access to justice to victims of conduct that the State did not regard as criminal. (2) The third consideration was a related one. The definition of victims of abuse of power was argued to be overly open and subjective. It could be interpreted so widely, in fact, that it would cover all "victims" of even the slightest misfortune, in which case it would lose its credibility and legitimacy. (3) The openness of the definition might also encourage outside interference in the internal affairs of sovereign States. (4)

The argumentation of those who supported incorporation of a reference to victims of abuse of power was based in particular on two points. One was that the victims of criminalized conduct and abuse of power have the same needs, and the State should meet these needs by and large in the same way. The second consideration openly admitted that the definition

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(1) For a close analysis of the concept of abuse of power as used in the various drafts, see Lamborn 1985b. In this connection, it might be noted that (d)(i) would also include "nonenforcement abuse of power" (see ibid.), which would be criminal.

(2) See Lamborn 1985b, p. 34.

(3) A/CONF.121/6 Annex, p. 2.

(4) Kerrigan 1986, p. 7.

of abuse of power was put forward as an ideal. It should be the role of the United Nations (according to this line of argument) to establish the goal which all Member States should seek to achieve. The United Nations should not satisfy itself with codifying what the Member States have, by and large, already done; it should activate the States to do more to help victims. (1)

What ultimately emerged from the discussions was a two-part draft. (2) The main part, part A, was entitled "Relating to Victims of Crime", and it set out fairly specific provisions on access to justice and fair treatment, restitution, compensation and social assistance. Part B, "Relating to Victims of Abuse of Power", was considerably more general. Its four paragraphs in essence called upon member States to grant civil and administrative relief to victims of abuse of power.

After adoption by consensus by the Third Committee of the General Assembly on 11 November 1985 the Declaration was formally approved by the General Assembly as a plenary body on 29 November 1985. In adopting it, the General Assembly noted that it was

> "Cognizant that millions of people throughout the world suffer harm as a result of crime and the abuse of power and that the rights of these victims have not been adequately recognized."

The adoption of the Declaration is a symbolic measure, and will not in itself change the status of the victim in any country. It is not legally binding. In the absence of other pressures working in the same direction, it would be visionary to assume that it would lead to a direct change of the law or practice of any jurisdiction. (3)

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(1) See e.g. A/CONF.121/6 Annex, p. 1-2.

(2) A/CONF.121/C.2/L.11. Draft resolution proposed by Australia, Canada and France. The resolution was adopted by consensus by the Second Committee of the Congress, and then formally approved by the plenary of the Congress for forwarding to the General Assembly for adoption. See Report of Committee II, in A/CONF.121/L.18. See also A/CONF.121/C.2/L.11/Rev.1, originally sponsored by Australia, Canada, Egypt, France, Greece, India, Italy, the Netherlands, Senegal, the United States, and Yugoslavia, and later also by Argentina, Costa Rica, Denmark, New Zealand, Panama, Uruguay, Venezuela, and Zimbabwe.

(3) However, as an example of the indirect effect of the Declaration it may that the Honourable Chris Sumner, Attorney General of South Australia, introduced legislation to the South Australian Parliament which was to a large extent directly influenced by the discussions at Milan and by the United Nations Declaration.

However, the Declaration has been unanimously approved by the member States of the United Nations. It can thus be seen as a statement of principles approved in the criminal policy of each country, in Europe as well as elsewhere.

3.3. The role of the Council of Europe in international criminal policy

From the Western European perspective, an international organization with considerable theoretical and practical importance in the development of criminal policy (and many other sectors of policy) is the Council of Europe, with its 21 Member States. (1) The Council works on areas of common interest inter alia by concluding European treaties (as of 1985, 18 such treaties have been concluded in the field of penal law) and adopting programmes of common action.

The Council of Europe has a considerable role in international criminal policy. Working through the European Committee on Crime Problems, assisted by the Criminological Scientific Committee, the Council has prepared conventions on a number of subjects, e.g., extradition, mutual assistance in criminal matters and the international validity of criminal judgments. It has also adopted a number of recommendations. Its criminological research conferences and colloquia are influential fora for the exchange of information between decision-makers and researchers.

The Council of Europe is also influential in the field of victim policy. (2) Victimological research has been dealt with in many connections, for example at the Second Criminological Colloquium in 1975, the 13th International Criminological Research Conference in 1978 and the 16th Criminological Research Conference in 1984. It has also figured in the discussions on the position of the child at the 3rd Criminological Colloquium (1979) and the migrant (1968).

CDPC Select Committees have dealt with prevention of victimisation and the position of the victim in criminal proceedings in connection with inter alia the relationship between the public and crime policy, violence in present-day society, the protection of the environment and economic crime. In 1982 the Division of Crime Problems established a Select Committee to prepare a convention on the compensation of

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(1) The Member States are Austria, Belgium, Cyprus, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechenstein, Luxembourg, Malta, Norway, the Netherlands, Portugal, Spain, Switzerland, Sweden, Turkey and the United Kingdom.

(2) A recent summary of the Council of Europe activities in this field is given in Tsitsoura 1983.

victims of crime from public funds. The work of the Select Committee soon led to the European Convention on the Compensation of Victims of Violent Crime, adopted by the Committee of Ministers of the Council of Europe in June 1983 (see section 9.5).

In 1985, the Committee of Ministers adopted Recommendation R(85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure, itself the result of intensive work by a Select Committee on the role of the victim in criminal law and procedure and social policy.

This Recommendation, in line with the general tendency in the work of the Council of Europe, was clearly designed for immediate implementation in practice. It urged member States to review their legislation and practice in accordance with a set of sixteen guidelines, dealing in turn with the police, prosecution, the questioning of the victim, court proceedings, enforcement, protection of privacy, and the special protection of the victim.

The guidelines overlap considerably with the provisions of the United Nations Declaration dealing with the victims of crime, and provide a greater degree of specificity. In respect of the police level, for example, Guideline 2 states that the police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation. The corresponding United Nations Declaration paragraph (15) merely states that the victim should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them. This leaves open the question of who bears the responsibility for informing the victim of these services, and of what information in particular should be provided.

Information to the victim is also dealt with in Guidelines 3 (information on the outcome of the police investigation), 6 (the final decision concerning prosecution) and 9 (court hearings, the opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice, as well as information on the outcome of the case). Paragraph 6a of the Declaration, in turn, notes that the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases "especially where serious crimes are involved and where they have requested such information". (1)

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(1) A more detailed discussion of the contents of the Declaration and the Council of Europe Recommendation will be presented in connection with each of the respective points and in the annexes. A commentary on the Recommendation is given in Council of Europe 1985.

The strong practical orientation of the work on this Recommendation as well as the intensive cooperation of decision-makers from member States of the Council of Europe imply that it may have a more immediate and direct effect on the operation of the criminal justice systems of these Member States than is the case with, correspondingly, the United Nations Declaration and the Member States of the United Nations. However, given the extensive overlap between the two instruments, as well as the fact that this study involves several non-members of the Council of Europe, the focus in the following will be on the United Nations Declaration as a statement of goals for victim policy in the core countries covered by the present study. Reference will be made to the provisions of the Council of Europe Recommendation where applicable.

4. THE ROLE OF THE VICTIM IN VICTIMIZATION AND CRIME PREVENTION

4.1.General remarks

The most effective way to assist a victim is by preventing him from becoming a victim. This simple statement is finding its way into more and more proclamations, resolutions and expressions of government policy.

In most of these proclamations, however, and even more so in public debate, the comment on the importance of prevention remains on the level of a mere platitude. It is not seen to call for any further examination. Many planners and administrators appear to assume that crime prevention measures are good per se and that potential victims are quite willing to change their behaviour, purchase the necessary paraphernalia, and assist the authorities in order to stop crime from taking place. (1)

Despite the fact that the major responsibility for the prevention of crime has historically been with the community and the individual, many potential victims appear to assume that it is the state, and primarily law enforcement, that will attend to the business of the prevention of crime. (2) They are especially annoyed if, when an offence does take place, the law enforcement authorities (or victimological researchers) give the impression that it was the victim who was at fault; the phrase commonly used here is "victim-blaming". (3) The victim is generally seen in the light of

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(1) See esp. Hope and Murphy, passim.

(2) Block 1981, p. 743. As Conklin notes, especially in high crime-rate areas, one common reaction to crime is to assign the full responsibility for crime prevention to the police. Conklin, pp. 10 and 167-170. See also Engstad and Evans, passim. Recently, a more positive note was struck by van Dijk (1986c, p. 158) in noting that public surveys indicate that in the Netherlands the need for personal crime prevention measures is being understood more widely.

(3) A reluctance to deal with the issue of victim culpability was one of the features of the 1982 "President's Task Force on Victims of Crime" in the United States. The report began (p. 2):

(continued on the next page)

the totally innocent victim who despite his conscientious efforts to avoid crime became the target of a deliberate offence.

The arguments against considering the culpability of the victim, however, do not rest only on moral outrage over allegations that the victim himself is to blame for what has happened, allegations that are seen to decrease the possibilities that the victim would otherwise have of securing redress for his injury. There is also the philosophical argument that efforts to concentrate on what the individual victim should have done, and on what potential victims can do, detracts from consideration of the structural factors conducive to crime (for example, economic inequality in society). (1)

The focus in this section is on the role of the individual in crime prevention. This focus should in no way be considered as an disregard of the importance of the State and the community in preventing crime. It is the State, for example, that drafts, passes and enforces the criminal law, and it is the State that establishes the various organs of the criminal justice system. Similarly, it is the State that takes criminal policy goals into consideration in the different sectors of social welfare, health care, educational policy, employment policy and so on (so-called social crime prevention). It is the cohesiveness of the community, in turn, that is most important in determining whether or not the law will be enforced - and how it will be enforced. (2) The importance of the community has received a unique and overriding emphasis in recent writings on criminal policy. (3) The community is also important in connection with urban planning and the use of the environment.

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> "Among the most difficult obstacles (to realizing that almost all Americans will be touched by crime during their lifetime) are the myths that if people are wise, virtuous, and cautious, they will escape, and that those who are victimized are somehow responsible for their fate... (T)o adopt the attitude of victim culpability is to accept that citizens have lost the right to walk their streets safely regardless of the hour or locale; it is to abandon these times and places to be claimed as the hunting preserves of the lawless."

(1) See especially Timmer and Norman, passim.

(2) For examples of community crime prevention, see e.g. Conklin, pp. 185-209; Lavrakas and Herz, passim. Twain contains a recent overview of various initiatives primarily in the United States.

(3) See, for example, the writings of Hulsman and Christie, and section 5.2, below.

Victimology has quite properly been used to assist the victim, by pointing out his needs, by securing him a better position in criminal procedure, and by simply pointing out the extent to which he has been ignored. Many victimologists have also underlined the importance of using victimology to prevent crime. (1) Victimology has probably seen its most evident crime-prevention orientation in the Soviet Union, (2) although certainly many writers in countries both east and west have drawn prevention implications from the victimological research.

4.2. Victimological processes

4.2.1. Victim participation

The stereotypical offence is often described in black and white: the offender deliberately commits his offence against an unwilling and innocent victim. However, one of the earliest victimologists, von Hentig drew attention to certain types of potential victims who contributed in some way to the offence. von Hentig referred to such victimization factors as apathy, submission, cooperation and provocation on the part of the victim. (3)

The term "victim-precipitation" has been one of the most hotly debated subjects in victimology. Those who first used the concept, especially Wolfgang and Amir, had used the term primarily as a tool in theory formation and data collection. From about the mid-1970s they and those following in their footsteps came under heavy fire for their (more or less construed) implication that the victim himself is to blame for his victimization, an implication that would have clear

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(1) See, for example, Schafer 1968, pp. 138 ff; von Hentig 1979, p. 387; and the collection of statements in Karmen, pp. 74-75. Crime prevention per se is a basic goal of applied criminology. There has been particular interest in the role of the victim in crime prevention in England and Scandinavia. See e.g. Mayhew et al; Svensson; and Kühlhorn and Svensson for examples of this.

(2) Ostroumov and Frank note that "many crimes are to a certain degree due to the behavior of the victims themselves. This circumstance does not, of course, provide grounds for shifting the entire guilt from the criminal to the victim, but it does have significance for the development of special, nontraditional measures to prevent crime, directed at preventing negligent, risky or provocative behavior by a person which may prove dangerous to that person himself" (Ostroumov and Frank p. 71). See also the many studies cited in Bieńkowska 1985, pp. 9-10.

(3) von Hentig 1979, pp. 386-389 and 419-429.

effects on criminal policy. (1) This was fed by statements such as "In a sense, the victim shapes and molds the criminal ... Ultimately, the victim can assume the role of determinant in the event." (2)

Wolfgang was the first to use the term "victim-precipitation". He was interested in homicides in the city of Philadelphia. In particular, he noted that in many cases there was not necessarily a clear-cut distinction between offender and victim. His operationalization of the concept of victim-precipitation was as follows: (3)

> "The term victim-precipitated is applied to those criminal homicides in which the victim is a direct, positive precipitator in the crime. The role of the victim is characterized by his having been the first in the homicide drama to use physical force directed against his subsequent slayer. The victim-precipitated cases are those in which the victim was the first to show and use a deadly weapon, to strike a blow in an altercation - in short, the first to commence the interplay of resort to physical violence.

This working definition was largely accepted in the research community. It was based on an overt act (the use of violence) that could usually be determined objectively. The criticism of Wolfgang's concept focused primarily on the fact that he used police records, which of course do not always reveal the whole truth. It was also noted that homicide (and other offences) may be precipitated not only by physical violence, but also, for example, by extended mental cruelty.

Amir, in his study of rape, also dealt in passing with victim precipitation. His focus forced him to use a somewhat different definition. According to him, victim precipitation was involved in: (4)

> "rape situations in which the victim actually, or so it was deemed, agreed to sexual relations but retracted before the actual act or did not react strongly enough when the suggestions was made by the offender(s). The term also apples to cases in risky situations marred with sexuality, especially when she uses what can be interpreted as indecency in language and gestures, or constitutes what could be taken as an invitation to sexual relations."

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(1) See Karmen, p. 100.

(2) von Hentig 1979, p. 384. See also the citation in Šeparović, p. 120, and Wolfgang 1958, pp. 245, 264.

(3) Wolfgang 1967, p. 252.

(4) Amir, p. 266.

This operationalization met with considerably more resistance than Wolfgang's operationalization for victim-precipitated homicides. (1) Part of the reason, of course, is that rape is an extemely sensitive issue, where the victim is often subjected to secondary victimization. Thus there are many who would oppose insinuations even in theory that an appreciable number of rapes are victim-precipitated. Such ideological points aside, a key difficulty with Amir's formulation is its nebulousness, especially such phrases as "react strongly enough", "what can be interpreted as indecency", or "constitutes what could be taken as an invitation". These are manifestly subjective elements, where at least the victim and the offender, and also the police officer, judge and researcher may quite honestly have different impressions. (2)

Subjective elements have been used also in the operationalization of victim-precipitation in the case of assault (3) and robbery. (4) A broader definition in connection with homicide has been used, e.g., by Hoyst. (5)

The general view in victimological research appears to be that, with the possible exception of Wolfgang's original operationalization, the various attempts at defining victim precipitation for research purposes have not been very suc-

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(1) See for example the discussion in Weis and Borges 1973 and 1976 (esp. pp. 243-248); Clarke and Lewis 1977; Fattah 1979 pp. 200-201; Curtis, pp. 225-226, footnote; Edwards, pp. 121-125. Curtis, for example, notes that Amir uses an either/or approach instead of referring to degrees of involvement, and notes that precipitation as a term is more biased than such concepts as voluntariness or vulnerability. Burt and Estep, although not commenting on Amir's study, note the effect that the dominant ideology of men and women in sexual relationships has on the definition of the sexual assault incident.

(2) Ben-David has developed the victim neutralization theories of Sykes and Matza, who suggest that the offender may redefine his behaviour as acceptable. In order to avoid admitting that what he does is both illegal and reproachful, he thus neutralizes these negative feelings by justifying his behaviour. The result can quite clearly be that the offender and the victim view the events leading up to the rape in completely different ways. See also Fattah 1976 and 1979, Schneider 1982, pp. 16-18.

(3) Mulvihill et al.

(4) Normandeau.

(5) See Curtis, pp. 166-167; Karmen, p. 82.

cessful. (1) The main criticism is that the definitional elements are overly subjective. It has been noted further that many definitions are based on the "attributional perspective" of the offender, rather than on that of the victim, (2) and that the research data is often limited to observable behaviour as reflected in police records and court files. (3) Also, some commentators have suggested that the victim-precipitation approaches imply that criminal deeds can be explained by the precipitative behaviour of the victim, that the criminal is in a passive state and set in action by the victim's behaviour, that behaviour displayed by a victim is necessary and sufficient for criminal acts, and that the intent of the victim can be assumed from his/her resultant victimization. (4) Finally, the victim-precipitation model often starts from the (implicit) assumption that an individual who does not want to be victimized will not be victimized - thus, the victim is concluded to have been victimized because he wanted to. The victim is assumed to have a will that has been denied the offender. (5)

Part of the precipitation debate, and its absence of immediate relevance to law and the operation of the criminal justice system, may be due to an imprecise use of terms. The term "precipitation" has often been used without realizing that it is a value-loaded word; there are many who believe it to be a clear sign of a victim-blaming tendency of at least some victimologists. Wolfgang's operationalization of the concept (for homicide) was relatively objective and has generally been considered useful. Other writers, however, tended to use "precipitation" to cover a number of different types of behaviour and even situations. According to the Bellagio Institute, the role of the victim can better be approached through concepts such as "victim participation" and "victim vulnerability", instead of victim-precipitation and victim provocation. The Bellagio Institute also emphasized the importance of perspective and recommended that there be a triangulation of the point of view of the victim, the offender, and a neutral observer. (6)

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(1) See e.g. Silverman, pp. 150-152.

(2) The "attributional perspective" has been dealt with by e.g. Gulotta and Neuberger, who note the many difficulties involved in attempting to evaluate what another person perceives. See also Curtis.

(3) Bruinsma and Fiselier, pp. 91-92.

(4) See e.g. Franklin II and Franklin, and Bruinsma and Fiselier.

(5) Bruinsma and Fiselier p. 92.

(6) Bellagio Institute, p. 137.

The difficulties in developing a theory of the role of victims in crime for research purposes would suggest that there are even greater difficulties in applying the research results in policy formulation, to say nothing of court decisions. Such application could be assisted if, instead of speaking simply of whether or not a victim contributed to an offence, it would be possible to speak of the various forms of contribution to an offence.

Several typologies of victims and of their roles or forms of participation in criminal acts have been presented. Schafer, for example, specifies such forms as simple passivity, precipitation, instigation, provocation, incitement, "making a person conscious of a criminal opportunity" (facilitation) and "irritation". (1) Lamborn has provided a more precise formulation of six different forms: invitation, facilitation, provocation, perpetration, cooperation and instigation. (2)

Karmen (3) has noted that Lamborn's scale uses criteria that are ambiguous, and himself suggests as a more precise scale (in connection with auto theft) the following: conscientiously resisting, conventionally cautious, carelessly facilitating, precipitatively initiating, provocatively conspiring, and simulating through fabrication. It would appear that the primary difference between Lamborn's and Karmen's scales is that Karmen has added a descriptive word to each adjective. It may be noted in particular that Karmen's scale involves an increasing degree of victim responsibility.

In order to be used in the analysis of criminal policy the various forms of victim participation should be defined more precisely, using the triangulated point of view suggested by Curtis and the Bellagio Institute. (4) It should be realized at the outset that no perfect typology or highly precise formulations can be presented. To take criminal law norms as an example, the essential elements of an offence of necessity include a subjective component. The victim, the offender and a third observer (such as a policeman or the judge) will not necessarily agree on the categorization of the victim's behaviour.

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(1) Schafer 1977, p. 71 and passim. In dealing with neutralization, Fattah (1976 pp. 112-113) notes how consent, willingness, a request, solicitation, provocation and precipitation confer legitimacy on an act from the point of view of the offender.

(2) Lamborn 1975, pp. 178-185, and Lamborn 1981.

(3) Karmen, p. 84.

(4) Curtis, p. 175; Bellagio Institute p. 137.

As it is provocation by the victim that has been given the most attention, this could serve as the point of initial focus in the development of such definitions. Furthermore, the required objectiveness can be found by looking at the convergence of criminology (and victimology) with criminal law. A legally-oriented definition of "victim precipitation" has been suggested by Gobert: (1)

> "As used in this Article, a victim-precipitated crime is an offense that would not have occurred except for the precipitative actions of the victim. Victim precipitation refers to some overt, identifiable conduct or omission on the part of the victim which provokes an individual to commit a crime."

Gobert further notes that "victim-precipitation" is an umbrella term, and that the intent of the offender may well vary from case to case. (2)

Wolfgang, in commenting on Gobert's definition, suggested a modification that would meet the concerns for a triangulated approach: (3)

> "A victim-precipitated offense is a crime, as defined by law, that would not have occurred without an overt act of severe provocation initiated by the victim upon the offender. Both the victim's and the offender's perception of what is severe provocative conduct should be taken into account by a judge, a jury and by scientific research."

There are two key differences between this definition and those used in research. One is that reference is made specifically to the standpoint of law ("a crime as defined by law"). The second is that Wolfgang (but not Gobert) refers to "serious" provocation. This is understandable in the light of American law, which requires that provocation

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(1) Gobert, p. 514.

(2) Gobert, p. 514. This point was made strongly by Curtis, who suggested that any scale of victim involvement be accompanied by a scale of offender intent. Thus, a simplified version would give a nine-cell diagram, with victim involvement on one axis (clear provocation; some victim involvement; and little or no victim involvement) and offender intent on the other (deliberate premeditation; some intent; little or no intent). "Pure victim precipitation" would be involved only if there were clear provocation by the victim but little or no intent on the part of the offender. "Total offender responsibility", on the other hand, would be involved when there was little or no victim involvement but deliberate premeditation on the part of the offender.

(3) Wolfgang 1985, pp. 7-8.

be serious before it is taken into consideration in cases of homicide. However, it is arguable that also conduct that is less than serious is taken into consideration in, for example, sentencing. (1) This point will be returned to in section 4.4.5.

Guided by such an approach, somewhat similar definitions can be drawn also for the other forms of victim participation acknowledged by criminal policy. It will be noted in section 4.4. below that all of these forms are relevant in deciding on the blameworthiness of the offender's behaviour. They are consequently relevant to prevention. The State uses various measures in placing some of the responsibility for crime prevention on the potential victim. The measures depend in part on the form of victim participation in the offence.

In connection with the definitions supplied below it should be emphasized that the "victim" need not necessarily be a physical person. The victim can also be a legal person, such as a business enterprise.

1. The conscientious victim. This is a person who behaves in the manner expected of the bonus pater familias, in accordance with the traditional standard of care expected of a reasonable and prudent person. He takes the conventional precautions against offences and, should he find himself in the face of a threatened offence, he resists conscientiously to the extent possible. No blame or reproach can be attached to his actions or omissions; he is the ideal "totally innocent victim". (2)

> An offence involving a conscientious victim is a crime that occurred even though the victim took all reasonable precautions against its commission. The standard of "reasonable precautions" is set by those that a reasonably prudent person would undertake in a similar situation.

The question of what are reasonable precautions cannot be answered unambiguously. (3) This would depend to a large degree on the cultural context. For example, in a rural en-

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(1) Kalven and Zeisel noted in their study of American juries that in theory (American) criminal law is not concerned with contributory negligence or assumption of risk. However, they argue that their study shows that juries have "bootlegged" these civil law concepts into the criminal law (pp. 242 ff.).

(2) Curtis would use the term "totally innocent", Karmen "conventionally cautious" or "conscientiously resisting".

(3) See the discussion on security measures in Greer and Mitchell 1982, pp. 95-98.

vironment it is generally quite reasonable to go out walking alone after dark, something that may be unreasonable in various sections of certain large cities. It may be very unreasonable in such cities to fall asleep drunk in public places. Similarly, it may be reasonable in a rural environment to leave one's doors unlocked. It would be quite unreasonable to do the same thing in downtown areas - especially if the doors in question are those of a business enterprise and it is after hours.

Generally speaking, one should not speak of precautions in isolation. Instead, one should consider the totality of the various precautions taken by the person in question. Locking doors, for example, would be insufficient if, at the same time, potential offenders are made aware that the premises contain something worth getting, and that this can be had merely by picking a lock.

The question of cost effectiveness should be considered in assessing what precautions are reasonable. This is not only a question of what hardware (if any) should be purchased and installed in light of the property and other interests to be protected. "Cost-effectiveness" should be considered also in terms of the human costs of avoidance behaviour, as noted in section 4.3.

One would therefore have to take into consideration what precautions in general are being taken by other persons in the area, facing similar risks. The risk, in turn, should be assessed in the light of what offences have taken place in the area.

2. The facilitating victim. Such a victim fails to take reasonable precautions against crime; for example, he leaves his valuables unprotected by locks or safes. (1)

> A victim-facilitated offence is a crime where the commission of the offence was eased by the neglect of the victim to take reasonable precautions. The standard of "reasonable precautions" is set by those that a reasonably prudent person would undertake in a similar situation.

In a victim-facilitated offence the victim in some way makes it easier for the offender to commit the offence. There are two subcategories here. It is possible that the offender had already intended to commit the offence before noting the

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(1) Karmen notes (p. 77) that facilitation is usually raised as a possibility in theft and "ought to be reserved for those situations in which victims unknowingly, carelessly, negligently, foolishly, and unwittingly make it easier for the criminal to commit and consummate the crime". Lamborn would speak of the "facilitating" victim, Karmen of the "carelessly facilitating".

facilitation by the victim; the fact that the victim made it easier for him to commit the offence does not detract from the blameworthiness of the offender's behaviour at criminal law. For example, the offender may have decided to try to steal a car, and notices an unlocked car with the keys in the ignition. His mens rea would have been the same even if he had had to break into the car.

A second category is formed by those cases in which the actions (or neglect) of the victim create an especially tempting situation. This situation thus leads the marginal potential offender to commit an offence that he otherwise would not have considered. To use the same example, a person walking down a deserted street may notice the unlocked car, and may form his intent to commit an offence then and there.

3. The inviting victim. An inviting victim knowingly and unnecessarily enters into a dangerous situation. For example, he unnecessarily enters into high-crime areas such as certain parks late at night, despite his realization of the dangers involved. Another example of an inviting victim is a person who engages in illegal or even immoral activity that carries with it an appreciable risk of victimization.

> A victim-invited offence is a crime that would not have been committed against the victim without the deliberate and unnecessary assumption of a risk on the part of the victim.

The difference between a conscientious victim and an inviting victim lies in the circumstances in which the victim behaves. For some persons entry into a high-risk area (such as a park late at night in certain large cities) may be necessary. This is the case with a policeman who is patrolling the area. In such a case, the presence of the victim (the policeman) in a high-risk area may indeed create an opportunity for the offender, but the presence of the policeman is necessary. (1)

The difference between a facilitating and an inviting victim lies in the awareness of the situation. A facilitating victim is careless but he is not aware of any particular risk of an offence. An inviting victim is aware that his actions may give rise to an offence and although he could behave with greater caution he chooses not to do so.

In the case of conscientious, facilitating and inviting victims, the offence involves intention by the offender. In

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(1) See Bein, p. 53, and Conklin, pp. 107-108. The distinction closely resembles the tort law distinction between assumption of risk and contributory negligence. The former refers to the deliberate taking of risks, the latter to carelessness.

the first case the offence took place regardless of the actions of the victim. In the second and third cases the offender may well have selected the victim because the victim presented a tempting target. (1) In all three cases what is involved is the risk of victimization alone, without the condition of an existing bilateral transaction between the victim and the offender. Such a transaction is involved in forms 4-6 noted below. (2)

4. The provoking victim. Such a victim behaves in a manner which provoked the offender to decide to commit an offence against him in retaliation.

> A victim-provoked offence is a crime that would not have occurred without an overt act of provocation initiated by the victim against the offender. Both the victim's and the offender's perception of what is provocative conduct should be taken into account in the assessment of provocation.

The importance of combining the victim's and the offender's perception should be emphasized not only in determining what is an overt act of provocation, but also in assessing what is meant by "initiation". In the case of extended interaction, the final offence may follow a gradually escalating chain of events in which it is difficult to state with certainty who initiated what.

One special category of the provoking victim is the perpetrating victim. Such a victim himself has used force or guile in order to further his intention to injure the offender; the offender may thus be in a position to plead self-defence. A common example occurs in domestic violence, where there may be a long history of violence. The assault that ultimately comes to the attention of the authorities may have taken place in self-defence.

5. The consenting victim. The victim, although he did not deliberately set out to engage in an offence, may willingly permit the offender to carry out his criminal intent after the offender's intent has been made known. This may be involved in, for example, homosexuality (where this is considered an offence) or gambling offences.

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(1) In the Japanese victimological literature the concept of "consensus eventuali" (somewhat similar to dolus eventuali) has been suggested for use in rape cases in which the victim, although sensing the intention of the offender, heedlessly follows the offender and does not attempt to escape even if offered the opportunity. See Miyazawa 1976, p. 313. Such circumstances, however, would more properly go under the label of "invitation" as used here.

(2) Sparks, p. 773.

The victim consents to an offence when, fully aware of the intent of the offender, he permits the offender to proceed with the perpetration of an offence directed against him.

It may be noted that in the law consent may remove the criminal significance from an act (see section 4.4.). For example, if a responsible victim knowingly and fully voluntarily permits the offender to take his possessions this is not considered theft; the essential elements of theft involve an unauthorized taking of property. However, as will be noted in section 4.4.6., the law also contains examples of offences to which the victim cannot legally give his consent. (1) Consent may also be a mitigating circumstance or it may change the rubric of the offence.

For consent to have relevance in law it must be what is referred to as "informed" consent. The person in question must be capable of assessing the significance of his consent. He must for example be sufficiently mature to carry out this assessment, and he must be aware of all the relevant factors, such as the actual intent of the offender.

6. The instigating victim. An instigating victim is one who has himself intentionally made it possible for the offence to be committed.

A victim-instigated offence is a crime that would not have occurred without deliberate facilitation by the victim. In the assessment of instigation, attention should be paid primarily to the perception and intent of the victim.

It is possible, although not necessary, that the offender is aware of the victim's instigation. For example, the victim may wish to defraud an insurance company. He therefore can either contact a potential offender and arrange for the "theft" of the insured property or he can conveniently leave the property in circumstances that he assumes will tempt an offender. In the first case, one could well speak of the consent of the victim to the offence of theft (although not, of course, to the offence of insurance fraud, which has a different victim). The difference between consent and instigation, as used here, lies in who made the first contact. In consent it was the offender who first made known his intentions; in instigation it was the victim. (2)

Despite the use of the term "facilitation", this should not be confused with the form of victim participation dealt with under 2 above. The latter dealt with a neglect of the victim to take reasonable precautions. Instigation on the other hand involves a deliberate attempt to become victimized.

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(1) See von Hentig 1979, p. 383; G. Williams, passim.

(2) Lamborn refers to "instigation", Karmen to "provocative conspiracy".

7. The simulating victim. A simulating victim fabricates the offence he alleges to have occured. Such a victim may try to obtain, for example, attention or financial benefit (e.g. the sympathy of his environment or payment from an insurance company for a fictitious loss) by falsely stating that an offence has been committed against him. Simulation may also be possible in the case of an actual offence; simulation would be involved if the victim deliberately exaggerates the seriousness of the offence or the extent of his loss. (1)

> A victim-simulated offence is one that the victim falsely alleges has been committed against him.

The discussion in section 1.4.2. on "alleged" victims is particularly apt in respect of a simulating victim. He is not a "real" victim in the sense that he would have been the target of the blameworthy act which he alleges to have occurred. However, the criminal justice system must deal also with simulating victims, and thus reference should be made to such victims here.

For both victim-instigated and simulated offences the example of insurance fraud was used. The difference between the two lies in the fact that in the former the offence actually took place, although on the instigation of the victim. In the latter, even if the offence did take place, the victim exaggerated the loss.

In regard to all of the forms of victim participation noted above it should be noted that the classification refers only to the "opening contact" between the offender and the victim, one of the first steps that is taken towards the commission of the offence. Once this first contact has been made clear-cut typologies easily fall by the wayside. Victimization is a very unusual event for many victims. The reaction of the victim (as well as the counterreaction of the offender, and so on ad infinitum) is often unpremeditated and depends on a wealth of chance factors. For example, victim resistance may block victimization but it may just as well aggravate the offence or turn it into another offence entirely. (2)

It should also be noted that the distinction between the various forms is theoretical. In practice it may often be difficult to classify the victim's behaviour in accordance with such neat types. Also, more than one form of participation may be involved at any one time, as in the case of instigated and simulated theft in order to commit insurance fraud.

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(1) Karmen refers to "fabricating simulation".

(2) See Claster and David, and Block 1981, passim, and esp. pp. 747-751.

Before going on to the related question of victim vulnerability, some comments are in order on the practical relevance of the above forms of participation. No general estimate can be made of the number of crimes for which these forms are relevant; any analysis would have to be made on an offence-by-offence level. Even such an analysis would have to remain on a very general level, given the very subjective nature of the issue. (1)

This discussion of forms of participation covers all forms of crime, and not simply the traditional "contact" offences, such as assault, homicide, robbery and rape. Victim invitation and facilitation, for example, are important also for theft, burglary and embezzlement, and for white collar offences. It was noted in section 1.4.2. that the focus in the present study is primarily on individual victims. If there were no such limitation of focus, the discussion could easily be continued to the question of the degree to which the state invites and facilitates tax fraud or traffic offences.

A further point is that the above list of forms of victim participation is not to be understood to imply that the victim has always participated in some way in any offence directed against him. At least provocation, p2rpetration, consent and instigation account only for a minor share of offences. The proportion varies considerably with the offence in question. The studies on victim-precipitation, which involved such offences as homicide, assault, rape and robbery (and which used several different definitions) usually indicated that most such offences are not "victim-precipitated". (2) There is little research on the extent to which facilitation and invitation contribute to crime. (3)

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(1) For an interesting study in Tashkent on the prevalence of victim participation in offences, see Ostroumov and Frank, p. 72 and esp. pp. 76-79. A brief international analysis that distinguishes between various offences is given in Curtis. In respect of homicide, see Šeparović, pp. 117-121, and in respect of Dutch studies, see Fiselier pp. 269-273.

(2) Weigend (1985, section VB2) concludes that the great majority of offences that are dealt with in criminal procedure involve "true" victims. The "innocent" victim, worthy of protection, is the normal case. With the exception of homicide, the rate of victim precipitated offences in all the offences studied is at most 20 %, and usually about 10 %. It should be noted that Weigend apparently uses the term "victim-precipitation" in the general sense.

(3) See, however, Waller (1982, passim) on burglary.

4.2.2. Victimization risk

The above discussion on victim participation would seem to suggest that crime prevention as such is simply a matter of making the potential victim more aware of what risks he is taking so that he can avoid these risks. This would be a serious misapprehension. The complexity of the situation has been made clear by the recent research into victim vulnerability, which indicates that many risks are highly correlated with such "unavoidable" and, largely, unchangeable characteristics as age, sex, ethnic origin, occupation and area of residence. The theories about the relationship between lifestyle and victimization are especially relevant. (1)

The terms "victim participation" and "victim vulnerability" (or "victimization risk") refer to somewhat interrelated phenomenon. The former can be understood to refer to actual behaviour on the part of the potential victim. The latter, in turn, refers, e.g., to the perceived attractiveness and/or defencelessness of the victim. (2)

Many victimization studies have noted that victimization is not randomly spread among the population. Especially for violent offences against the person, there is a small group of persons that appears to be at high risk; they are often "recidivist victims". (3) For example, policemen, waiters, taxi-drivers and restaurant bouncers are high-risk groups, but so also are young, single males living in urban areas. Studies have also pointed out the high victim proneness of persons lacking social ties, such as the divorced and the separated. (4)

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(1) Šeparović observes (p. 13) that the victimization potential consists of the following factors: 1) personal (including biological factors such as sex, age and health, and psychological factors such as aggressiveness, negligence and alienation), 2) social, and 3) situational. In respect of the social factor, Separovic refers to society-made victims, immigrants, minorities, occupation, criminal behaviour and interpersonal relationship.

(2) van Dijk and Steinmetz (1984, esp. p. 36) speak of attraction, proximity and exposure.

(3) Other terms that have been suggested are repeat victims or multiple victims.

(4) See, e.g., Schneider 1982, p. 22; van Dijk and Steinmetz 1984, pp. 39-40; Garofalo 1986, pp. 141-142. The Hungarian report to the Seventh United Nations Congress (pp. 6-7) notes the significant overlap between the social groups of offenders and victims; regarding possible reasons for this perceived overlap, see Braithwaite and Biles 1979; Singer, passim.

The term "lifestyle" in the criminological sense refers to a person's pattern of routine activities, both vocational and leisure. (1) The social structure and role expectations regulate to an important extent the way in which persons behave in society. The social structure and the role expectations, in turn, are largely determined by such demographic characteristics as age, sex, occupation and area of residence. This can be illustrated by comparing young males in urban areas with elderly persons in rural settings. Many young urban males spend a relatively large part of their leisure time in public places, also at night. Because of the urban environment they often come into contact with strangers and other nonfamily members. Elderly persons in a rural environment, on the other hand, generally spend a large part of their leisure time at home or in the company of family members or close acquaintances. They have little stranger-to-stranger contact. (2)

Lifestyle is related to the factors of proximity and exposure to risk. If a person's lifestyle involves a great deal of contact with strangers in public places this increases the risk of an offence. (3) As noted above, victim vulnerability is also connected with the perceived attractiveness of a potential victim. The risk of robbery or theft increases with the potential offender's perception that there is something worth taking.

4.3. The potential for situational crime prevention

In analysing the extent to which measures by an individual can prevent crime the research results on what is known as "situational crime prevention" are of special importance. (4) Although common sense notes that "opportunity makes the thief", the early research interest in crime prevention focused on what is known as "social crime prevention", the elimination or compensation of the deprivations that are

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(1) Hindelang 1982, p. 156; Garofalo 1986, p. 136.

(2) Hindelang 1982, p. 162.

(3) See, e.g., Cohen and Felson, passim. For an update on this seminal study, see Garofalo 1986, esp. pp. 141-142. This emphasis on stranger-to-stranger contact in the discussion of lifestyle should be seen in connection with the fact that the data is largely from victimization studies. Such studies are believed to underestimate the actual incidence of domestic violence.

(4) The concept was developed in a series of studies by the Home Office, and it has aroused interest especially in Scandinavia. See, e.g., the articles in Kühlhorn and Svensson.

believed to lead to crime. (1) Although the individual also had his (admittedly slight) role in this general preventive work, the primary responsibility was seen to lie with the State and the community.

The purpose of situational crime prevention is to analyze specific situations in order to reduce the opportunities for, or attractiveness of, crime. According to Clarke and Hough, (2) the situational approach

> "consists of a detailed analysis of the way in which particular crimes in particular places occur; from this an assessment is made of the ways in which situational inducements and environmental opportunities to commit crime can be reduced, and of the extent to which specific organizations and individuals can be held responsible for those reductions."

Following what was noted above in section 4.2. on victim participation and risk, a crime opportunity can be said to exist where the material conditions are present and the benefits can be gained at low risk. (3) In addition, for crimes that are the result of impulse or temptation, a further requirement is the presence of an inducement. Thus, the reduction of the attractiveness of crime can take place by eliminating the material conditions, by reducing the benefit (and/or the inducement) or by increasing the perceived risk. The methods include target removal, removing the means of crimes (such as guns), reducing the payoff (for example through marking goods to reduce their value to the fence), target hardening, and environmental management. (4)

Increasing the (perceived) detection and apprehension risk is primarily done by increasing and facilitating surveillance. The guardians can of course be law enforcement officers ("formal surveillance"). However, significant forms of surveillance include natural surveillance (by other members of the public (5)) and employee surveillance. (6)

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(1) Mayhew et al, p. 1.

(2) Clarke and Hough, p. 11.

(3) Clarke and Mayhew, p. 5.

(4) See e.g. Clarke and Mayhew, pp. 5-10 and passim; Southgate; Conklin, pp. 105-125; Gladstone pp. 43-45; Svensson, pp. 17-26; and Garofalo 1981.

(5) See esp. the studies by Newman; Greenberg et al. The studies by Bickman and by Huston et al deal with bystander intervention.

(6) An example of a study on employee surveillance is Balkin and Houlden.

In particular the Socialist countries are reported to have had favourable experience with cooperation between citizens and the police in the form of social guardianship. (1)

Situational analysis is an innovative approach to crime prevention but several warnings have been expressed regarding its limitations and possible drawbacks. Among those cited are the displacement theory, according to which crime reduction in one area may lead to increases elsewhere, or that potential offenders will switch to other types of offences. Linked with the displacement theory are fears that, for example, target hardening will lead to an escalation in the commission of offences; determined offenders will match wits and strength, as it were, with preventive efforts. However, most writers currently appear to be somewhat optimistic in this connection and note that the displacement theory will be a factor primarily in cases of professional, deliberate offences - which form only a minority of offences. (2)

Other drawbacks that have been cited include the trouble and expense of the method and doubts over whether the suggested prevention measures will actually be used. There may also be a conflict between demands, such as those placed by fire prevention and staff time. Methods used in isolation (such as mere security devices) may have only a limited impact if not backed up by other methods. (3) Although it has often been demonstrated that many people seriously overestimate the risk of crime, it has been noted that especially in high crime-rate areas, one bar to crime prevention may be that the individual seriously underestimates his personal risk and does not adopt preventive measures. (4)

One of the main drawbacks, however, may very well be that increased emphasis on crime prevention may lead to a less pleasant world. Target hardening and the other means of reducing the attractiveness of crime may lead to an ugly, fortress-like environment. The combination of an increase

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(1) HEUNI 2, p. 8.

(2) See e.g. Clarke and Mayhew pp. 10-12, Waller 1976, p. 246. Winchester and Jackson state (p. 21) that "most houses become the target for burglary for reasons independent of their degree of security. Targets are chosen because of the potential reward they offer, because they are not occupied, but mostly because they can be easily approached without the burglar being seen."

(3) This is noted by Winchester and Jackson, pp. 24 ff., in the case of burglary. See Hope and Murphy for an analysis of the difficulties encountered by one project.

(4) Conklin, p. 81.

in crime in many countries and the supply of (expensive) crime prevention measures, among other factors, may also lead to a polarization in the community, with the well-off withdrawing into protected enclaves, leaving the more heavily victimized and less well-off to fend for themselves. (1) The increase of surveillance, on the other hand, may easily restrict personal freedom.

Preventing crime through reducing opportunities may also turn out to be counter-functional. For example, if more and more people attempt to avoid being assaulted in the city streets by staying away ("avoidance behaviour"), there will be less natural surveillance and consequently perhaps a greater risk for those who must use these streets. (2)

The list of difficulties and disadvantages may be disillusioning, but the potential benefits of situational crime prevention, when coupled with other methods of crime prevention, are considerable. Crime prevention measures can certainly be misused, as is the case with most results of victimological research. In developing criminal policy, however, informed decision-makers can weigh the costs and benefits against each other and develop a particular strategy for the crime problem in question that will be most advantageous to the potential crime victims and to society as a whole. (3)

4.4. Diminishing victim participation and risk: placing the responsibility on the victim

4.4.1. General remarks

Despite the warnings noted in section 4.3. against oversimplifying the issue of victim participation by assuming that victimization can be prevented by informing potential victims of the risks attached to certain forms of behaviour, this remains one possible method of crime prevention. Crime cannot be prevented solely by relying on the State or the community. Clearly, instigation and simulation, where the original impulse for the offence comes from the victim, cannot be prevented other than by focusing on the victim. To a lesser degree, consent, provocation, invitation and facilitation can also be lessened by focusing on the potential victim.

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(1) Cf. Jepsen, p. 195.

(2) See Skogan and Maxfield, pp. 185-206 for a review. See also Conklin, pp. 94-99 and 105-125; Goodstein and Shotland.

(5) See Clarke and Mayhew, pp. 12-16 for counter-arguments to the criticism.

The criminal justice system has long used a variety of individual-oriented measures in decreasing victimization. These include the supplying of information through crime prevention campaigns and advisory services. The image of the local constable is often connected with helpful advice on what precautions to take. Potential victims are warned of the existence of various risks and they are given the opportunity to adjust their behaviour accordingly.

However, practice has shown that not everyone can and will heed the model of the bonus pater familias in his every-day activities. The carrot of crime prevention campaigns is not enough; other measures have been developed. These measures, many of which were not created expressly for the purpose of crime prevention, share the element that they remind society - and above all the potential or actual victim against whom they are invariably directed - of the virtues of crime prevention and the unfortunate consequences of neglecting the proper precautions.

In preparing this study, it was found that these measures could be classified in accordance with their financial or punitive effect. Certain measures reduce the size of the compensation that the victim receives from third parties (referred to here as "benefits") or from the offender. Other measures are in fact different ways in which the criminal justice system takes into account the blameworthiness of the offender's act. If the victim participated in a certain manner in the commission of the offence, this may have an effect on the prosecutor's decision on the charges. It may also mitigate the penalty. In some cases, the offender may be relieved entirely of penal responsibility or the punishment may be waived.

The measures in question were therefore grouped as follows: (a) withholding of benefits, (b) reducing the amount of restitution or compensation, (c) reducing the charges facing the offender or his penalty on conviction, (d) releasing the alleged offender from all liability, and (e) subjecting the alleged victim to punishment.

4.4.2. The use of crime prevention campaigns

Before analyzing the use of the measures referred to immediately above, it should be noted that they form a last resort in reminding the public of the virtues of crime prevention. Normally the State and the community will prefer the soft approach to changing the behaviour and vulnerability of the potential victim, through persuasion. It would seem, however, that this is a slow and difficult process even if the action being recommended is extremely easy and the protective devices can be obtained at nominal cost. (1)

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(1) Winchester and Jackson p. 11. See also Knutsson, p. 15; Lavrakas and Herz, passim.

Three types of crime prevention campaigns can be distinguished: the media campaign, the technical campaign and the organization of community-based activity. The general purpose of media campaigns is to change the attitudes and behaviour of the public at large. Technical campaigns are directed at specific groups of persons or corporate bodies at risk (such as boat owners, shops or banks). Such groups are informed, for example, about the benefits of improved locks or safes or about the need to change the way in which money is handled or goods are displayed. Finally, the general purpose of community-based activity is to increase the risk of crime detection through local surveillance and encourage local residents to learn more about crime prevention measures.

Crime prevention campaigns may improve attitudes towards crime prevention but studies thus far have shown that they lead to little change in security behaviour itself. This may be due to the fact that potential victims consider victimization too remote a possibility, they simply forget the precautions, or they consider that the recommendations are prohibitively expensive, inconvenient or time-consuming. Measures that have been suggested to offset these difficulties include the use of financial incentives, making crime prevention as easy as possible in concrete instances, and negotiation, i.e., directly contacting the potential victim, identifying obstacles to crime prevention, finding a way around them, and improving attitudes.

The two primary difficulties in providing advice on crime prevention are the lack of public interest in turning to the police for such information and the strains that the direct negotiation approach places on the time of the police. Some countries, such as the Netherlands, England and France, have organized crime prevention services on a local level. (1) Unfortunately, the results of successful crime prevention work are not easily tabulated and in many countries the police prefer to focus on the one activity that yields concrete results that can be pointed to with pride in the statistics: the detection and successful prosecution of offenders.

Not only law enforcement officers, but also insurance companies provide information on crime prevention measures. However, because of the orientation of the insurance industry

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(1) A large-scale campaign by the police in the Netherlands focusing on households yielded the complementary benefits of reducing fear, improving attitudes towards the police, and increasing willingness to report offences and take precautions. See van Dijk, 1984a. For a more general analysis, see Engstad and Evans. For a cautionary example of the unexpected effects of a information campaign (feminist criticism of an anti-rape campaign directed at potential victims) see H. Schäfer.

the advice applies primarily to the prevention of property offences such as burglary and arson. The advice is also limited to policy-holders or at least potential policy-holders. Those who cannot afford insurance do not benefit from this advice.

For many persons, the primary source of advice on crime prevention is the media and advertising. In market economy countries, however, the focus of the media is on entertainment and that of advertising is on increasing sales. The image that the individual receives from both is that crime is a looming presence in our life: avoid the streets or you will be mugged, lock and bar your doors and windows or your house will be burgled. Often neither the media nor advertising can or will differentiate among the risks of crime for different groups. As a result the individual may easily overreact in his preventive measures through excessive avoidance behavior and the adoption of a fortress mentality. The other extreme is the attitude that since crime is so pervasive no preventive measures can be of any help and so none are adopted. In both cases the result may well be an increased fear of crime.

There is a third possible reaction other than overreaction or apathy. This is simply ignoring the advice as not relevant to the person's needs or interests. This is the case if the person in question has not been faced with the prospect of personal victimization. Crime prevention advice will often not be heeded until the person in question, or someone in his immediate circle, has already become a victim. The situation has a parallel in the seeking of benefits on the basis of an offence: research in England has shown that few victims are aware of the State compensation scheme for the simple reason that at the time that the scheme is publicized, the information is not noted because it is not considered relevant. (1)

In order to avoid the fear of crime through an exaggeration of the risks the nature of crime and the level of the risks should be portrayed accurately and in a matter-of-fact manner. As this is generally not in the interests of the media or advertisers, it is left to the State or to victim assistance organisations to carry out such campaigns as a public service. It may also be possible to persuade "opinion formers", both within and outside of the media, of the importance of accurate portrayals. The tendency of the public to ignore information perceived to be nonrelevant can be overcome by bringing the actual risks home to them through localised campaigns involving face-to-face contact, concentration on specific themes, and special reference to local crime patterns. (2)

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(1) See, e.g., Shapland 1986, p. 226.

(2) Mayhew, pp. 59-60. Examples of offences for which such campaigns have been carried out are auto thefts, vandalism and burglary. See e.g. Clarke and Mayhew.

4.4.3. Withholding benefits

Crime prevention campaigns and the providing of information are generally based on the assumption that potential victims will voluntarily adopt the advice provided. The experience cited above shows that such assumptions are overly optimistic. If society wishes to activate the individual to prevent crimes other means must be used. In certain cases the potential victim can be pressured to undertake various precautions by financial incentives or disincentives. Either the potential victim is promised that certain financial obligations will be reduced if he undertakes certain measures or he is warned that failure to undertake such precautions may lead to a withholding of benefits that otherwise would be obtainable.

This is the case with many insurance policies, where the policy contains a provision requiring the exercise of some degree of care or the undertaking of specific precautions (such as the installation of locks and intruder alarms or the use of a safe conforming to certain standards). The specific areas of application in regard to crime prevention are fire insurance (arson), theft insurance, household insurance, money insurance, goods in transit insurance, fidelity guarantee insurance, and motor insurance.

Advice and recommendations by insurers can be given at two stages. The first is on the potential victim's application for a policy, when the insurer can survey the risks involved. The second is in connection with the adjustment of a claim. In both cases one of the points of interest will be the size of the premiums. The insurance company may well offer a reduction in premiums if certain precautions are taken.

The insurance companies, however, do not have very much leeway in reducing premiums. The competition on the insurance market and the small size of the premiums paid by, for example, householders and car owners preclude any considerable reductions. The expense for the policyholder of carrying out the precautions and security measures suggested may outweigh the reduction in premiums. Such reductions are most practicable in connection with insurance cover for especially valuable property or in high-risk areas. (1)

A second incentive/disincentive, alongside the reduction of the premium, is the use of a deductible. (2) In policies

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(1) Litton, pp. 10-11.

(2) Comparable methods of involving the policyholder in the financial consequences of losses are co-insurance, in which the policyholder can claim only for an agreed percentage of the loss, and first loss insurance, whereby he can claim only up to an agreed amount. Litton, p. 17.

with a deductible the policyholder can claim only for a loss above a certain amount. Any losses below this amount would be covered by him. Victimization studies indicate that the large majority of such common offences as theft, assault and robbery involve only minor losses. (1)

A third incentive/discentive for insurers is to refuse to compensate any losses arising from a neglect to follow the recommendations of the insurance company or the conditions explicitly noted in the insurance contract. (2)

The withholding of benefits is not a measure limited to insurance companies, as is illustrated by a successful crime prevention campaign in Sweden. An increase in the number of cheque frauds led to a decision in 1970 to require all persons presenting a cheque to present identification. Failure to do so would be grounds for the drawee bank to refuse to redeem the cheque. (3) Here the onus of crime prevention is in effect transferred from the original victim or potential victim (the bank) to new persons (those who accept cheques as payment).

To turn to the forms of victim participation noted in section 4.2.1., withholding benefits is applicable to the following:

- facilitation. Any victim who neglects reasonable precautions may find that benefits on the basis of, in particular, an insurance policy may be withheld.

- invitation. Knowledge that a neglect of reasonable precautions may lead to a loss of benefits may deter deliberate taking of unnecessary risks.

- provocation. Insurance contracts are often written to preclude benefits to persons who provoked the event insured against.

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(1) Thus, for example according to a major Finnish survey undertaken in 1980, the median value of property lost through a property offence (with the exception of tax fraud) was only 200 FIM, roughly 35 USD. Niskanen, pp. 19 and 53.

(2) Insurance conditions, for example, may require that insured objects be stored in a certain way. In some cases the degree of caution required of the potential victim may even exceed that assumed in the case of the bonus pater familias: for example, being under the influence of alcohol itself may be grounds for the withholding of benefits if this fact had essentially contributed to the origin or extent of the loss.

(3) See the study by Knutsson and Kühlhorn.

- consent. If it is noted that the victim consented to the event insured against, benefits will presumably be withheld.

- instigation and simulation. Both forms of victim participation are of special relevance in areas where the victim would normally stand to collect benefits; one or the other, or both, are involved in insurance fraud when the event insured against is an offence.

4.4.4. Reducing the amount of restitution or compensation

In civil law the concept of contributory negligence has been developed for those cases in which the complaining party (or anyone for whom he is responsible) has negligently contributed to the occurrence of the damage as an accessory to the event leading to the damage or where the neglect to take measures to avert or mitigate the harmful consequences of the event increased the extent or scope of the damage. Where such contributory negligence is demonstrated the plaintiff's right to damages can be wholly or partly reduced. (1)

In the case of crime, where the victim's role had been limited to invitation or facilitation, such concepts are generally not applied in assessing the right of the victim to restitution from the offender. The principle here is that even if the victim had been incautious the offender must still provide full restitution for the harm caused by his offence. Similarly, in cases of precipitation the offender would normally be held responsible for restitution. (2) In cases of instigation and consent, however, the court would normally take the view that the victim should himself bear the financial consequences.

The concept of contributory negligence is a considerably more important factor in connection with State compensation. (3) All existing State compensation schemes in Europe in-

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(1) In the United States, this would be referred to as "comparative negligence".

(2) The extent to which courts may implicitly take invitation, facilitation or precipitation into consideration in fixing the size of restitution is unclear. Jury research in the United States would appear to indicate that it has a clear effect on jury decisions. See Kalven and Zeisel, pp. 242 ff.

(2) Regarding compensation from other third parties, see the discussion in section 4.4.3. on withholding benefits. In the case where an offence has actually taken place but the victim's role is not considered critical enough to cause the insurer or other third party to withhold benefits entirely, the compensation may be reduced as noted in the present section.

clude a provision to the effect that the award can be reduced or denied if the victim contributed in certain ways to the offence. (1) As will be noted in sec. 9.3., even facilitation and invitation by the victim may lead to such reductions, to say nothing of provocation, consent and instigation. (2)

Contributory negligence may become an issue if, once the offence has occurred, the victim fails to undertake various measures to prevent further loss. Broadly speaking, an offender will be held responsible for all consequences of his offence that a reasonable person might have foreseen. If a burglar has broken a window in order to gain entry into a household, and a rainstorm the next day causes extensive damage to the interior his liability for restitution will presumably be full. He cannot normally argue that a reasonable householder would have immediately repaired the window as soon as possible thus averting the additional damage. The phrase often used in the literature is that the offender must "take his victim as he finds him". (3)

If, however, the victim deliberately refuses to stem the flow of damages (for example, an assault victim refuses to seek obviously necessary medical treatment or the householder referred to above refuses to repair the window despite the onset of winter), the situation may well change. The

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(1) See section 9.3.5.

(2) It was noted in sec. 4.2., supra, that invitation is not involved if the deliberate assumption of a risk is not unnecessary, but instead a necessary by-product of an important social function. This was noted by an English court of appeals in rejecting the analogy between common law contributory negligence and negligent behaviour as defined by the State compensation scheme. Lord Denning noted explicitly:
"To my mind it would not be right to expect a policeman, in the course of his duty, to take reasonable care for his own safety. Take a case where a policeman is faced by a bank robber armed with a gun. If he thought of his own safety he would run away. If, instead, he tackles the robber and is shot dead, he may be said to be foolhardy; but his widow should not be deprived of compensation. ... I would suggest, therefore, that the conduct, to be such as to reduce or reject compensation, should be something which is reprehensible or provocative, something which could fairly be described as bad conduct or misconduct, rather than failure to take reasonable care for his own safety." R. v. Criminal Injuries Compensation Board, ex. p. Ince (1973) 3 All E.R. pp. 808, 813-814, cited in Greer and Mitchell 1976, p. 69.

(3) Smith and Hogan, p. 283; Gordon 1978, pp. 798-800.

victim may well find that he must share in the loss with the offender; he has a duty to minimize the loss. (1)

4.4.5. Reducing the charges or the penalty

The possible participation of the victim in the offence need not have only financial implications through the withholding of benefits or the reduction of compensation. It may also be of significance in the evaluation of the seriousness and blameworthiness of the conduct of the alleged offender. Participation of the victim may mitigate or eliminate the criminal responsibility of the alleged offender.

Mitigation of criminal responsibility may be evident in two ways. The possible participation of the victim may be specifically considered as part of the elements of the offence or such participation may be assessed in an evaluation of the blameworthiness of the conduct when the penalty is determined.

Victim participation may, first of all, alter the definition of the offence. Perhaps the most evident example of this in European law is the consideration of provocation in the case of homicide.

Specific references to provocation or corresponding factors in the statutory definition of homicide, however, are not found in the criminal law of all countries. Of the fifteen core countries dealt with in this study, such references were found in the laws of the Federal Republic of Germany, the German Democratic Republic, Hungary, Poland, the Union of Soviet Socialist Republics and the United Kingdom. (2)

For example, art. 104 of the RSFSR Penal Code refers to intentional homicide in a state of sudden strong mental

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(1) In a Scottish case where the victim of an assault died after refusing medical treatment the court ruled that the special situation was immaterial for criminal law, although the concept of forseeability can operate in favour of the offender in regard to compensation. In another Scottish case, in which the victim of an assault deliberately ignored medical advice and died, the verdict was "not proven". See Gane and Stoddart 1980, pp. 43-44 and 48-55. See also Gordon 1978, pp. 124-125, and on English law Smith and Hogan, pp. 283-284 and 287.

(1) Sec. 213 of the Penal Code of the Federal Republic of Germany; sec. 113 of the Penal Code of the German Democratic Republic; sec. 167 of the Hungarian Penal Code; art. 148(2) of the Polish Penal Code; art. 104 of the RSFSR Penal Code; and sec. 3 of the English Homicide Act 1957.

agitation provoked by force, a grave insult or any other unlawful actions on the part of the victim if these actions have resulted or could result in grave consequences for the guilty person or to people near to him or his family.

Section 167 of the Hungarian Penal Code refers to killing under the influence of extreme emotional disturbance caused by justifiable cause.

Section 148(2) of the Polish Penal Code also refers to killing under the influence of an intense agitation justified under the circumstances. (1)

Provocation may take place under circumstances where the court may have difficulty in ascertaining the original cause of the offence. Homicides are often the result of escalating arguments where first insults are exchanged, then blows and finally the homicide itself occurs. It is possible that a calculating offender may deliberately provoke such a quarrel in order to take advantage of the mitigation afforded by law. Jescheck refers here to "Absichtsprovokation", provocation with intent. (2) It is recognized in the literature of several countries.

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(1) There is a tendency in Polish criminal jurisprudence to narrow the scope of this provision to cases of provocation. Such a trend in the decisions of the Supreme Court has been criticized in the Polish doctrine of criminal law. See, e.g., Cieślak, p. 348.

The provisions cited above are constructed in fairly general terms. In the preparation of this study, a very specific provision was found in a country not included among the core countries of the study, Malta. Sec. 241 of the Maltese Penal Code notes that wilful homicide shall be excusable where it is provoked by, e.g., a grievious bodily harm or certain other serious crimes; and where it is committed by any person acting under the first transport of a sudden passion or mental excitement in consequence of which he is, in the act of committing the crime, incapable of reflecting.

(2) Jescheck 1978, p. 278. Sec. 213 of the Penal Code of the Federal Republic of Germany excludes mitigation where the offender was blameworthy in bringing about the provocation of the victim. See also sec. 243 of the Maltese Penal Code and art. 24 of the Greek Penal Code.

Examples of the literature on this are Baumann and Weber, pp. 306-309 and Schmidhäuser, pp. 158-161 from the Federal Republic of Germany; Bricola and Zagrebelsky, parte generale, vol. I, p. 511, and Manzini,

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Homicide under provocation in these statutory provisions is considered a privileged form of homicide. The scale of punishment is less than that for unprovoked homicide. In England, for example, murder carries a mandatory sentence of imprisonment for life. If the act took place under provocation, it may be considered manslaughter, which carries a lesser penalty. (1)

Also for the countries in which no specific statutory reference is made to provocation, it would appear that provocation is one important element in distinguishing between homicide and manslaughter. (2) In general the provocation must be what is termed "adequate provocation"; the provocation must be such that it would cause a reasonable person to loose his self-control under the circumstances, and the response by the offender must have occurred during the heat of passion before a reasonable opportunity existed for the

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vol. II, p. 250 from Italy; Gordon 1978, pp. 750 ff. for Scotland. As for English law, Smith and Hogan (pp. 310-311) believe it "farfetched" that someone would deliberately induce provocation in order to kill a person under mitigating circumstances: "if it did occur, it should, it is submitted, be decided on the same lines as A-G for Northern Ireland v. Gallagher - D should be held liable for the acts which, when unprovoked, he intended to do under provocation." See also Edwards v. R. (1973) 1 All E.R. 152.

(1) Smith and Hogan, pp. 299-311. The Criminal Law Revision Committee suggested that provocation remain an element only of the offence of homicide; see Law Commission, pp. 148-149.

(2) See, for example, on the law in Finland Honkasalo 1970, pp. 15 ff; for Norway, Andenaes and Bratholm, pp. 59-64 and 223-224; and for Sweden, see Jareborg, p. 186. For Scotland, see Gane and Stoddart 1980, pp. 309-311 and 355-366; a charge of murder is reduced to one of culpable homicide. However, Gordon (p. 5; cf. pp. 766-787) notes that in practice the principle of provocation has not been explored in Scot law, due to the way in which the Crown Office has adopted a practice of accepting pleas of culpable homicide in charges of murder. See also Nicholson, pp. 213-215.

passion and intense emotions to cool. Types of provocation include assault, insults or even certain types of behaviour. (1)

The statutes of some country also specify charge reduction or a mitigation of punishment in the case of assault. This is the case in Norway, Poland and the Union of Soviet Socialist Republics. (2) For example, art. 110 of the RSFSR Penal Code refers to the intentional infliction of grave or less grave bodily injury while in a state of sudden strong mental agitation provoked by force or grave insult or any other unlawful actions of the victim, if such actions have resulted or could result in grave consequences for the guilty person or his near ones.

As the assault in itself may be petty, the mitigation may lead to the waiving of punishment entirely. This is noted specifically in sec. 228(3) of the Norwegian Penal Code, according to which the court may waive punishment for an assault which occurred in reply to another assault, or for an assault provoked by an earlier assault or insult. (3)

The third type of offence for which statutory provisions may provide a privileged form is insult. According to art. 599(1) of the Italian Penal Code, in the case of the reciprocation of an insult as defined by art. 594, the judge may waive punishment for one or both offenders. Thus, if two persons exchange insults, one or both may be free from punishment. According to art. 599(2), no punishment need follow an insult which took place in a state of rage caused by the wrongful act of another.

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(1) In the French literature, it is stated that simple verbal insult is not to be considered sufficient provocation. Stefani and Levasseur, p. 450. One special type of provocation which is not deliberately directed at the offender, but which is often recognized as "adequate", is adultery. See, e.g., Gordon 1978, p. 775, on the law of Scotland. A similar provision in the Italian Penal Code on provocation and adultery (art. 587) was abolished in 1981. See Bricola and Zagrebelsky, parte speciale, vol. II, p. 1047, and Manzini, vol. III, p. 282. Cf. also sec. 250 of the Maltese Penal Code.

(2) Sec. 228(3) of the Norwegian Penal Code, art. 182(2) of the Polish Penal Code and art. 110 of the RSFSR Penal Code.

(3) This Norwegian provision therefore only considers assault and insult as potentially adequate provocation. For example, the destruction of property is not considered provocation in this connection. See Andenaes and Bratholm, p. 60. The RSFSR provision cited above in the text is thus much broader. See also sec. 233 of the Penal Code of the Federal Republic of Germany.

It is by far more common that provocation, instead of being considered as a statutory element of an offence such as homicide or assault, is assessed in the determination of the penalty. (1) This may be explicitly noted in the provisions on sentencing. This approach eases the position of the draftsman of law, as instead of specifying the effect of provocation in the elements of every offence for which it is possible he need only include a general provision to the effect that provocation is to be considered a mitigating factor. Such a provision would therefore apply not only to homicide, but potentially also, e.g., to assault and libel.

A survey of the laws of Europe shows that this is indeed a common approach. Provisions on provocation as a mitigating factor in sentencing can be found in the penal codes of Austria, Denmark, the German Democratic Republic, Italy, Norway and the Union of Soviet Socialist Republics. (2) These provisions generally subsume provocation under terms such as "mental state caused by the actions of another".

Art. 321 of the French Penal Code notes that provocation is a mitigating factor only for violent offences against the person.

According to chap. 6, sec. 2 of the Finnish Penal Code, significant pressure, threat or similar influence on the perpetrator of the offence is grounds for mitigating the punishment within the statutory scale.

It is noteworthy that the Netherlands has no provision on provocation. This can be explained by the fact that there is no statutory special minimum penalty for an offence; the court is free to use the entire general scale of punishment up to the special maximum. Thus, there is no need to state that the penalty can be mitigated in a case where the offender was provoked.

In considering whether the penalty should be mitigated because of the provocation of the victim, what was referred to in section 4.2.1. as perpetration (the use of force or guile

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(1) Anttila 1985, p. 174 distinguishes between provocation as an element and as a general consideration.

(2) Sec. 34, point 1 of the Austrian Penal Code;, sec. 84(1), point 4 of the Danish Penal Code; sec. 14 of the Penal Code of the German Democratic Republic; art. 62(2) and 62(5) of the Italian Penal Code; sec. 56(1)(b) of the Norwegian Penal Code; and art. 38, point 5 of the RSFSR Penal Code.

The Penal Code of Turkey specifies the extent of sentence mitigation allowed: according to art. 51 the penalty shall be reduced by from one fourth to two thirds if the crime was committed in the heat of anger or under the influence of a strong grief caused by unjust provocation.

in order to further the victim's intention to injure the offender) raises the question of whether or not the alleged offender can be considered to have acted in excessive self-defence.

For example, according to art. 38(1), point 5 of the RSFSR Penal Code, it is a mitigating factor if the offender committed the offence under the influence of a strong emotion brought about by the unlawful actions of the victim.

The key word here is "unlawful". Self-defence as full justification for the alleged offender's act will be considered in section 4.4.6. However, self-defence is of interest also in sentencing to the extent that it exceeded the legitimate scope.

Excessive self-defence is explicitly noted in the sentencing provisions of several countries. Of the fifteen core countries, it is noted in the laws of Denmark, the Federal Republic of Germany, Finland, the German Democratic Republic, Hungary, Italy, the Netherlands, Norway, Poland, Sweden and the Union of Soviet Socialist Republics. (1)

The majority of the provisions provide that the penalty may be waived entirely on the grounds of excessive self-defence, in particular if this excessive self-defence was due to an uncontrollable impulse or the heat of passion ("Affekt") (Denmark, the Federal Republic of Germany, Finland, the German Democratic Republic, Hungary, Norway, Poland and Sweden). In these countries, mitigation is also possible either on the basis of the law (Denmark, Finland, Hungary, Poland and Sweden) or practice (Norway). Furthermore, in the Netherlands the defendant is declared not punishable in cases of excessive self-defence. In two countries (the German Democratic Republic and the Union of Soviet Socialist Republics) the provision refers only to mitigation, although the material concept of the offence in these countries allows the court to consider whether or not an offence was committed, in view of the circumstances.

The Italian provision provides that an offence committed in excessive self-defence shall be dealt with as a negligent offence. (2) In Austria and France, an offence committed in

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(1) Sec. 13(2), 84 point 4 and sec. 85 of the Danish Penal Code; sec. 33 of the Penal Code of the Federal Republic of Germany; chap. 3, sec. 9 of the Finnish Penal Code; sec. 17(2) of the Penal Code of the German Democratic Republic; art. 29(2) of the Hungarian Penal Code; art. 55 of the Italian Penal Code; art. 41(2) of the Penal Code of the Netherlands; sec. 48(4) of the Norwegian Penal Code; art. 22(3) of the Polish Penal Code; sec. 24(5) of the Swedish Penal Code; and art. 38(1) point 6 of the RSFSR Penal Code.

(2) Bricola and Zagrebelsky, parte generale, vol. I, pp. 526-528.

excessive self defence will presumably also be dealt with as a negligent offence. (1)

The discussion thus far has been limited to provocation, which has received the most attention in criminal laws and the literature. It should be noted, however, that the other forms of victim participation may be relevant in the reduction of charges or the penalty.

Even the slightest degree of victim participation may be of such relevance. This is generally due to the way in which the elements of the offence are drafted. For example, if the offence of breaking and entering is defined to require the actual opening of a window, door or other means of entry, then burglary through an open window will be dealt with differently. (2) Neglect to close the windows of one's home before leaving may be considered unreasonable and a victim who neglected to close his windows before leaving may therefore be termed a "facilitating victim" in the sense noted in section 4.2.1. However, even conscientious potential victims may well leave windows open while leaving the room for short periods.

A similar example is the theft of goods that the offender found by chance. Should the offender take a wallet that the victim has dropped this may be dealt with differently than a case in which the offender sees a wallet intentionally left somewhere as, for example, on a table indoors in full view of passerbys. Again, the victim may at most have only facilitated the offence and yet the law may deal with otherwise identical cases in a different manner. (3) For example, in Finland, chapter 29, section 4 of the Penal Code provides for a fine or imprisonment for up to one year for

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(1) Haberl, p. 22 on Austria; Pradel 1981, p. 273 on France. For Scotland, Gordon 1978 notes that excessive self-defence probably reduces a charge of murder to one of manslaughter; along these lines, see Law Commission p. 149 on England.

(2) Gobert, pp. 518-521. Gordon notes (1978, p. 519, on the law of Scotland) "It is not housebreaking to enter by an ordinary opening, such as a door which is unsecured." This is true even if the key was left in the lock and the offender had to turn the key.

(3) Bein, however, notes (p. 53) that larceny by finding is punished in Israel in the same way as ordinary larceny despite the fact that the former is often due to the carelessness of the victim.

Also invitation may be a factor here in charge reduction. Should the victim have deliberately taken the risk of leaving his wallet in a public place, the law may hold that the mens rea of the offender extends only to the theft of found goods.

the theft of found goods regardless of the value of the goods. The punishment latitude for ordinary theft, not to mention that for serious theft, is considerably higher.

The role of victim invitation of offences - the deliberate assumption of unnecessary risks - would ordinarily not be a factor in the reduction of the charges or the penalty. There is one group of offences, however, in which alleged victim invitation has caused considerable debate: rape and other sexual assault. As noted in section 4.1. this is also a sensitive area where the debate over victim precipitation first erupted.

In connection with the 1984 reform of the Swedish legislation on sexual offences there was heated debate on this subject. Some argued that the behaviour of the victim before the offence should have absolutely no significance while others supported a distinction between rape and a lesser offence, depending in part on the behaviour of the victim. Such a distinction would be reflected in the elements of the corresponding offences. The compromise finally reached was that the behaviour of the victim has no influence on the classification of the offence but it can be considered in the measurement of punishment. (1)

The behaviour alleged to have preceded the rape may be invitation (deliberate unnecessary assumption of risks) or consent that the victim retracted before the act took place. The alleged offender may in particular raise the defence of consent where the behaviour of the victim gave rise to such a misapprehension on the part of the offender. If so, the victim's character may become a focus of testimony and evidence on the theory that a reputation for unchastity is relevant to determining if consent was given to the sexual intercourse. (2) The result may well be the secondary victimization of the woman.

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(1) See Snare, pp. 202-204. See also the discussion in Edwards, pp. 124-126, where she suggests that "contributory negligence may influence sentencing."

(2) McDonald 1976, pp. 23-24. Since this article was published, various statutory changes have taken place in the United States. See, e.g., Lamborn 1985a, notes 9 and 15. McDonald's comments also no longer hold true for England. Sec. 2 of the 1976 Sexual Offences (Amendment) Act states that "except with leave of the judge, no evidence and no questions in cross-examination shall be adduced or asked at the trial about any sexual experience of a complainant with a person other than the defendant." As for consent in English law in the case of rape, the prosecution must indeed prove the absence of consent, but it is enough to show that the complainant did not assent. Smith and Hogan, p. 408; see also Edwards, pp. 123-125.

Consent may not only affect the penalty, in certain rare cases it may change the charges. (1) Sexual relations with a minor are generally criminalized. However, such sexual relations without the consent of the person in question (to the extent that consent by a minor is regarded as legally relevant in the jurisdiction in question) may lead to charges for rape; if consent is present the charges will be for the lesser offence of sexual relations with a minor. (2)

The question of consent has aroused debate in criminal policy also in connection with another offence. This is the case with assistance in suicide, or active euthanasia. The background to the debate is that consent as such usually frees the alleged offender from liability. (3) The general view in European criminal law, however, is that consent is not a defence for all actions. In particular if the enormity of the physical harm that is done outweighs the considerations of personal autonomy and free will or if the act in other respects conflicts with public policy the offender may be punished even if he acted with the full and informed consent of the victim.

Homicide either on the express request or with the consent of the victim is generally criminalized in European law. The penalty, however, is considerably less than that for homicide. (4)

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(1) One area in which consent cannot change the penalty are those offences where the elements specifically require the consent of the victim, as in usury.

(2) Another example is abortion: the seriousness of the offence of illegal abortion depends on whether or not it took place with the consent of the mother. See, e.g., chap. 22, sec. 5(2) and 6 of the Finnish Penal Code; law no. 194 of 1978 of Italy.

(3) See section 4.4.6.

(4) See sec. 77 of the Austrian Penal Code, sec. 239 of the Danish Penal Code, sec. 216 of the Penal Code of the Federal Republic of Germany, chap. 21, sec. 3 of the Finnish Penal Code, art. 579 of the Italian Penal Code, art. 293 of the Penal Code of the Netherlands and art. 150 of the Polish Penal Code.

The above provisions would largely apply also to what is known as active euthanasia. Also most of the other core countries would mitigate the penalty for active euthanasia: see, e.g., Pradel 1981, p. 483 (France); Bricola and Zagrebelsky, parte speciale, vol. II, pp. 1029-1030, and Manzini, vol. VIII, p. 85 (Italy); Brinck et al, p. 88 and Jareborg, pp. 188-190 (Sweden); Smith and Hogan, p. 277 (England) (however, no discretion exists if the offence is held to be murder). The situation in Scotland, however, is doubtful. See Gordon 1978, p. 765.

Yet another example of how consent may affect the charges is the case in which the victim agrees to an act but has a concealed purpose in mind. This factor has been raised in the agent provocateur case, where a law enforcement official (or even a private citizen) "goes along with" an offence in the hopes of gathering evidence against the offender. If a victim voluntarily gives property to the offender in full knowledge that the offender intends to steal or defraud the victim of it the offender may be able to raise successfully the defence of consent. (1)

In the case of instigation the offender will generally not be granted a reduction of charges or penalty, other than where the instigation of the offence can be seen to involve consent and consent to the offence in question is a defence. Instead, the offender will normally be punished for the offence in accordance with the basic scale of punishment, while the alleged victim may well be punished for incitement. (2)

The Finnish Penal Code (chapter 6, section 3) is wide-ranging in obliging the court to take into consideration the participation of the victim in the offence. It decrees as grounds decreasing the punishment a) significant pressure, threats or similar influence on the perpetration of the offence, and b) strong human sympathy leading to the offence, and exceptional and sudden temptation or a similar factor that has been conducive to significantly lowering the ability of the offender to obey the law.

To summarize the above discussion of the effect of victim participation on the reduction of the charges or the penalty, all forms - from conscientiousness to instigation - may be relevant. With the possible exception of sexual assault, conscientiousness, facilitation and invitation will be relevant in only a few isolated cases where the elements of the offence take into consideration chance factors that even a reasonable person cannot foresee.

Provocation is a widely recognized factor in charge reduction and mitigation of the penalty. In common law coun-

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(1) Gobert, pp. 521-524. This is of particular interest in the common law countries. See, e.g. Smith and Hogan, pp. 145-147, and Walker p. 49. There is, however, no leading Scottish case: see Gane and Stoddart 1980, p. 263. See also Bricola and Zagrebelsky, parte generale, vol. II, pp. 565-668, and Manzini, vol. II, p. 568 on Italian law.

(2) Incitement in general will not be dealt with in this study, as normally the incitement involves an offence not directed at the alleged victim. A unique situation in this respect involves incitement to a duel, which is criminalized by art. 130 of the Swiss Penal Code and sec. 90 of the Cyprus Penal Code.

tries, its scope is limited to homicide. In most other countries, the criminal law recognizes provocation also in connection with other violent offences against the person and even with libel.

Consent and instigation appear to be quite relevant factors in both the reduction of charges and the reduction of the penalty. For only a few offences will consent by the victim be totally without meaning. If the victim has instigated the offence the court may find that this lessens the blameworthiness of the actions of the offender. The court will then set the penalty accordingly.

4.4.6. Releasing the alleged offender from criminal liability

The possible participation of the victim in the offence may not only diminish the criminal liability of the offender, it may eliminate such liability entirely. This can be the case in connection with consenting and perpetrating victims.

As noted in the preceding section consent may lead to a reduction of charges or of the penalty. However, generally where the victim is considered to have the right to dispose of the legal interest in question his consent to the offence eliminates the criminal features of an act entirely. The Latin phrase commonly used here is "volenti non fit injuria"; whoever knowingly and voluntarily exposes himself to danger shall be deemed to have assumed the risk and shall be precluded from recovery. The consent of the victim is thus a general element of justification. (1)

There are few general statutory provisions on the significance of consent. (2) One of the rare examples is art. 50 of the Italian Penal Code, which states that a person who injures or endangers a right with the consent of the person in question shall not be punished if the person in question could validly dispose over this right. (3)

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(1) Rubinstein, p. 189. Rubinstein also notes that most criminal law prohibitions are designed to protect society as a whole. "These prohibitions raise no question of consent by the victim, since the victim by its very nature is incapable of giving it." On this, see also Jescheck 1978, pp. 305-306 (public legal interests; the Federal Republic of Germany); Bricola and Zagrebelsky, parte generale, vol. II, pp. 493-499 (consent not possible if the offence is against public order or bonos mores; Italy); Andenaes, pp. 190-194 (Norway); Brinck et al, pp. 84-86 (offence against the State or the public; Sweden).

(2) Bein, p. 58.

(3) Bricola and Zagrebelsky, parte generale, vol. II, pp. 493-499.

The issue of consent is more commonly mentioned by indirect reference in the various provisions or only in the legal literature. Examples of the first approach include the use of such words and phrases as "unlawfully", "without authorization", "by force" or "against the will of another" in provisions criminalizing, e.g., rape, theft and robbery. Consent thus removes part of the actus reus. (1)

Some offences may explicitly note that an act is criminal even with the consent of the victim. A common example here is abortion.

It was noted in section 4.4.5. that the general view in European criminal law is that consent cannot be given to all actions. The clearest example of this is the causing of death or serious bodily injury such as mutilation of limbs. Sec. 90 of the Austrian Penal Code, for example, states that bodily injury or an endangerment of bodily integrity is not unlawful if the victim consented and if the injury or endangerment is not contra bonos mores. Art. 5 of the Italian Penal Code forbids the individual from entering into any disposition of his own body that causes a permanent loss of his physical integrity, or is otherwise against the law or bonos mores.

The statutory laws of most European countries do not contain an explicit provision corresponding to these Austrian or Italian provisions, although a corresponding position is generally taken in the literature. Subject to what was stated in section 4.4.5. on active euthanasia, in most countries the position is that a victim cannot consent to the taking of his life or to serious injury. (2) The line between serious and petty injury is drawn in Poland according to whether or not the offence is subject to private prosecution. (3)

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(1) The use of the term "unlawfully" in the definition of offences has been criticized in England as unnecessary. See Law Commission, p. 117.

(2) See, e.g., the following sources: Hurwitz, pp. 206 ff. (Denmark); Anttila 1946 (Finland); Jescheck 1978, pp. 304-305, Baumann and Weber, p. 327 and Schmidhäuser, pp. 112-116 (the Federal Republic of Germany); Bricola and Zagrebelsky, parte generale, vol. II, pp. 494-497 (Italy); Békés et al, pp. 191-193 (Hungary); van Bemmelen 1979, p. 200, and Hazewinkel-Suringa, pp. 300 ff. (the Netherlands); Bratholm, pp. 176-199, Andenaes and Bratholm, pp. 80-85 and NOU pp. 139-140 (Norway); Buchala, pp. 316-319 (Poland); Gordon 1978, p. 272, footnote 2 (Scotland); Brinck et al, pp. 84-86, Jareborg, pp. 254-262 and Strahl, pp. 384 ff. (Sweden); and Smith and Hogan, pp. 258-261 (England). See also Rubinstein, p. 210.

(3) Buchala, pp. 316-319.

In this connection it may be noted that in the Socialist countries of Europe even where consent is not mentioned as a specific factor in criminal law it will be considered to the extent that it influences the social danger of the offence. For example, the court may well rule that the fact that the victim consented to the act eliminates the social dangerousness of the offender's act and thus the act is not an offence. No punishment will follow. (1)

When consent is a factor the court must normally consider whether or not this consent was informed and whether the person in question had the capacity to give the consent. (2) The general position in the criminal law of the core countries is that consent must be seriously intended, voluntary and understood by the giver to be consent.

The obligation that the consent be informed means primarily that the victim is aware of the offender's intention and of the consequences of the offence and yet agrees to the offender's action.

The obligation that the consent be voluntary rules out the possibility that an offender who coerces the victim into agreeing to the act can benefit from the law on consent. The situation becomes difficult if the victim was coerced into the act by a third party unknown to the offender and the offence cannot be undone once the coercion ceased.

The criterion that the offender understood that consent was given has given rise to discussions of how the consent is to be communicated to the offender. The previous position in several countries was that the victim must expressly grant his consent. Today, in some of the core countries it is considered sufficient if the victim had intended to consent (the "Willensrichtungstheorie"), although in practice in all of the countries, expressly granted consent remains more important. (3)

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(1) See section 6.1.3.

(2) The consent must also normally be given in advance. See, e.g., Anttila 1946, p. 166; Brinck et al, pp. 86-87 and Jareborg, pp. 253-254. However, for several offences retroactive consent may effectively bar prosecution; it will certainly stop prosecution in those offences where charges can only be raised on the request of the complainant.

(3) See, e.g., Jescheck 1978, pp. 308 ff. (Austria, the Federal Republic of Germany and Italy); Baumann and Weber, pp. 322 ff. (the Federal Republic of Germany); Hazewinkel-Suringa, pp. 302 ff. (the Netherlands) and Jareborg, p. 253 (Sweden). There is no clear statement of the law of England on this point. For Scotland, see the case of Meek & others v. HMA 1982 SCCR 613: an honest but mistaken belief in consent will amount to a defence on a charge of rape.

There are two areas in which consent is often implied, and not expressly granted. One is in connection with necessary operations, the other is with dangerous sports and other recreational activities.

Several surgical operations and other medical measures involve a considerable risk of death or injury, and normally the patient is assumed to have consented to what the physician regards as necessary. (1) It has been noted, however, that medical measures can also be based on necessity, as is evidenced by the position of the surgeon who operates in an emergency without the consent of the patient. (2)

Participation of the victim and the offender in an event that per se may be dangerous (e.g. boxing, ice hockey) generally implies that the victim consents to any action on the part of the offender that is in accordance with the normal course of the game. Should the offender depart from this standard (for example by committing a particularly blatant infraction of the rules) the victim cannot be said to have given his consent. (3)

It was noted at the beginning of this section that, in addition to consent, also perpetration by the victim may result in the defendant being absolved of criminal responsibility. A perpetrating victim, as defined in sec. 4.2.1. supra, is one who himself has used force or guile to further his own intention to injure the alleged offender. The fact that the victim has committed an unlawful assault on the alleged offender may provide the latter with the excuse of self-defence.

Self-defence is universally regarded as justification for an act. The general formulation among the countries in the study appears to be that self-defence can be effected

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(1) Soyer, p. 115.

(2) Pradel 1981, p. 482; Law Commission, p. 129.

(3) Bein, p. 58. Malmsten (see pp. 34-41) considers that the social adequacy of the conduct in, e.g., athletic competitions is a better criterion than consent. See ibid, pp. 34-41, for an analysis of a Swedish case where an ice hockey player was sentenced for assault and the negligent causing of injury after he had hit an opponent on the head with his stick; see also Svensk Juristtidning 1966, p. 57; Slettan, p. 250. It may be noted in passing that consent cannot legally be given to professional boxing in Norway and Sweden, as this activity is now illegal. See the Prohibition of Professional Boxing Acts of Norway (68/12 June 1981) and Sweden (1969:612).

against an unlawful, real and direct assault against the rights and interests of another. (1)

Thus, the assault must first of all be unlawful. Self-defence is not permitted by law against, for example, lawful enforcement of a civil judgment or against a policeman attempting to maintain order within the limits of his authority. The unlawfulness of the assault is phrased somewhat differently in the provisions. Usually, the reference is to an assault contrary to law; an unlawful assault (thus the Danish "uretmaessigt" assault, the Dutch "wederrechtelijke" assault, the Austrian and FRG "rechtswidrigen" assault.) The Finnish provision refers to "unjustified assault".

The assault against which the self-defence is directed must also be real and direct. This means that the assault must be either imminent or already begun. The Italian article, for example, refers to present danger, the French article to actual necessity. The provisions in the Nordic countries refer to an assault which is imminent or has already begun.

The self-defence must be carried out in order to protect rights and interests. There is appreciable variance in the wording of the provisions on which rights and interests may be protected through self-defence.

The Austrian provision, for example, lists life, health, bodily integrity, liberty and property. (2) The Swedish provision refers to attacks on the person or property, as well as to trespass. The Finnish provision refers to an assault on the person or property. Several provisions merely refer to interests in general, or else merely to an unlawful assault. This is the case with Denmark, the Federal Republic of Germany, France, Italy, the Netherlands and Norway. (3)

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(1) The respective provisions of the penal codes of the core countries are: Austria, sec. 3(1); Denmark, sec. 13(1); the Federal Republic of Germany, sec. 32; Finland, chap. 3, sec. 6; France, art. 328; the German Democratic Republic, sec. 17; Hungary, sec. 29; Italy, art. 52; the Netherlands, art. 41; Norway, sec. 48; Poland, sec. 22; Sweden, chap. 24, sec. 1 and 4; and the RSFSR, sec. 13. For Scotland, see Gane and Stoddart 1980, pp. 343 ff. and Gordon 1978, pp. 761-763; and for England and Wales, see Walker, pp. 48-49. Sec. 3(1) of the English Criminal Law Act 1967 permits the use of reasonable force in the prevention of crime or in lawful arrest.

(2) Haberl, pp. 19-25; Jescheck 1978, p. 281. See also Franke for a comparison of the law of Austria, the Federal Republic of Germany, France and Switzerland.

(3) Despite limitations in the wording, these are generally interpreted broadly. See, e.g., Jescheck 1978, p. 272; Soyer, p. 110.

The laws of some of the socialist countries permit, and even encourage self-defence against, respectively, acts directed at the State or the public interest. For example, sec. 29 of the Hungarian Penal Code, art. 22 of the Polish Penal Code and art. 13 of the RSFSR Penal Code refer to one or the other of these. Sec. 17 of the Penal Code of the German Democratic Republic is even more explicit:

> "Whoever defends against a present unlawful assault against himself or another or against the socialist State and social order in a manner appropriate to the dangerousness of the assault, acts in the interests of the socialist society and the rule of law and does not commit a criminal offence." (1)

The success of a plea of self-defence will often depend on the evaluation of what alternative courses of action were open to the defendant and on whether or not the measures of self-defence were reasonable in light of the injury prevented. Excessive self-defence will generally bring criminal liability although the penalty may be reduced or even waived, as noted in section 4.4.5.

The extent to which self-defence is permitted varies. Several penal codes note explicitly that the interests defended by self-defence must be in proportion to the unlawful assault. This is true of Austria, Denmark, Italy, Norway, and Sweden. Property, for example, generally cannot be defended by killing the thief. (2) The laws of Finland, France and Poland, on the other hand, refer only to "necessary" self-defence. (3)

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(1) Compare this with, for example, the law of the Federal Republic of Germany, where self-defence cannot be justified solely in defence of public interests; Jescheck 1978, pp. 270-273.

(2) For support of this proportionality principle in the literature of other countries, see Jescheck 1978, pp. 268 ff. (the Federal Republic of Germany; he notes that the proportionality need not be strong); Pradel 1981, pp. 272-273 (France); Pompe, p. 7, and Hazewinkel-Suringa, pp. 270-271 (the Netherlands); Andenaes, pp. 170-171 (Norway); Smith and Hogan, pp. 328-329 (England). Fletcher argues that the Federal Republic of Germany and the Union of Soviet Socialist Republics pay less attention to proportionality in respect of self-defence than in respect of necessity. Cf. also the explicitness of art. 237 and 238 of the Maltese Penal Code, on grounds for self-defence.

(3) The Spanish reference to "rational necessity" in the corresponding provision, art. 8, no. 4(II) of the Penal Code, can be regarded as a hybrid of these. On the Spanish law, see Ramos, pp. 180-184.

To summarize this section, consent and provocation (perpetration) have general significance even to the extent of releasing the alleged offender from criminal liability.

As noted in the previous section, instigation may be assessed as consent and will be dealt with accordingly. Thus, instigation may also absolve the offender of criminal liability.

Victim facilitation and invitation would appear very rarely to have any significance in this respect. However, criminal policy may also provide an incentive to undertake preventive measures in a negative way through de facto or de jure decriminalization. (1) The Swedish discussion on this point has concerned shoplifting. Some commentators have noted that it is the shopkeepers who are to blame for the increase in shoplifting, through the placement of enticing objects in easily accessible areas. They suggest that petty shoplifting should simply be decriminalized. Although this may rationalize police procedures and avoid clogging court calendars, it may be surmised that such de facto decriminalization will not change the behaviour of the potential crime victim (the shopkeeper). Instead, he will presumably conclude that the increased business brought by his displays, as well as a cost mark-up, will offset the pilferage.

4.4.7. Punishing the alleged victim

The concept of punishing the victim of an offence for his participation in this offence may seem to be a contradition in terms: it may be argued that since the primary purpose of the criminal law is to protect potential victims, victims cannot and should not be punished for their role in becoming a victim of an offence.

However, examples can be cited where even a careless victim may find that his participation in the offence will open him to the possibility of punishment.

In regard to facilitation and invitation the law may contain special obligations to take care. For example, drivers who neglect to lock their cars may be punished in some jurisdictions, as in Greece and Israel. (2) In court practice, to

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(1) HEUNI 2, paragraphs 31-32, pp. 8-9. The difference between the position of criminal law and criminal policy in this respect should be emphasized: facilitation and instigation generally have no such significance at criminal law.

(1) An example is the Swedish Traffic Decree 1972:603, sections 75 and 164.

(continued on the next page)

take another example, jaywalking pedestrians who were injured by a car may find insult added to injury in the form of a fine for their own traffic violation. It should be noted specifically that in these cases it is not the fact that the victim contributed to his victimization that is criminalized but the mere neglect to take care, a neglect which is brought to the attention of the authorities by the offence facilitated or invited by the offender. (1)

In provocation of an offence the victim may be liable to punishment if the provocation in itself involves an unlawful assault.

In instigation the victim-to-be actively seeks someone who will play the part of the offender. A typical example would be arson or car theft, where the overt criminal act hides an attempt at insurance fraud; in such cases, of course, one must distinguish between the immediate victim (the owner of the business, or the owner of the car) and the indirect

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See for example Schembri, p. 350. In the Federal Republic of Germany, this is dealt with as a minor offence ("Ordnungswidrigkeit"), in accordance with sec. 14(2) of the Road Traffic Order.

If the negligence leads to the opportunity to commit an offence against another person, the negligent person may find that he is punished for his role. In the Federal Republic of Germany, for example, case law has led to the position where, if a car is left unlocked in an area where the car owner should have anticipated that it may be stolen (for example on the street in a downtown area), and the stolen car is involved in, for example, a hit-and-run offence, the car-owner may be found guilty of negligent manslaughter or injury, accordingly. Kerner, interview, 20 April 1986 (cf. sec. 222, 230 of the Penal Code of the Federal Republic of Germany; this tendency in jurisprudence has been criticized). The leading French case of Family Cannot v. Franck (Court of Cassation 1941) decided the reverse in what was, broadly, a comparable case; the car-owner in question was not held to be criminally liable.

(1) The Hungarian report to the Seventh United Nations Congress states that (p. 8)
"Such kinds of active roles of victims as provocative behaviour, drunkenness, irresponsibility, carelessness are today evaluated only by the science. However, experiments are made that in the course of criminal proceedings also such behaviour shall be considered in whatever form, at least to the extent of a judicial warning".

victim (the insurance company). In many European states the instigator is punishable in the same way as the immediate offender, in accordance with provisions on incitement, complicity or conspiracy. However, the fact that in the cases cases considered in the present study the instigator is at the same time the victim may alter the finding of the court; above all, the court may find that no one can commit an offence against himself. (1)

It has been explicitly noted in the common law countries that a person protected by the criminalization cannot be held to have instigated the offence in question. In the case of R. v. Tyrell (1894 1 Q.B. 710) it was held that "where the purpose of an enactment creating an offence is the protection of a class of persons no member of that class who is the intended victim of such an offence can be guilty of incitement to commit that offence." (2)

Simulation of an offence is generally criminalized if the alleged victim reports the imagined offence to the authorities for action. If the alleged victim reports it for example to an insurance company in order to secure financial benefit it will generally constitute fraud.

Here there are three primary possibilities. The alleged victim may falsely report that a specific person has committed an offence against him. This variant of libel is dealt with seriously in all the countries covered by this study, as it opens the alleged offender to the threat of officially sanctioned punishment. (3) The second possibility is that the fabricated offence is reported for gain; here it is primarily a question of insurance fraud. The third possibility is that the alleged victim reports the offence in order to get attention or to vex the police. (4)

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(1) Cf. the above discussion in this section on the significance of consent.

(2) Smith and Hogan, pp. 144-145 and 222-223. The case in question concerned unlawful carnal knowledge of a woman. The position in Scotland is the same; see Gordon 1978, pp. 131-132.

(3) See, e.g., sec. 164 of the Penal Code of the Federal Republic of Germany; chap. 26, sec. 1 of the Finnish Penal Code; sec. 228 of the Penal Code of the German Democratic Republic; sec. 233 of the Hungarian Penal Code; and art. 368 of the Italian Penal Code.

(4) Here the elements of the offence do not require that there is the danger that another person will be accused of the offence. See, e.g., sec. 298 of the Austrian Penal Code; sec 165 of the Danish Penal Code; sec. 145d of the Penal Code of the Federal

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4.5. The role of the bystander

One issue involving the individual in crime prevention that would call for lengthy examination in its own right is the obligation to prevent crimes directed at other persons. (1)

The obligation to assist victims in distress or to report offences to the authorities appears to be very common in two areas: traffic and offences involving general danger.

In addition to special legislation on traffic, failure to render assistance in or report offences involving general danger has been criminalized in a large number of countries. (2) The general tenor of these provisions on the responsi-

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Republic of Germany; art. 367 of the Italian Penal Code; art. 251 of the Polish Penal Code; art. 180 of the RSFSR Penal Code; sec. 5(2) of the Criminal Law Act 1967 of England. The Scottish position would fall in this category; see Gordon 1978, pp. 38-40.

(1) See the extensive discussion in Sheleff.

(2) The large question of crimes of omission will not be dealt with here. It will only be noted that persons in certain capacities have a positive duty to act and to help. See, e.g., Baumann and Weber, pp. 319-330 and the extensive literature cited.

Failure to render assistance in certain cases has been criminalized in the penal codes of Austria (sec. 94; abandonment of an injured person, and sec. 95. failure to give assistance); Denmark (sec. 141 and 253; failure to prevent certain offences, and failure to help a person in danger); the Federal Republic of Germany (sec. 323c; failure to help in an accident or general danger); Finland (chap. 21, sec. 13; failure to help a person in danger); France (art. 63; failure to help in general danger); the German Democratic Republic (sec. 119; failure to help when there is a general danger to life or health); Hungary (sec. 172-173; failure to help an injured person or a person in danger); Italy (art. 593; failure to help a person in danger); the Netherlands (art. 450; failure to help a person in immediate danger to life); Norway (sec. 387; failure to help a person in danger); Poland (art. 164; failure to help a person in danger); and the Union of Soviet Socialist Republics (e.g. sec. 127-128 of the RSFSR; failure to help a person in danger).

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bility of a bystander to render help is that the neglect to assist a victim who is in danger of losing his life is criminal if the assistance could be rendered without considerable disadvantage or danger to one's self or family and without violating other legitimate interests. It may be noted that most provisions speak of "mortal danger" or a corresponding situation without limiting this danger to the effects of, e.g., an offence.

Some provisions oblige the bystander to assist the victim even if there is no mortal danger. The Austrian and Polish provisions as well as the provisions in the Federal Republic of Germany and the Democratic Republic of Germany refer also to assistance to persons in danger of serious injury or impairment of health. The Hungarian provision is perhaps the widest:

> "A person who fails to lend such assistance as may reasonably be expected of him to an injured person or to one in immediate danger of life or of his bodily integrity, commits a misdemeanour ... "

Some countries have criminalized the failure to report certain offences when there is still an opportunity to prevent the commission of such offences, or when their effect can be limited. Generally, the offences in question are serious offences against the State, for example treason. However, some provisions refer also to certain serious offences with individual victims in the meaning adopted in the present study. This is the case in respect of the penal codes of Austria (sec. 286); Denmark (sec. 141); Finland (chap. 16, sec. 19); the Federal Republic of Germany (sec. 138); France (art. 62); the German Democratic Republic (sec. 225); Italy (art. 593); the Netherlands (art. 136); Poland (art. 254); Norway (sec. 387); Sweden (chap. 23, sec. 6) and the RSFSR (art. 19 and 190). There is no corresponding provision in England or Scotland. (1)

The provision of such an obligation on bystanders may place them in danger not only of being injured themselves, but also of unintentionally causing injury and therefore laying themselves open to litigation. As noted above, bystanders may generally invoke the law of self-defence (defence of

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There is no general provision in Sweden, although chap. 23, sec. 6 of the Penal Code deals with the prevention of an offence by one's ward. See the discussion in Jareborg, pp. 211-224. There is no obligation on a bystander to help in Scotland or England. See, e.g., Gordon 1978, p. 89.

(1) English common law formerly recognized the offence of misprision, concealment of crime. See Smith and Hogan, pp. 711-712.

others) in coming to the assistance of victims and in preventing further victimization. Even after the victimizing incident is over bystanders may refer to necessity as justification for their actions. According to this doctrine the party in question will not be held criminally liable for his actions if he is dealing with real and direct danger that cannot be prevented otherwise and the damage that he causes is less than the damage prevented. (1)

It may be noted that many State compensation schemes explicitly note that persons who are injured while endeavouring to arrest a person or assist a law enforcement official in doing his duty or in preventing crime and preserving the peace are entitled to claim under such schemes. (2)

4.6. Seeking a balance in the allocation of responsibility

The behaviour of the potential victim relevant to the offence has been categorized in this section in seven forms. To summarize the description of these forms, they are:

- conscientious prevention: the victim took all reasonable precautions against the crime.
- facilitation: the victim unintentionally eased the commission of the offence by failing to take reasonable precautions;
- invitation: the victim took a deliberate and unnecessary risk that made the commission of the offence possible;
- provocation: the victim provoked the offence;
- consent: the victim permitted the offence to be committed;
- instigation: the victim deliberately made the commission of the offence possible; and
- simulation: the victim falsely alleges that an offence has been committed against him.

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(1) On necessity, the following penal code provisions are relevant: Austria, sec. 10; Denmark, sec. 14; the Federal Republic of Germany, sec. 32 and 34; Finland, chap. 3, sec. 10; France, art. 63; the German Democratic Republic, sec. 18-19; Hungary, sec. 30; Italy, art. 54; the Netherlands, art. 40; Norway, sec. 47; Poland, art. 23; Sweden, sec. 24(4); and the RSFSR, art. 14. For Scotland, see Gordon 1978, pp. 416 ff.; for Sweden, Brinck et al, pp. 78-80. In England, the existence and extent of a defence of necessity is unclear. See Smith and Hogan, pp. 201-209 and 325-326; cf. sec. 3 of the Criminal Law Act 1967 and sec. 5(2)(b) of the Criminal Damage Act 1971.

(2) This schemes will be dealt with in section 9.3., infra. Such specific inclusions can be found in the respective legislation of Denmark (sec. 1(1)); Ireland (sec. 1 and 4); Northern Ireland (sec. 2(2)); Norway (sec. 1(1)) and the non-statutory scheme in the United Kingdom (para. 5). See Burns 1980, pp. 264-274.

Correspondingly, the various measures which can and have been implemented to diminish the role of the victim in his own victimization have been classified as follows:
- persuasion (e.g. crime prevention campaigns);
- the withholding of benefits;
- reducing the amount of restitution and compensation;
- reducing the charges or the penalty;
- releasing the alleged offender from criminal liability; and
- punishing the alleged victim.

The preceding discussion of the role of the various measures for each of the forms of participation will be summarized below, proceeding from what can be seen as the "lightest" form of victim participation, conscientious prevention, and going on to the "heaviest", simulation. The role of persuasion will not be dealt with; specific crime prevention campaigns are generally directed at lessening facilitating and inviting behaviour but at the same time the entire operation of the criminal justice system can be seen to reinforce norms against such behaviour as provocation and instigation.

If the victim conscientiously attempts to prevent crime - behaviour that may be said to accord with the idealized image of a victim - there are only a few, rare features in some legal systems that may lead to a reduction of the charges or the penalty. Factors leading to this result can be seen as fairly random, which the bonus pater familias could not reasonably have been expected to foresee.

To a considerably lesser extent than the other forms of victim participation noted below invitation and facilitation may lead to a diminishing of the criminal liability of the offender, to say nothing of to the punishment of the alleged victim. On the other hand, it would appear that the taking of deliberate and unnecessary risks (invitation) may in many cases lead to a withholding of benefits from third parties although not to a diminishing of the restitution due from the offender.

Provocation, to a lesser degree than simulation and instigation, may lead to the punishment of the precipitator. On the other hand, the above survey shows that it is a considerable factor in deciding on financial obligations, the charges or the penalty. If perpetration may lead to the excuse of self-defence it will also often lead to a lack of culpability on the part of the alleged offender.

It was noted in section 4.1. that the debate over what is known as "victim-precipitation" brought forth conflicting research results over the extent to which offences are precipitated by victims. The proportion appears to be considerable (perhaps as much as one third or even more) for homicide, but considerably less for the other offences studied (in particular, rape). The difference in the research results may be due to actual differences in the study data, but it may also be due to the difficulties in determining on

an objective basis what offences are precipitated.

The entire range of measures can also be directed at consent. Again, if the alleged victim consents to the offence he will generally not stand to obtain any financial benefits and the charges or penalty facing the offender will often be mitigated, if not waived. Punishing the alleged victim himself for consent is less common although not unknown.

The prevalence of consent cannot be seen in light of the statistics for the simple reason that since offences are generally reported by the (alleged) victim there would rarely be any motive for reporting the offence. Also, as noted in section 4.4.5., consent often eliminates the unlawful nature of the act.

Instigation is within the possible scope of application of all of the measures. If the victim deliberately made the offence possible he would presumably not be able to obtain any financial benefit either from the offender or a third party. The charges and even more probably the penalty will be mitigated or even waived if it becomes evident that the alleged victim had instigated the offence that was directed against himself. Finally, as was the case with simulated offences, the alleged victim may be subjected to punishment in certain circumstances, such as where he attempted insurance fraud.

For simulation, all the measures cited are of relevance. Since the offence is a fictitious one the alleged victim would not be able to benefit financially from the offence nor would the alleged offender be subjected to punishment. Whether or not the alleged victim would be punished for simulating an offence would depend on the action he took. If he only complained to his friends and neighbours about his alleged misfortune, for example, he would not normally incur criminal liability (unless at the same time he accused a specific person of the offence, in which case he would have committed libel). On the other hand, once he turns to the authorities he may be subject to punishment for false representations - and if he attempted to collect benefits, for example from an insurance company, the act would presumably fulfill the essential elements of (insurance) fraud.

The above summary shows that the heavier the involvement of the victim in the offence the lesser the blameworthiness of the behaviour of the offender in the eyes of the law and the greater the negative consequences to the victim.

Why should this be so? Why, for example, should a careless victim find that benefits are withheld or that the offender is sentenced to a lesser punishment? Could it not be argued that careless victims are in even greater need of the protection of society against crime?

Two different theories can be suggested for this approach. One refers to the blameworthiness of the behaviour of the (alleged) offender and the second to the blameworthiness of

the behaviour of the victim. Both theories have been influential in the criminal policy of the European countries; both may also be regarded as mirror images of one another.

The first theory holds that if a victim has participated in an offence at least to the extent of easing its commission the blameworthiness of the offender's act (and his criminal intent) is less. This is most clearly true in the case of instigation and consent, where the offence is not the same deliberate violation of the interests of another person. (1) Also in the case of precipitation and invitation, the intent on the part of the offender to commit an offence is generally less than is the case with offences in which the victim played no role. Especially in provocation, the alleged offender can often argue that it was the behaviour of the victim that made him lose his temper and commit the offence in the heat of the moment. In the case of invitation, the sudden opportunity to commit the offence may have placed the offender in such temptation that the commission of the offence is more understandable although still blameworthy.

It can, and has, been argued that the reproach of society should be directed with particular strength in order to prevent potential offenders from taking advantage of careless victims and giving in to weakness. (2) It would be in line with this approach to allot particularly severe punishment to such persons or at any rate not to reduce the charges or the penalty. The evidence of the criminal law in the various countries covered in this study would appear to indicate that such arguments have not been regarded with particular favour by the legislators. Indeed, assigning such offenders with lesser guilt accords with the theories of general and special prevention as well as with the theory of retribution in sentencing.

The second and related theory holds that if the victim in some way participated in the commission of the offence, his conduct is blameworthy and should be dealt with appropriately. The idealized image of the victim is that he is a totally innocent sufferer who was subjected to a surprise assault by the offender and did his best to prevent and resist the offence conscientiously.

The Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in dealing with the subject of the economic and social consequences of crime, approved of the general goal of a just and equitable allocation of the costs and the consequences of crime and crime control. The offender, the State and the community are readily understood as parties in this allocation.

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(1) In the case of simulation, of course, there is no "offender", at least not to the extent alleged by the victim.

(2) Bein, pp. 52-54.

The individual citizen, however, has also been assigned a responsibility for preventing crime. (1) Through a variety of measures the State attempts to ensure that the individual citizen behaves within at least reasonable limits of care. If he has shown gross carelessness or recklessness the reproach voiced by the State will be directed against him. Furthermore, the question may be raised of whether or not it should be possible for a grossly reckless or careless victim to be able to demand that society will bring to bear the heavy machinery of the criminal justice system in order to grant him protection. (2)

In addition to the two mirror theories noted above, there is a practical argument for considering victim participation in crime when deciding on what measures to adopt. By mitigating the responsibility of the offender and correspondingly raising the negative effects for the victim in accordance with the degree of his participation, the victim is shown that he must do his share in preventing crime. It has been argued that victim-oriented crime prevention, in comparison with offender-oriented prevention, is socially just, economical and humane. Informal social control is considerably more effective than formal control and can not only react more easily to variations in the individual circumstances, it can also draw from the existing social culture and structure. (3)

This common sense approach, however, can also be used to scapegoat victims in general, and thus provide a convenient response should the criminal policy of a country be criticized. The decision-makers, in effect, can protest that crimes are being committed because the potential victims are not acting in a sensible manner; they are not buying and installing the right security devices, they are being careless in how they spend their free-time, they are not helping their neighbours in controlling crime in their area. If this approach is used to justify secondary victimization of victims, the victims have received more than their share of the responsibility.

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(1) This assignment of responsibility has even found its way into constitutional law in one country. Art. 90 of the Constitution of the German Democratic Republic notes that crime prevention is a joint concern of the entire society, the state and all citizens.

(2) Anttila 1983, p. 2.

(3) Spinellis, p. 4.

5. ALTERNATIVES TO REDRESS THROUGH THE CRIMINAL JUSTICE SYSTEM

5.1. General remarks

The criminal justice system has been developed for the authoritative determination of the proper reaction to an offence. However, all offences will not necessarily be dealt with by this system. A great number of offences are never even reported to the authorities, while some offences only lead, for example, to administrative or civil proceedings.

This fact is implicit in the drafting of the United Nations Declaration. Indeed, the criminal justice system and law enforcement (with the minor exception of paragraph 16), are not specifically referred to in the body of the Declaration. This can be taken as a suggestion that both formal and informal alternatives to redress through the criminal justice system may be preferable from the point of view of society, the victim and the offender. Furthermore, the victim may have several needs that cannot be met within the present framework of the criminal justice system.

This is most clearly evident in two paragraphs, 5 and 7. Paragraph 5 states:

> "Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms."

Paragraph 7 is even more explicit in stressing alternatives:

> "Informal dispute resolution mechanisms, including mediation, arbitration, and customary or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims."

The inclusion of such a reference in a United Nations instrument is, to some extent, at odds with the earlier "social defence" orientation in international criminal policy. This earlier orientation emphasized, for example, the need for effective detection and prosecution of all offences. The implicit model for this activity was the criminal justice system of the more developed countries. The turnaround is a reflection of an acceptance of the continued strength of such customary or indigenous practices as the Pandanyat in Indonesia, or the tribal councils in areas with a weak centralized structure.

5.2. Private settlements and informal channels

The many studies of hidden criminality have shown the large extent to which offences never come to the attention of the criminal justice system. (1) Crime often remains hidden because the victim believes that the offender cannot be apprehended or brought to justice, he considers the matter too trivial, or he believes that the matter is not something that the criminal justice system would deal with.

To some extent, however, crimes remain hidden because the offender and the victim have reached some sort of settlement on the matter. This is in particular the case where the offence was committed against the background of a personal relationship between the two: for example, they may be members of the same household, or they may be neighbours or colleagues. It is also the case where the victim is an organized entity that has established its own procedures for dealing with petty offences; this may be the case, for example, with shoplifting. (2)

The role of the victim as gate-keeper of the criminal justice system is critical. It will be noted in section 6.2.2. that the overwhelming majority of offences directed at individual victims come to the attention of the police on the basis of a report from the victim or, in general, the public, and not through the activity of the police themselves. The decision of the victim as to how to proceed will effectively determine what happens to the case and who deals with it.

In deciding on how to deal with the offence without turning to the criminal justice system the victim may have several options. First, he might choose to ignore the offence entirely, either because it is "something not worth bothering about" or because ths difference in social or physical power between the two is so great that the victim is afraid to react (as may be the case in, for example, domestic violence).

The second option is to confront the offender directly and demand an apology and/or restitution. In communities with a tight social network the pressure exerted by the social environment can contribute to such an outcome. (3)

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(1) Such research has been undertaken in a number of European countries, including England and Wales, Ireland, the Netherlands and the Nordic countries.

(2) Dünkel 1985b, p. 34 refers here to the actions of companies and public transport.

(3) Research in Hungary noted that in 10 per cent of the cases studied, the matter was dealt with by "taking the law into one's own hands or private agreement". Korinek, p. 14.

The third option is to exact satisfaction through personal revenge; taking an eye for an eye. (1) Should this revenge-taking be more than just an isolated incident one may speak of vendettas or blood feuds (in which one incident leads to another) or of vigilantism (which implies some degree of organization in the community for direct and illegal action against the alleged offender).

The fourth option is to turn to a third party. This third party, if he agrees to assist in settling the dispute, may take one of three positions: that of arbitrator, mediator or conciliator.

An "arbitrator" is understood here as a person whose authority is acknowledged by both parties to the extent that they will submit to his determination. A "mediator" does not have the same position of authority but will actively seek to bring about a settlement, for example, by questioning the parties and by suggesting means of settlement. A "conciliator" has a less active role: he in effect merely brings the parties together and creates the framework for a direct settlement between the two.

A requirement for the success of such intervention by a third party is that both the victim and the offender agree to attempt an informal settlement; whether or not such agreement is not fully voluntary is another matter. Securing such compliance often presupposes the existence of social power which can be directed at the offender. (2)

The difficulties notwithstanding, many factors speak in favour of informal, private settlements. They generally provide a quick decision at low cost. The individual features of the conflict can be studied to an extent not possible for the authorities of the criminal justice system, and there is certainly considerably more discretion in deciding on the proper solution. Instead of the "all or nothing" decision that is often the only option for the criminal justice system (and in which one party is usually held to be the guilty offender, the other the innocent victim), informal settlement can seek a compromise decision that fits the unique features of the case in hand and the parties to the conflict. Finally, the parties can be directly involved in the search for the proper outcome to an extent that is not possible in formal criminal procedure.

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(1) Examples are given in Kaiser 1976, p. 167.

(2) Nader, for example, emphasizes in the collection of studies she edited on this subject, that the third party (for example, trade unions, mass media "action lines" or Better Business Bureaus) is often approached only by the victim. Under such circumstances, the third party often fails to settle the matter. However, it should be noted that Nader's remarks apply primarily to what are essentially civil conflicts, although also some criminal events were involved.

Until recently, private settlements have not generally been regarded with official favour by the criminal justice systems of Europe. Indeed, some jurisdictions have the special offence of "compounding a felony", in which the offender and the victim reach a private settlement in the matter and attempt to avoid formal criminal procedure. (1)

This felony previously existed at common law in England. It disappeared with the Criminal Law Act 1967, sec. 5(1) of which states:

> "Where a person has committed an arrestable offence, any other person who, knowing or believing that the offence or some other arrestable offence has been committed, and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by that offence, or the making of reasonable compensation for that loss or injury, shall be liable on conviction on indictment to imprisonment for not more than two years." (2)

In the attitude towards private settlements, the Socialist countries of Europe have formed a significant exception. Several of these countries, including Bulgaria, the German Democratic Republic, Hungary, Poland, Romania, the Union of Soviet Socialist Republics and Yugoslavia, have experimented with various forms of social courts. (3) Presently, such auxiliary organs have an appreciable role in at least the German Democratic Republic and the Union of Soviet Socialist Republics. (4)

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(1) This offence is not recognized by any of the core countries in this study. However, see, for example, sec. 123 of the Penal Code of Cyprus.

(2) See Smith and Hogan, pp. 711-715.

(3) See, for example, Andrejew, pp. 146-149; Weigend 1985, section IV4b; Waltos and Skupinski, passim; Horvatic, passim.

(4) In the opinion of Schultze-Willebrand, the social courts do not play any role in Czechoslovakia, Hungary, Poland or Yugoslavia (Schultze-Willebrand, p. 383). However, see Horvatic and Cok on the social courts in Yugoslavia, and Waltos and Skupiński on the situation in Poland. Horvatic, for example (pp. 1059 and 1074) notes that 1/4 of all private complaint cases come before the Yugoslavian conciliation councils (Schiedskommission), and that 60 % of these cases are successfully resolved. As for Hungary, since 1975 the social courts have not been permitted to decide on the response to criminal offences or administrative infractions. See Bárd, pp. 5-7.

In comparing the social courts with the mediation and conciliation bodies that have been receiving an increasing amount of attention in Western Europe and elsewhere, it should be noted that the social courts have been established primarily in order to increase lay participation in the maintenance of order and discipline. The main rationale for their establishment has thus not been to respond to criticism calling for a more humane and effective alternative to the criminal justice system.

A second distinctive feature is that the social courts have an officially recognized position. They are, for example, based on law. (1) The position of the social courts of the German Democratic Republic is even stronger. Instead of being limited to voluntary jurisdiction, the social courts in the German Democratic Republic have constitutional powers to dispense justice. (2)

The traditions with social courts are the longest in the Union of Soviet Socialist Republics. In 1977, legislation was passed in order to revitalize the social courts, for example through broadening their jurisdiction. (3) On the basis of the legislation, social courts are to be established in all collectives with at least fifty members, and may be established for smaller collectives. They concern themselves especially with violations of order and discipline that do not present so great a social danger to the community that they should be dealt with by the formal courts. Thus, they deal with, for example, alcoholism, disputes between relatives and neighbours, small-scale theft, petty disputes over property, violations of labour discipline, and various petty offences by first offenders. (4)

The measures of social pressure available to the social courts in the Union of Soviet Socialist Republics include requiring a public apology to the victim or the collective, a comradely warning, social censure, an unpublished social reprimand, a published social reprimand, demotion, compensa-

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(1) See the Social Courts of the German Democratic Republic Act of 25 March, 1982; for Poland, the Social Courts Act of 30 March, 1965; and for the Union of Soviet Socialist Republics, see for example the RSFSR Statute on Comrades Courts, no. 12, item 254.

(2) Art. 92 of the Constitution of the German Democratic Republic states that the social courts "exercise the dispensation of justice" ("Rechtsprechung ausüben").

(3) See e.g. Butler, pp. 326-328. This article is followed by an English translation of the statute, pp. 332-343.

(4) See art. 51 of the RSFSR Penal Code and art. 7 of the RSFSR Code of Criminal Procedure. See also Encyclopedia, p. 156.

tion, deprivation of certain material advantages and, for specified offences, a fine of up to 50 roubles. (1)

The procedure is fairly informal, with all interested parties (including members of the audience, should they have questions or comments) taking part. The immediate parties are informed of their rights and role and the conflict is considered together with the underlying circumstances. Although the decision (for example, on compensation) is not immediately enforceable on the basis of the judgment of the social court, non-payment may lead to the matter be taken over by a people's court.

In the German Democratic Republic, on the basis of the 1982 act on social courts, the scope and variety of sanctions available to the social courts correspond on a general level (although not in all details) to those in the Union of Soviet Socialist Republics. The sanctions include, e.g., compensation, admonition and a small fine. A terminological distinction is made between the "conflict commissions" which operate at places of work and the "arbitration commissions" which operate in communities. (2)

In Poland and Yugoslavia the jurisdiction of the social courts is totally voluntary. In Yugoslavia the lower court judge may refer private complaint cases to the social court for consideration. Such a referral is obligatory for insult and petty assault. If the social court notifies the lower court judge within three months that conciliation has been achieved the case is formally closed. (3) Similarly, in Poland the chairman of the court may, if he considers this advisable, refer a case to a social court to conduct conciliatory proceedings. Such a referral is mandatory for private prosecution cases. After such proceedings, and regardless of its results, the case is returned to the state's court. (4)

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(1) Butler, p. 326.

(2) Sec. 4 and 5 of the Social Courts of the German Democratic Republic Act, 25 March 1982. See Kaiser, 1976, pp. 165-167; Weigend 1985, sec. IV4b; Bárd, p. 6. In the literature, the "arbitration commissions" have also been referred to in English as "reconciliation commissions" or "mediation commissions".

(3) Art. 445 of the Yugoslavian Code of Criminal Procedure. A condition for referring a case to conciliation is that the parties live in the same area or work for the same organisation, and this area or organisation has a conciliation council. See Cok and Horvatic. According to art. 407 of the same Code, the lower court judge may himself attempt conciliation in private complaint cases. Art. 109(5) of the RSFSR Code of Criminal Procedure is somewhat similar.

(4) Art. 436(1) and 436(2) of the Polish Code of Criminal Procedure.

Presently there is a clear general trend also among Western European countries towards the development of various forms of conciliation and mediation procedures. These may take place totally outside of the criminal justice system, they may take place in cooperation with the criminal justice system or they may have a formalized role within the criminal justice system.

In both Western Europe and the Socialist countries the police have always been instrumental in informal dispute resolution. This has been the case regardless of whether or not the police have an obligation to deal with suspected offences in a formal manner. (1) Studies of the role of the police in domestic disturbance calls underline this use of discretion. (2) There is now an increasing number of conciliation and mediation projects in which the police are also involved. (3)

An example of one of the early experiments in mediation with a link to the criminal justice system is still in force in France, although on a reduced level. A decree of 20 March 1978 gave the French courts the possibility of appointing mediators for civil cases and civil issues in criminal cases. The system was heavily criticised for a variety of reasons, such as the disproportional use of retired upper-class males as mediators, and the fact that the settlement could not be verified in court. Its use was reduced following the change in Government in 1981. A new model developed in the Nancy court and copied by some fifteen other courts provides the judge with the possibility of diverting some civil cases to a suppliant d'juge for mediation. (4)

In Paris, the chief prosecutor has appointed one prosecutor to work together with a victim assistance group. Using the opportunity principle in prosecution, cases that otherwise would be prosecuted can be diverted for an investigation of the possibility of restitution and conciliation. (5)

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(1) For example, countries such as Finland that adhere to the legality principle place an obligation on policemen to report all suspected offences to their superiors. The strictness of this obligation was not relaxed in Finland until 1966 (in very petty cases), but it is clear that even previously, policemen used discretion in deciding on the proper reaction to offences in the light of the circumstances. See, in particular, Lahti 1974.

(2) See e.g. Reiss, passim.

(3) Such projects have been started in Belgium and England.

(4) de Liege, interview, 21 July 1986.

(5) de Liege, interview, 21 July 1986. Somewhat different experiments are also being carried out in Bordeaux, St. Etienne, Strasbourg and Valence.

Norway is carrying out a broad experiment with conflict councils, where a publicly appointed mediator attempts to get the parties to settle the matter. If an agreement is reached the prosecutor may drop the case or recommend to the court that the offender be given the benefit of a mitigation in punishment. (1)

Finland is an example of a country with a strong emphasis on the legality principle which has, nonetheless, an ongoing experiment with mediation. The project, begun in 1983, involves a residential area near the capital of Helsinki. Mediation is attempted by volunteers who are local residents of the community. The project is being carried out with the assistance of an advisory board with representatives from, inter alia, the local court, the police, the city and social workers. The mediation is oriented towards the development of a written agreement between the victim and the offender. Because of the legality principle, most criminal cases (other than the complainant offences) will still come before the court. It is noteworthy that the agreements have been submitted in a few cases to the court in connection with prosecution, and the court has in effect incorporated the agreement on damages into the judgment. (2)

The courts themselves have also experimented with forms of dispute resolution in some countries. As noted above, lower court judges in Poland and Yugoslavia are empowered to seek conciliation. Similarly, in Portugal, as long as the harm done is considered slight, the judge is empowered to attempt conciliation. Austria has a project involving victim-offender conciliation in two juvenile courts. (3)

A more formal role in conciliation and mediation exists in the Federal Republic of Germany in the form of the Schiedsmann ("arbitrator" or "official referee"). The Schiedsmann is a lay person nominated by the local council and appointed by the director of the court of first instance for a five-year term. Before private complaints can be brought to court the Schiedsmann must invite the parties to settle the matter. According to studies of this institution it has successfully filtered out one half of the cases submitted to it over a fifteen year period. (4)

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(1) Stangeland, passim; NOU, pp. 219-223.

(2) See Iivari, which contains an English summary on pp. 104-107. The Finnish and Norwegian experiments have formed the model for an experimental programme in Malmö, Sweden; see Falkner, p. 11.

(3) Furthermore, successful mediation may be taken into consideration in deciding on court dismissal in Denmark, the Federal Republic of Germany, Norway and the United Kingdom, although this option is seldom used. See Dünkel 1985a, p. 14; United Nations Report, para. 59.

(4) Sec. 380 of the Code of Criminal Procedure of the Federal Republic of Germany. Weigend 1985, sec. IV6a.

The extent to which both formal and informal mediation and conciliation schemes are preferable to the criminal justice system is a matter of considerable discussion in Europe. The discussion has been fueled primarily by the ideas of McClintock, Hulsman and Christie. (1)

A background to this discussion can be drawn from the analysis by Galtung of rights and economic development. (2) The first stage in criminal policy was that of classical criminal law. This held that the criminal justice system was an impartial arbitrator that should be called into play only when the law has been violated. Citizens were considered equal in their ability to obey the law, and punishment should be meted out on an equal and proportional basis. The assumption was that any violation of the law was a manifestation of the free choice of the offender to break the law and should be punished accordingly.

The second stage was that of treatment optimism. Crime came to be regarded as a curable illness. If the reason for crime could be found, it could be eliminated. Consequently, offenders should not be punished, but treated. What is more, it was argued that people had different capacities to obey the law. Those who grew in underprivileged circumstances, who were poor, undereducated, unemployed and who perhaps abused alcohol and narcotics, people who had difficulties in their interpersonal relationships and so on, should be assisted by the State - by force if necessary.

The proponents of the treatment orientation were instrumental in decrying the strictness and philosophical weaknesses of classical criminal law. They, in turn, have been subjected to increasing criticism since the 1960s, especially in the Nordic countries. (3) The criticism involved reference to, among others, the following factors:
- the technical and philosophical difficulties in predicting who would become an offender;
- the failure of any and all attempts to prevent recidivism on a wider scale for an appreciable number of offences;

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(1) See, for example, Hulsman 1977 and 1985 and Christie 1978 and 1981. Galtung and Aubert have considered the same issues from the point of view of legal regulation in general.

(2) Galtung argued (p. 2) that during the first stage economic growth was spearheaded by an entrepreneurial class unfettered by state control or initiative. During the next stage economic growth was controlled and initiated by a state bureaucracy. Galtung envisages a third stage where the basis is autonomy of the local level and smaller economic cycles.

(3) Official or semi-official committee reports published in Denmark, Finland, Norway and Sweden almost simultaneously at the end of the 1970s clearly showed how this disillusionment had permeated the official circles in criminal policy.

- the fact that recidivism is most likely for petty offences and least likely for serious offences, thus raising ethical questions about who should be treated;
- the fact that studies of hidden criminality have shown that the commission of offences is very common, and thus not necessarily a sign of a deviant personality;
- the subjective nature of decisions on who should be treated, and on when the treatment has been successful; and
- the fact that from the point of view of the subject of the measures, coercive treatment can be as severe (or even more severe) than measures meted out as punishment.

While, for example, the Nordic countries have responded to this criticism by seeking means of strengthening the basic principles of equality and proportionality in punishment as well as a general mitigation of the severity of the criminal justice system, the proponents of community-oriented criminal justice point out the one feature that unites both classical criminal law and treatment optimism. This is the belief that the decision on the proper reaction should be made by the State. McClintock, Hulsman and Christie argue that, instead, the decision should be left as far as possible to the parties immediately involved (the offender and his victim) and to the local community in which they interact.

Their argumentation (1) in favour of such a community-based approach to crime rests to a large degree on the view that this would be more in the interests of the community itself and the State. However, there is also a considerable victimological point of view underlying their argumentation, a point of view with great relevance to the status of the victim.

The argument that is perhaps repeated most often is that the formal criminal justice system does not and cannot take the special interests of the victim into consideration. The State has its own interests in preventing crime and in allocating the blame for offences and these may override the interests of the victim. Consequently, not only may the victim often feel that he has not been allowed a role in reaching a decision regarding "his" offence; he may also find at the end of the process that his needs for financial compensation and other redress have not been met. The process itself may be expensive for him in time, money and perhaps as a source of frustration.

Another argument in favour of private settlements is that they can avoid the legal formalism that typifies criminal procedure. The law works on the basis of rules. In order for the law to be applied, various situations (e.g. suspected crimes) must be classified in the black-and-white language of these rules. The taking of the property of another person either is or is not theft; the causing of injury to another person either is or is not assault. Consequently, a

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(1) Perhaps the most eloquent and well known presentation of these views is Christie 1978.

person either is or is not guilty of an offence. This analysis, again because of the special requirements of law, must be based on certain isolated facts that are the subject of the presentation of evidence in the trial. It is only rarely that the court may (at least formally) take a more far-ranging view of the broad circumstances underlying the alleged offence, on the side of both the victim and the offender.

Private settlements, on the other hand, can be made on broader grounds and involve the victim to a greater degree in the analysis of the case. This is particularly important where the alleged offender and victim are acquaintances or relatives who are in constant contact with one another. Bringing the matter to the formal attention of the criminal justice authorities may ultimately make things more difficult for both parties by disrupting their relationship.

The arguments in favour of private settlements are, indeed, important ones. If this approach can provide a more lasting solution to conflicts than the formal criminal justice system, it is in the interests not only of the parties immediately involved, but also of the local community and the State. Even so, several reservations may be made.

One reservation has to do with the actual amount of public interest in private settlements. The attempts in the Socialist countries to establish social courts have not all succeeded. Hungary, for example, abolished the use of these courts in criminal matters in 1975 after the lack of interest of the public at large led to a situation in which the social courts were rarely used. The Western European countries that have had some experiments with conciliation and mediation have also had difficulties in finding suitable cases to deal with; for many projects, the number of cases is only a few dozen a year. (1) There is thus a high cost per individual case in time and money; this cost may offset the benefits derived from the few cases successfully resolved.

Another reservation has to do with the extent to which the individualized decisions resulting from private settlement are in accordance with the interests of the State in achieving equality and proportionality in the administration of criminal justice. (2)

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(1) The Victim-Offender Restitution Projects (VORPS) in the United States have often come up against the reluctance of many victims to meet the offender. See, e.g., Marshall, passim. Victim-offender mediation experiments have been carried out in Austria, Belgium, the Federal Republic of Germany, Finland, France, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom (Dünkel 1985a, p. 20; United Nations Report, para. 57).

(2) A further reason for abolishing the use of social courts for criminal cases in Hungary was that they violated the principle of equality, as they had only been established in the larger State enterprises.

It may be argued that it is unjust to allow one offender simply to apologize for his offence to his victim, while another offender must pay a fine for a similar offence. This argument is offset to some extent by the fact that private settlements usually deal with petty cases, where the possible punishment is so slight that the inequity between like cases is quite small.

The inequity, however, need not be felt by a person subjected to the punishment meted out by the criminal justice system. It may also be felt by the person subjected to the social pressure of the private settlement process. If a mechanism is constructed whereby most conflicts of a certain type are dealt with by community boards or the like the parties to the conflict may not be able to rely on the legal safeguards developed over the centuries. For example, a defendant with weak social power or social skills may find himself at a loss in presenting his version of the events if the persons deciding the conflict side with the victim, who may have greater social power or skills. Such a situation may easily arise if the defendant is a juvenile, as is often the case in the Western European experiments.

Yet another reservation is attached to the authority-centred nature of many of the present experiments with conciliation. The selection of cases depends to a large extent on how the authorities use their powers to decide on prosecution or other measures. The selection and outcome of the cases may thus depend more on administrative convenience than on an interest in the outcome, in the settlement itself.

Such reservations notwithstanding, the trend towards private settlements will in many cases provide an alternative form of conflict resolution that can be of more assistance to the victim than can the criminal justice system.

5.3. Insurance

Insurance coverage has often been suggested as an alternative or supplement to restitution from the offender or State compensation. (1) Among its benefits are the rapidness and sure way in which compensation can be provided, the fact that the victim need not identify the offender, the fact that it can be adjusted to the needs of the victim, its independence from political precedent, its simplicity, the fact that the premium can be calculated in accordance with the risk, the absence of the trauma of confrontation with the offender, and the absence of the element of private vengeance. Moreover, the schemes can be designed to cover intangible losses, which are more rarely covered by social insurance schemes. On the other hand, insurance schemes do not involve a deterrent element and may thus fit poorly into the over-all criminal policy. (2)

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(1) See, e.g., Karmen, pp. 200-204. On the role of insurance in crime prevention, see Litton.

(2) Mueller and Cooper; Sethna.

The fundamental principle in insurance is that the potential victim pays a premium in exchange for which the insurer guarantees him a payment to cover specific losses and expenses in the case of certain events. The events insured against are generally those that can be predicted to take place in society (e.g., arson, theft) although not necessarily with the policyholder as the victim.

The insurer can be either a private or a public company. At present the most widespread model is private insurance. The risk can be either property loss (as in the case of arson, burglary and theft insurance) or injury (as in the case of accident insurance). In many countries a majority of homeowners and car owners carry insurance. (1) For private enterprises insurance against theft or fire (e.g. arson) may be a necessary business cost.

Since private companies operate in pursuit of a profit there is the possibility that the required premiums may be excessive for some segments of the population. (2) Where the risk of injury or loss falls on persons in certain professions or occupations, the high premiums can be offset by taking out a group insurance policy or by the employer taking out coverage for those of his employees in certain high-risk duties (such as coach and lorry drivers).

Voluntary or mandatory State insurance schemes are a second alternative in distributing the risk and the cost. (3)

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(1) In Sweden, for example, 90 % of homeowners have comprehensive householder's insurance. Council of Europe 1978, p. 20.

(2) Karmen notes, with reference to the situation in the United States, that higher-income people are more likely to buy crime insurance than lower-income people (p. 201).

The problems with violence and terrorism have led to a unique situation in Northern Ireland. The high risk of injury and property loss led to prohibitively high premiums. With the enactment of the Criminal Damages (Compensation) (N.I.) Order in 1977 the insurance companies were freed of any liability in cases that came within the scope of the Order. The compensation for damage caused by terrorism thus ceased to be a private responsibility of the insurance companies, and became a public responsibility of the State. See Greer and Mitchell 1982, p. 28.

(3) Social insurance is dealt with in brief in section 5.6. A recent example of a national mandatory insurance scheme is the Finnish Patient Insurance Act of 25 July 1986, by which all injuries incurred as a result of health and medical care are covered, regardless of whether or not a (negligent) offence was involved.

State insurance schemes are rarely specifically designed to cover crime risks. (1) Instead, they generally cover losses or injuries incurred in certain risky fields of activity, regardless of the cause of this loss or injury. Perhaps the most notable example is provided by mandatory traffic insurance schemes, which are to be found in most, if not all, European countries. Here the insurance covers risks caused not only by traffic offences per se but also by any traffic accident. Should a party to a traffic accident not be covered by such insurance the State in question has generally established a national fund.

It is, of course, in the interests of the insurer to see that the risk of loss is minimized. For this reason the terms for the granting of insurance policies may be quite stringent. As was noted in section 4.4.3. the normal approach to urging potential policy holders to undertake preventive measures is by offering both advice and the incentive of a reduction of premiums if certain measures are followed. The insurer may also refuse insurance coverage until certain standards of protection are met.

Even if an insurance policy is granted, however, the policyholder may discover ex post facto that he should have undertaken certain crime prevention measures. For example, his claims for compensation for personal injury may be denied on the grounds that he had been exceptionally careless or reckless; claims for stolen property may be denied because the victim had not used the locks or other target hardening measures specified in the insurance policy.

Among other problems with insurance coverage are the assessment of the extent of the loss (especially for unique items) and possible difficulties in having, e.g., lost wages and psychological counselling covered.

Furthermore, the cost of crime is so high and the risk of loss so unevenly spread that some differential in the premiums would remain. Even if the premiums were made as low and competitive as possible, many would try to (or, because of a lack of resources, would be forced to) do without full coverage or in some cases without any coverage at all. (2)

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(1) The United States Department of Housing and Urban Development established a crime insurance programme for businesses and individuals in high crime areas (see Chappel, p. 302). The original 1968 scheme involved the reinsuring of private companies against property losses arising from civil disorders. In 1970, Congress amended the Act to permit the Federal Government to offer "affordable" burglary and robbery insurance to those in high-risk areas (Karmen, p. 302).

(2) In a Dutch study of 106 victims of violent acts and 253 victims of property offences, Timmerman (p. 219) found that only some 10 per cent received full compensation on the basis of insurance.

One group with insufficient coverage would presumably be the poor. Poor people, in turn, often live in high-risk crime areas and the effects of crime may be more noticeable than for persons who can afford a minor loss. Relying on private insurance schemes alone may thus mean continued inequity in the protection that the State provides its citizens. (1)

5.4. Administrative proceedings

The administrative organs of government may be called upon to assist the victim of crime in three respects. The victim may turn to a specific agency in order to obtain the services that it provides for the public at large (social assistance) or the victim may request that the agency review a decision of a lower authority subject to the supervision of the agency in question. (2) A third, and important area where administration proceedings may be called into play is in the control of certain special fields; for example, much of what is termed "economic crime" is dealt with by administrative agencies and not by the courts.

The offender in such cases can be a private citizen, a corporate body, or a part of the administration itself. The measures available to the victim in these cases are somewhat different. (3)

Where the offender is a person or enterprise outside the administration, the purpose of the administrative provisions is to ensure that the legislation governing the field is observed. Examples may be found in the areas of labour safety, business practice, consumer protection, and health. In many cases the victim will be satisfied if the administrative machinery orders the offender to provide compensation for the damage and where possible restore the status quo. The victim will not necessarily demand that the offender be punished through criminal proceedings.

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(1) Mayhew, in summarizing the research on the effects of crime on individual victims (p. 51) states that "it is probably the case that the material, physical and emotional effects of crime strike hardest at disadvantaged groups."

(2) The question of social assistance will be dealt with in section 5.6. As was noted in section 1.4.2., a "victim" is here understood as the person harmed by an act or omission in violation of the criminal law operative within the jurisdiction in question. The special case of "admninistrative offences" ("Ordnungswidrigkeiten") will not be dealt with separately in this study.

(3) On the privileged position of public agencies as victims of crime, and on their ability to use the administrative machinery of the State, see esp. Nelson 1985b, passim.

The shift from criminal proceedings to administrative proceedings in respect of economic crime in particular has been justified by, for example, the need for administrative expertise and discretion in the application of norms on complex undertakings, and on the need to seek a compliance orientation rather than a punishment orientation. Economic activity is not as susceptible to control through criminalization as, for example, traffic and narcotics. There are only a few examples of economic activity that States have found to be so dangerous that these can and should be prohibited totally, under any circumstances. Normally, it is only when economic activity exceeds certain limits, or takes place under certain circumstances, that it is defined as criminal. To take an example from the area of consumer protection, advertising as such is generally legal. It is only when advertising exceeds certain limits - limits that must be defined more or less arbitrarily - that it may be regarded as criminal.

On the surface, this shift to administrative proceedings may be a simple one. The criminal proceedings are replaced by administrative proceedings, and the penal sanction is replaced by an administrative sanction. It may also be argued that this shift favours both victims and offenders. The emphasis of administration on compliance with regulations and on negotiation in the case of violations (as opposed to the emphasis in the criminal justice system to punishment of offences) would seem to lead towards more informal, open proceedings.

However, the shift may in fact lead to a more rigid and punitive system. Using administrative proceedings instead of criminal proceedings may mean that different rules of evidence are applied, and the burden of proof may suddenly shift to the enterprise. It may be considered enough that the authorities demonstrate that a violation exists; if so, then they do not need to demonstrate intention or negligence, as would have to be done under due process guarantees in criminal proceedings - although, of course, due process guarantees may also be applied in full measure in administrative proceedings.

From the point of view of the victim, administrative proceedings may be even more unfamiliar than criminal proceedings, and the emphasis on negotiation between the agency and the alleged violator may bypass the interests of the victim.

On the other hand, the sanctions offered through administrative proceedings may be more attractive to the victim than the standard sanctions of imprisonment and fines offered by the criminal courts. The measures may include warnings, mandatory recall of defective products, remedial orders (e.g., compensation, divestiture, the repair of environmental damage, corrective advertisements, the reinstatement of unlawfully discharged employees), cease-and-desist orders and consent agreements. (1)

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(1) See Clinard and Yeager, pp. 83-91.

Finally, administrative proceedings offer many countries in Europe a way of establishing corporate responsibility, something which may not be possible under criminal law. Many countries of Europe place the determination of personal guilt as a prerequisite for punishability. In administrative proceedings, on the other hand, the sanctions can generally be imposed on corporate bodies.

5.5. Civil proceedings

The purpose of civil proceedings is different from that of criminal proceedings in that the procedure is not oriented towards the punishment of the offender but, largely, towards the settlement of disputes between individuals. In connection with criminal cases, civil proceedings may be invoked primarily in order to obtain restitution for the damages resulting from crime. However, an area that is receiving increasing interest is the "civilization" of conflicts - the redefinition of conflicts as civil rather than as criminal.

The extent to which the civil courts are used to collect restitution varies, primarily, of course, according to whether or not the presentation of civil claims is possible in criminal court. Combining civil and criminal proceedings has several advantages for the victim. Above all, he need not invoke what is often slow and costly civil litigation. Furthermore, the presentation of evidence regarding the extent of the loss (and also regarding responsibility) is facilitated if the public prosecutor will attend to this part of the case. (1)

The possibilities of presenting civil claims in criminal proceedings will be dealt with in section 7.2. At this stage it may be noted that such claims may be presented in criminal proceedings in almost all countries of Europe. In England and Wales, the Republic of Ireland, Northern Ireland and Scotland, however, claims for restitution are ordinarily to be presented only in the civil courts, not in connection with the criminal case. Even so, the courts of England and Wales have the right to order the accused who has been found guilty of an offence to compensate the victim even though the victim has not presented a claim.

It was noted above that the combining of civil and criminal actions often benefits the victim. However, in some circumstances the victim may find civil litigation preferable. The relationships between the victim and the offender might be such that victim would not wish to demand punishment in court. Also, in general the rules of evidence, and above all the standard of proof required, in civil proceedings are

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(1) However, as noted below, there may be a difference in the degree of proof required. In criminal procedure the fact that the conviction generally leads to punishment requires a heavy burden of proof. In civil proceedings, on the other hand, there is not the same demand for "proof beyond a reasonable doubt"; a preponderance of evidence ordinarily suffices.

not as demanding as in criminal proceedings. There may even be special provisions in this respect which make civil proceedings preferable from the point of view of the victim. An example would be the wide use of strict liability in civil law. (1)

Research has indicated that the victim in general is not necessarily punitively oriented and does not always consider that punishment is called for. (2) In such cases the victim might prefer civil proceedings. It may also be noted that the fact that litigation on restitution can be halted in civil courts, but criminal actions normally cannot be halted by the complainant, may be a factor pressuring the offender to work for a settlement with the victim within the scope of civil law. He may calculate that in this way, he may prevent the victim from taking the case to criminal court, which may order not only an adverse settlement with the victim, but also punishment.

In the majority of countries with a Roman law tradition (including Austria, Belgium, France, Hungary, Italy, the Netherlands, Poland, Romania, Spain, the Union of Soviet Socialist Republics and Yugoslavia), the consideration of a separately filed civil claim will wait until the decision of the criminal court, which establishes res judicata in respect of the reponsibility of the offender for the act. This is not the case in the Nordic countries, the Federal Republic of Germany, the German Democratic Republic, Greece, the Republic of Ireland, Scotland, Switzerland and the United Kingdom (3), where a decision in one is not binding on the other.

The interest in making more use of civil proceedings where criminal proceedings were used before is perhaps most evi-

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(1) For example, under art. 1384 of the French Civil Code, the victim of damage caused by a motorist may obtain a court judgment without being obliged to demonstrate that the motorist was at fault.

(2) See Shapland et al and Mayhew, p. 53 (England); Hes, p. 2 and Fiselier, p. 269 and 272 (the Netherlands); Sessar et al (the Federal Republic of Germany). See also Bussman, p. 3. Walker, however, cautions (p. 72) that the studies should not be used as the basis for any generalizations about the vindictiveness of victims.

(3) In England, the Hollington v. Hewthorn case ((1943)K.B.587 (C.A.)) established that a judgment in a criminal case could not be relied upon in a subsequent civil action. This remained the law until the passing of the Civil Evidence Act in 1968 (sec. 11 of the Act; see Sebba, p. 233). Cf., for Switzerland, art. 53 of the Code of Obligations.

dent in the Netherlands. (1) An example of this development is in the case of sexual violence between ex-partners. Instead of (or possibly in addition to) seeking punishment of the offender the victim may turn to the civil courts to seek an injunction prohibiting the offender from entering an area surrounding the residence of the victim. (2) Thus, the civil proceedings may be directed at issues other than restitution.

The arguments against the criminal justice approach and for the civil justice approach are, of course, much the same as noted in section 5.1. in respect of private settlements. One reason for favouring civil litigation over private settlement is the possibility of obtaining official sanction for the decision. If, for example, the respondent fails to adhere to an injunction given by the civil court it may generally be enforced through a fine or the intervention of the police. Furthermore, the more active role of the plaintiff in civil proceedings, as compared to the role of a complainant in criminal proceedings, may in itself assure plaintiffs that their personal feelings will be considered and that the State will legitimize their demands at least to the extent of granting them a hearing.

5.6. Social assistance

5.6.1. General remarks

The United Nations Declaration deals with social assistance in four paragraphs, 14-17.

> "14. Victims should receive the necessary material, medical, psychological, and social assistance through governmental, voluntary, community-based, and indigenous means.
>
> 15. Victims should be informed of the availability of health and social services and other relevant assistance, and be readily afforded access to them.
>
> 16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.
>
> 17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of

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(1) The Erasmus University of Rotterdam began, in March of 1984, a project called "The criminal law system viewed from an abolitionist perspective". One of the major arguments of the abolitionist school is that criminal proceedings can and should be replaced by civil or informal proceedings. See e.g. Hulsman 1977; Hes.

(3) Hes (p. 1) notes that this measure is also being used by some victims of assault or rape.

such factors as those mentioned in paragraph 3 above." (NB. paragraph 3 is the non-discrimination paragraph.)

Paragraph 14 refers to "necessary" services. Before dealing with the availability of services, some comments are called for on the extent to which any services are necessary.

For most victims of crime there is little or no financial damage or physical injury resulting from the offence itself. The intangible effects (as, for example, feelings of having been violated, an increased sense of insecurity and fear) are harder to assess. A minority of crime victims do suffer appreciable loss or injury. In absolute terms this group is a sizeable one. (1)

The array of forms of assistance that the victims of crime may need is considerable. Some of the forms are the following: (2)
- crisis intervention (stopping an ongoing offence or preventing immediate further victimization);
- emergency services (medical, financial, housing or shelter, repair work, counselling);
- home security and crime prevention advice;
- assistance in practical arrangements, such as in contacting the victim's employer, filing for claims, and replacing lost documents; and
- assistance in legal arrangements, including information on the status of the case.

The degree to which a victim will need such services varies considerably, depending not only on the offence but also on the circumstances of the victim. A burglary, for example, may be a minor matter to a young person who is able to adjust to the loss and repair any damage, while an elderly victim of the same offence may need several of the above services. Mayhew suggests that the need among victims for professional assistance may be overstated, while the need for the close support and reassurance of family and friends appears to be important. (3)

The last item in the list, assistance in legal arrangements, is important not only in offsetting any harm resulting from the offence but also in preventing what is known as "secondary victimization", the harm resulting from an inappropriate response to the offence by the community (and in particular, by the criminal justice system). Research indicates that one of the strongest needs of victims is for reassurance that what they suffered was wrong and blameworthy, and information on what is being done about the matter. (4)

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(1) An excellent summary of the research on the effects of crime, carried out in Europe and elsewhere, has been provided by Mayhew; see esp. pp. 50-54.

(2) See, for example, Center, passim; Dussich 1976, passim.

(3) Mayhew, p. 52.

(4) Mayhew, pp. 52-53 and 56; Shapland et al.

5.6.2. Funding, organization and functions

To meet the basic medical and social needs of its citizens (regardless of the source of the need) many European countries have adopted national public health systems according to which any citizen is provided medical care and treatment at a nominal cost or even at no cost. Cost-free health service is available, for example, in some Socialist countries, such as Czechoslovakia, the German Democratic Republic, Hungary and Poland, as well as in some Western European countries, such as the United Kingdom. Several other European countries provide heavily subsidized health services. The social welfare system, in turn, provides financial and other assistance, and counselling to those with a variety of problems.

The development of these medical and social services is a matter for the general social policy of the country. Improvements in their quality and accessibility will, of course, benefit both victims of crime and victims of other forms of suffering.

There remain a number of problems which may be especially acute for the victims of crime and the abuse of power. (1) These include the need for practical information on what to do as well as emotional support in recovering from the victimization.

As envisaged by paragraph 14 of the United Nations Declaration, the status of such services can be governmental, voluntary, community-based or indigenous. The organization of these services raises several problems.

One problem concerns the divergence in functions. Assisting the victim in his recovery is certainly a worthwhile goal in itself. However, such a benevolent purpose is rarely sufficient motivation for allocating time, energy and money for victim services. Those providing the services generally have their own image of what services are needed and why.

A distinction can be made between the primary and the secondary functions of services. The primary function, broadly speaking, is to assist the victim directly. The secondary functions include those of assisting the police, prosecutors and the courts. Victim-specific services serve such secondary functions by, e.g., encouraging the reporting of offences, assisting in crime prevention, relieving the police of certain victim-connected duties, and insuring the careful

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(1) Šeparović (p. 170) notes the distinction between services specifically for crime victims, and services to the general public. See in general Separovic, pp. 169-180; Dussich 1976.

processing of evidence and information obtained from victims. (1)

Should the burden of providing these services be laid on the police, the necessity of combining the operational police functions with that of assisting the victim may indeed lead to functional conflict. From the point of view of the victim what is important is obtaining help and avoiding further victimization. From the point of view of the police what is important is bringing the offender to justice. The pressure of police duties is such that, good will and the importance of good police-public relations notwithstanding, the police may be interested in the victim only to the extent that he provides information required for identifying and apprehending the offender. The functional conflicts may lead to the victim shunning contact and therefore at the same time being left outside of the scope of any services provided by the police. (2)

The problem is a real one, especially when it is considered that in many respects the police are the ideal agency for the location of victim-specific services. It is usually the police who are the first to be in contact with the victim and thus they can provide services at a very early stage to a great number of victims.

There are a number of private organizations interested in providing services. Notable European examples are the Victim Support Schemes in the United Kingdom (3) and the Netherlands, and the Weisser Ring in the Federal Republic of Germany, Austria and Switzerland. France has a large number of local movements assisted financially and to some degree coordinated by the Ministry of Justice.

Considering the wide range of services that a victim may need, as well as the difficulties involved in too disparate an approach in providing services, some observors have suggested the establishment of a comprehensive victim-support centre that would work with individual victims and promote training, sensitization to the needs of victims, and im-

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(1) Dussich 1976, pp. 472-473. Weigend 1983 distinguishes between victim/witness assistance programmes and victim service programmes. The latter concentrate on assisting the victim in his interaction with the criminal justice system, and what are here referred to as the secondary functions of services is dominant. In victim service programmes, the primary purpose is to aid the victim in his recovery.

(2) See e.g. Mayhew, p. 59 and Shapland et al, p. 115. For examples of negative experiences with a police-based victim-support scheme, see Friedman, esp. pp. 487-488.

(3) For an analysis of voluntary victim services in England, see Gill and Mawby. See also Maguire and Corbett.

provements in services. (1) Such a scheme might also incorporate elements of an "outreach" programme, which would actively seek those in need of victim services but who for a variety of reasons will not or cannot turn to the authorities or even community agencies for help.

The Government of France has established a special office in connection with the Ministry of Justice to deal with victims' matters. The office coordinates activities in support of victims, and in 1982 published a special "Guide des droits de la victimes". (2) In addition, many courthouses in France have a special office for victims.

5.6.3. Specialized and crisis services

Paragraph 17 of the United Nations Declaration calls for attention to those with special needs because of the nature of the harm inflicted or because of certain characteristics of the victim. One element that the drafters clearly had in mind - and which was explicitly stated in an earlier draft of the Declaration (3) - was the special needs of the victims of sexual assault and domestic violence. Both were the subject of early and intensive victimological interest; both gave rise at an early stage to practical action.

Crisis services for victims of domestic violence (especially so-called shelters) have been established in some countries. The initiator of this was England, which saw the first shelters for battered women in 1971. From there the idea spread at least to Austria, Belgium, Czechoslovakia, Denmark, the Federal Republic of Germany, Finland, France, Ireland, Italy, Malta, the Netherlands, Norway, Spain, Swe-

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(1) See e.g. Šeparović, pp. 174-175. Dussich, in a similar vein, has suggested the establishment of the post of "victim ombudsman"; Dussich 1974, pp. 11-15; see also Friedman, pp. 488 ff.; Albert, passim. Perhaps the first to call attention to the need for such "victim clinics" was Mendelsohn. See e.g. Mendelsohn 1974. See also the President's Task Force report, pp. 47-49, where the Task Force advocates the development of comprehensive services, and points to the administrative benefits as well as the fiscal benefits to criminal justice administration of e.g. enhanced victim/witness cooperation.

(2) The guide provides information not only for the victims of crime, but also for the victims of e.g. traffic, labour and sports accidents.

(3) Art. VI(1) of the Ottawa draft stated, inter alia, that "(s)pecial facilities should be made available to assist the victims of domestic violence and sexual assault." See Annex I of A/CONF.121/IPM/4.

den, and Switzerland. (1) The shelters provide a place of refuge and also offer counselling, companionship in a time of need, and emergency help, for example, in care of children. Many shelter programmes are designed in order to prevent further exploitation; either efforts are made to change the hostile environment at the home of the victim or the victim is encouraged to move away.

The concern for victims of domestic violence soon spread to a concern for victims of rape, and hotlines or other crisis services were established in a few cities and areas in Austria, Belgium, Denmark, England, the Federal Republic of Germany, France, the Netherlands, Northern Ireland, Norway, Sweden and the United Kingdom. Austria, Finland, Hungary and the United Kingdom have also established crisis telephones or other services for children; the services in the first three countries are general while the service in the United Kingdom is for child victims of sexual abuse. (2) The same general motivation led in Denmark and Norway to the establishment of the institution of women's advocates; victims of sexual offences are now entitled by law to free legal assistance.

The rapid spread of such victim assistance schemes shows a strong interest in helping victims. The rush of enthusiasm, however, is not solely a positive phenomenon. It was noted in section 2.2. that various conflicting ideologies serve as underpinnings to the victim movement. The practitioners may attempt to use the victim's difficulties in order to promote their own ideologies. This may make it difficult for them to make a balanced assessment of the victim's actual needs. The difficulty is all the more marked if the victim assistance involves an intervention into the life of the victim, and the practitioners lack sufficient knowledge of the possible effects of this intervention. As an American expert phrased the problem, tinkering with the social system without knowledge compounds problems. (3)

5.7. Dealing with victimization outside of the criminal justice system

The United Nations Declaration clearly indicates that both formal and informal mechanisms outside of the criminal justice system can be called upon to deal with victimization. The role of these mechanisms arises from two limitations of the criminal justice system:

1) the criminal justice system may be an <u>inappropriate</u> response to crime; or

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(1) This data is taken from the responses to the United Nations Survey of Redress, Assistance, Restitution and Compensation for Victims of Crime. A general summary is provided in A/CONF.121/4, para. 127-128.

(2) Ibid.; para. 126.

(3) Pagelow, p. 461.

2) the criminal justice system may be too restricted in its response.

For offences that involve relatives or acquaintances, the incident may be just one aspect of an ongoing relationship. The legalistic approach of the criminal justice system may be unable to take this relationship into consideration and the process itself, as well as the final judgment, may hamper the lives of both the victim and the offender. For them, turning to administrative or civil proceedings and especially to private settlements may be preferable. (1) To the extent that the cases that are thus diverted from the criminal justice system are minor, the preference for alternatives should not hamper the smooth and equitable operation of the criminal justice system. Indeed, the removal of some cases may improve the flow of other cases through this system. (2)

When the offence is committed by a stranger, and the victim decides not to report it to the authorities, this can be seen as an indication that the victim considers the criminal justice system to be an inappropriate response. Many offences, especially trivial ones, remain unreported, generally on the grounds that it is something "not worth bothering about" or "the police couldn't do anything anyway". The lack of resources makes it impossible for the criminal justice system to deal with all offences, and in such a situation the system should concentrate on the more serious offences. Thus, the fact that some offences remain unreported should not in itself be cause for alarm. However, also offences which are relatively serious from the point of view of the criminal justice system may remain unreported.

Should public opinion of the inappropriateness of turning to the criminal justice system reach the dimensions where there is a general disillusionment with the powers of the police to prevent and solve crimes, cause for alarm would certainly arise. The alternative responses may then involve violent retribution or vigilantism, the replacement of criminal justice with make-shift justice.

The restricted nature of the criminal justice system, the second limitation referred to, is due to its purpose. Law enforcement agencies are assigned the functions of preventing crime, ascertaining the responsibility for offences, and deciding on the proper sanction. Victimization leads to many needs that cannot be met within such a framework. Such needs can best be met by family, friends, lay helpers and professional social service workers.

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(1) See Davis and Smith, passim.

(2) Weigend 1985, passim, suggests a system where reconciliation is an integral part. Serious offences would be prosecuted, but petty offences would be left open to settlement through reconciliation.

6. ENTRY INTO THE CRIMINAL JUSTICE SYSTEM

6.1. From victim to complainant: the problem of definition

6.1.1. General remarks

It was noted in section 1.4.2. that the concept of "victim" in criminology and victimology is, in many respects, broader than the concept of "complainant" in law.

The definitions adopted in this study have a legal basis. Since the study is focused on the victims of crime as defined by the law, the definition of "victim" will be conditioned by the view of the law.

The general view in the law of the countries covered by this study is that a complainant is a natural or juridical person (as recognized as such by law) directly endangered or harmed by a criminal act. Such a victim may generally present demands at law on the basis of the offence. In all countries studied demands for compensation from the offender or a responsible third party may be presented in civil proceedings; the victim would thus become a plaintiff. The determination of the validity of the claims would be made by the court acting on the basis of all of the evidence presented by the parties.

The situation is much more diverse with regard to criminal proceedings. The differences are due primarily to two factors, a practical and a legal one. First, alleged offences are rarely taken directly to the criminal court and are instead investigated by certain authorities, generally the police and the prosecutor. Second, the position of the victim in criminal proceedings may vary, from that of witness for the prosecution (if and when called upon by the prosecutor) to full party.

In respect of the first point, it is important to notice that the definition of who is the victim (if indeed a crime is considered to have been committed) is a matter of perspective. For example, what one considers an assault another may consider horseplay and a third justified self-defence. (1) Or, what one considers fraud, another might consider normal business practice. From the point of view of a person who considers himself victimized the injury caused by

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(1) The Shapland study noted that some of the "victims" in the study sample were eventually prosecuted and convicted as offenders. See Shapland et al, pp. 5 and 15. See also Miers, pp. 49.

the offence may be compounded by his difficulties in convincing or inability to convince the criminal justice system that an offence has been committed.

The preceding examples of the subjectiveness of the definition of an offence also have a mirror image. A law enforcement agency may consider itself justified in intervening in a situation that the parties immediately concerned do not consider criminal or at least do not consider something that should be dealt with by the criminal justice system.

In respect of the second point, the differences in the position of the victim in the criminal justice systems of Europe and indeed in the terminology used may lead to confusion in any general review. For the sake of clarity in this study the victim will be called the "complainant" in criminal proceedings regardless of the differences in his status. The differences in the legal position of the victim in criminal procedure will be dealt with in section 7. (1)

6.1.2. Complainant offences: leaving the definition to the victim

As noted in section 2, in developed legal systems an offence is considered an offence against the State. Consequently, the State considers itself to have a right and indeed at times even an obligation to prosecute those suspected of offences. The wishes of the complainant are often considered secondary to the interests of the State. As it is in the public interest to prosecute offences most offences are open to public prosecution. Thus, once the offence comes to the attention of the authorities, the decision on further action, and above all the definition of what happened will depend largely on the criminal justice system. (2)

Where the State has furthermore adopted the principle of mandatory prosecution - i.e. all offences that come to the attention of the authorities must be prosecuted - difficulties may arise over the difference in perspective referred to above. The State may choose to prosecute an act which the parties involved do not consider criminal or that they do not want brought to court.

Even where the State has adopted the principle of prosecutorial discretion - i.e. the offence will be prosecuted if this is believed to be in the public interest - similar difficulties over differences in perception may arise.

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(1) A further example of the difficulties in using terms which do not have an established meaning is provided by the term "complainant" itself. As used here, it refers to the victim or alleged victim of an offence. A complainant can also, for example, be a bystander who reports an offence to the police; it will not be used in this meaning here.

(2) Shapland notes that "once an offence is recorded as a crime, it acquires an official identity. ... The offence will be processed according to (police) agency rules and practices." (Shapland et al, p. 14).

One mechanism by which some of these difficulties are avoided is the institution of the complainant offence ("Antragsdelikt"), in which the complainant has some discretion over whether or not charges should be instituted. The public prosecutor may not prosecute unless the complainant has, in some way, officially reported the offence for the initiation of prosecution.

Closely related to the complainant offence is the private prosecution offence (the "Privatklagedelikt"). (1) In the complainant offence, the prosecutor brings the case to court on the request of the complainant. In the latter, the complainant himself must bring the case to court, acting in all essential respects as the prosecutor, subject to certain limitations. A third form is a private prosecution offence for which either the complainant or the prosecutor may prosecute.

There may be several reasons of policy for a decision to include an offence within the scope of complainant (or private prosecution) offences. (2) The four principle reasons are:

1) the offence is petty and prosecution is unnecessary for the maintenance of the public order. This may be noted either by saying that only a private interest has been violated or that there is no public interest in prosecution.

2) The attitude or behaviour of the victim himself is critical in assessing whether or not an offence has been committed. For example, the attitude of the victim is critical in assessing whether or not breach of domicile or insult have occurred. (3)

3) prosecution of the offence may harm the social relations between the victim and the offender. For this reason, offences which take place within a family may be considered complainant offences. This point is closely related to the previous one.

4) even if the offence is a relatively serious one (for example a sexual offence) prosecution may violate the complainant's right to privacy or other special interests. For example, the victim may object to the

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(1) See e.g. Riess, pp. C17-C18; Heuman, pp. 78-80; Jescheck 1978, pp. 722-723 and the literature cited.

(2) See section 7.3., infra.

(3) This is not to say that the subjectiveness of whether or not an offence has been committed will be the determinative factor in classifying offences as complainant offences. For example, theft is generally not a complainant offence although one essential element of it is generally that the property was taken "without authorization". See also Rikosoikeuskomitean mietintö, pp. 130-131.

publicity of a trial, or may not wish to be forced to recall the hurtful details of the offence. Such particular interests of the complainant may be seen to outweigh the public interest in prosecution.

Other reasons for distinguishing between offences open for public prosecution and complainant offences can be noted. One reason of practical relevance is that requiring a complaint is one way of ensuring that the victim will cooperate in any prosecution that is undertaken.

The different jurisdictions in Europe commonly distinguish between offences subject to public prosecution and offences that can be brought to court only if the victim himself desires prosecution. The scope of the offences varies from country to country although it would appear that in almost all countries the list of complainant offences is relatively short, the offences are primarily trivial and their proportional share of all offences reported to the police is small.

The offences most commonly classified in this category are:
- certain types of insult and defamation (Austria, Denmark, the Federal Republic of Germany, Finland, Hungary, Italy, the Netherlands, Sweden and the RSFSR);
- certain forms of breach of domicile (Austria, Denmark, the Federal Republic of Germany, Finland, Hungary and Italy);
- certain offences within a family relationship (theft in Austria, the Federal Republic of Germany, Finland, the German Democratic Republic, Hungary, Italy, the Netherlands and Poland; certain forms of assault in Austria and the German Democratic Republic);
- certain types of petty assault or the causing of injury (Denmark, the Federal Republic of Germany, Finland, the German Democratic Republic, Hungary, Italy, Norway, Sweden and the RSFSR); and
- certain types of sexual assault (Denmark, Finland, Hungary, Italy, the Netherlands and Poland).

Offences more rarely noted include fraud between family members or, respectively, in respect of small amounts (Austria, the Federal Republic of Germany, Italy and Poland), unjust accusation (Norway), unauthorised use of certain types of private property (the Federal Republic of Germany, the German Democratic Republic, Italy and Poland) and damage to private property (the German Democratic Republic and Poland). (1)

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(1) Because of the different basis for prosecution, no complainant offences in the meaning used here exist in Scotland or in England and Wales. However, some offences can lead to prosecution only if reported by certain authorities; an example is the necessity for a report by a factory inspector in connection with certain alleged violations of labour safety. Moody and Tombs note, in respect of Scotland, the ways in which prosecutorial discretion may consider inter alia the wishes of the victim.

There are no complainant offences in France.

In many countries, the complainant offence must be reported to the authorities within three months of when the victim detected the offence and learned who was the presumed offender; otherwise, the right of prosecution will become time-barred. This is the case in the Federal Republic of Germany, the German Democratic Republic, Italy and (if the offence occurred in Europe) the Netherlands. In Hungary, this period is thirty days. In Denmark and Norway, the period is six months. If the offence occurred outside Europe, the period is nine months in the Netherlands. The statutory period is the longest in Finland, where it is one year. In Poland, there is no special time limit.

A special provision on withdrawal in the case of complainant offences exists in Italy. According to art. 124 of the Italian Penal Code, the right of complaint may no longer be exercised if it is implicitly or explicitly waived by the person entitled to use it. An implied waiver is deemed to exist when the person with the power to initiate a complaint has in fact acted incompatibly with the desire to complain. Art. 152 provides that withdrawal of the complaint ("remissione") extinguishes the offence. (1)

Some countries provide that the complaint, once made, cannot be withdrawn. This is the case in Hungary (sec. 31(6) of the Penal Code) and Poland (see art. 5(3) of the Code of Criminal Procedure). In the Netherlands, the complaint may be withdrawn within eight days after being made (art. 67 of the Penal Code). In Finland, in turn, the complaint may be withdrawn at any time before the prosecutor brings the case to court (Enforcement of the Penal Code Decree sec. 17(2)). The same is true of Sweden (chap. 20, sec. 12(1) of the Code of Judicial Procedure). In the Federal Republic of Germany, in turn, the complaint may be withdrawn up to the end of the trial (sec. 77d of the Penal Code).

One mechanism for easing the either-or rigidity of the institution of the complainant offence - either the complainant reports the offence for prosecution or the prosecutor may not proceed - is to allow the possibility of public prosecution in exceptional cases regardless of the complainant nature of the offence (so-called relative complainant offences). (2) In the normal (and often petty) cases the

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(1) See Bricola and Zagrebelsky, parte generale, vol. III, pp. 996-1027, and Manzini, vol III, p. 600. Cf., for the Federal Republic of Germany, sec. 206 a and 206(III) of the Code of Criminal Procedure.

(2) Such relative complainant offences are known in Denmark (sec. 67a of the Penal Code), the Federal Republic of Germany (e.g., sec. 232 and 248a of the Penal Code), Finland (chap. 20, sec. 11 of the Penal Code, which applies to sexual assault; sec. 18(2-3) of the Enforcement of the Penal Code Decree, which applies when the complainant is a dependent of the offender), the German Democratic Republic (sec. 2 of the Penal

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decision whether or not to have the matter dealt with in court will then continue to rest primarily with the victim. In certain exceptional cases, however, such as where the victim is apparently under some form of threat on the part of the offender not to proceed, the public prosecutor will be free to act.

Leaving the decision on whether or not to invoke the criminal process in the hands of the victim has considerable merit, both for the operation of the criminal justice system and for the victim. The criminal justice system is relieved of the responsibility of dealing with a considerable number of petty cases and the victim is relieved of the possibility that the case will be dealt with by the system against his will. An additional potential benefit for the victim is that he can pressure the alleged offender into paying compensation by threatening to report the matter to the police.

However, serious criticism has been levelled against the institution of the complainant offence, especially in those countries where serious offences (such as rape) are included in its scope. This criticism is predominantly based on the three considerations of 1) general prevention, 2) the risk of undue pressure on the alleged offender and 3) the risk of undue pressure on the victim.

The criticism oriented along the first line emphasizes that general prevention is most effective when the risk of detection and punishment is greatest. Leaving the decision to the victim, according to this argument, would decrease the probability of punishment. On the other hand, it may be noted that the "dark figure" of those offences which are classified as complainant offences may be, on the average, even higher than for other offences. Violations of domicile, insults and petty assaults can be presumed to be offences which very rarely come to the attention of the police. The same is true even of such serious offences as sexual assault. If we assume, for example, that only ten per cent of rapes are reported, and as a result of a law reform that makes rape a complainant offence this percentage shrinks to eight or nine, the threat to general deterrence is slight.

The arguments noting the risk of undue pressure on the alleged offender point out that this may be a mechanism for, in effect, extorting compensation from a person without his responsibility or without the true extent of the damages being authoritatively established. Even where the alleged

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Code) and Norway (art. 82 of the Penal Code). Anttila 1977 notes that the Finnish provision on sexual assault is rarely applied. See also Jescheck 1978, p. 723, and Eser, p. 219 (the Federal Republic of Germany); Träskman 1980, pp. 131 ff. (Finland) and Strafrecht der DDR, pp. 46-52 (the German Democratic Republic).

offender in fact committed the offence in question, the complainant may threaten to use the trial in order to create a public scandal. (1)

The third argument is that as long as the decision rests with the victim the offender may threaten the victim with continued violence or other injury. If such offences were made subject to public prosecution, according to this argument, such a risk would be diminished. This danger is illustrated in the case of domestic violence, where a complaint is often retracted, under circumstances which suggest such threats. This third argument has been made very strongly by feminists who emphasize that "family violence is a crime" and should be dealt with as such and not as a possible social or psychological problem. (2)

The counterargument can be made here that threats to the victim may be made even where the offence is subject to public prosecution. The decision to report an offence is as subject to pressure as a decision to press charges; quite often the two decisions are made at the same time.

A further argument against the institution of complainant offences applies only to those offences for which the complainant himself must prosecute in court. In all of the countries where the complainant offence is used the prosecutor may decide that there is insufficient public interest and refuse to proceed. (3)

When the burden of prosecution is left to the victim he must attend to all of the practical and legal details that the prosecutor would normally deal with; for many victims, who normally lack legal expertise and may lack the resources for obtaining professional advice, this may prove an insurmountable obstacle. They would thereupon be forced either to proceed through the civil process - which is often more expensive and time consuming than the criminal process - or refrain entirely from litigation. The prosecution of complainant (and private prosecution) offences would then depend not so much on the seriousness of the offence itself as on the resources available to the complainant and perhaps also on such subjective factors as his feelings of revenge.

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(1) Ekelöf, p. 61.

(2) This argument was raised at the Seventh United Nations Congress in connection with the discussion of a proposed Resolution on domestic violence (A/CONF.121/C.2/L.12). In this connection, it may be noted that as of 1 January 1982, all domestic violence in Sweden is subject to public prosecution. See Taub, p. 158.

(3) Whether or not the prosecutor will proceed depends to a considerable extent on whether prosecution rests on the principle of discretion or on the principle of legality. Even if the latter principle is predominant as is the case in, for example, Finland, the prosecutor generally still retains some discretion. See Tak, passim, and esp. pp. 26-42.

6.1.3. Factors influencing the definition

Even in those countries that have a great number of complainant offences, the large majority of the decisions on prosecution are made by the public prosecutor. His decision is based, first, on an analysis of whether or not the conditions necessary for prosecution are met; second, on whether or not there is sufficient evidence for prosecution; and third, on whether or not prosecution is called for. (1)

The second question, that of the sufficiency of evidence, is one that will not be dealt with here. (2) The first and third questions, however, are predominantly questions of definition.

The first question concerns the conditions for prosecution. This is answered on objective grounds through an application of the law. The prosecutor is interested, first of all, in whether or not the elements of an offence are present.

Any claims that "the victim is the forgotten party in criminal justice" overlook the fact that the legislators of the various European countries specifically consider the victim in criminalizing offences. A review of the criminal legislation of any jurisdiction will reveal that many elements explicitly refer to various characteristics of the victim. Examples that illustrate this are the following:

- The age of the victim. In various areas of behaviour those under a certain age are protected by special criminalizations. This is true in particular in respect of sexual behaviour and assault; the issue of child abuse has focused special attention on this. Child neglect is also widely criminalized, as is abandonment. (3)

- The sex of the victim. The sex of the victim is an obvious factor in the elements of sexual offences. However, it is a factor considered also in general, for example, by some Socialist countries, which stress the special protection of women, in particular of mothers. Thus, for example, a violent offence against a woman may be regarded as more blameworthy than a similar offence against a man.

- The victim's membership in a certain ethnic group or in another collectivity. The position of the migrant victim has raised special concern in many European countries and, for example, discrimination has been criminalized. The criminalization of certain offences against humanity (for example, the criminalization of genocide) is an example of attempts to prevent extremely serious forms of crime.

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(1) Tak, p. 50.

(2) Tak notes that also this question may be influenced by considerations of expediency; see Tak, pp. 50-52.

(3) See Šeparović, pp. 129-140.

- The occupation or other similar status of the victim. Persons who are engaged in particularly risky occupations may be protected by special criminalizations; government officials and in particular law enforcement officers enjoy such special protection. (1)

- The personal circumstances of the victim. This heading is connected to some extent to the previous one, in that both refer to the lifestyle of the victim. Such circumstances may be an aggravating factor in, for example, assault or robbery. Thus, for example, if a person is in circumstances in which he is unable to protect himself or his property, the offence may be considered more serious (this is the case with chap. 21, sec. 5(2) and chap. 31, sec. 2 of the Finnish Penal Code).

- The personal relationship between the victim and the offender. The archetypical example of an offence predicated on the personal relationship between the two parties is incest. Another example is patricide or matricide, which are often considered aggravated forms of homicide. Infanticide, on the other hand, is generally a privileged form of homicide. Also the protection of the employee against certain arbitrary behaviour of the employer and the protection of the tenant against the landlord should be cited in this connection.

  The personal relationship between the two may also be a mitigating factor; an example would be theft from a family member (e.g. art. 345 of the Maltese Penal Code; art. 524 of the Turkish Penal Code; see also chap. 30 of the Finnish Penal Code). For other offences, the personal relationship may be an exculpatory factor. Spousal rape is not recognized as an offence in many jurisdictions.

- The commercial relationship between the victim and the offender. Here, the purpose of the criminalization is not so much to protect victims in particularly dangerous circumstances as to ensure the smoothness of commerce. The relationships in question may be, for example, between an insurer and a policyholder, a principal and his agent, and a creditor and debtor. The offences may involve, for example, fraud, embezzlement and abuse of trust.

An apparent tendency in the drafting of legislation is towards the use of general elements instead of the casuistry of earlier legislation. Where previously the seriousness of an assault was established by law according to the type and degree of injury, modern legislation appears to be oriented towards general categories that place the responsibility for the assessment of the offence on the adjudicatory body. The

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(1) Although one could consider under this heading the protection provided to civil servants (for example, policemen) in the pursuit of their duties, the interest being protected is presumably more the proper functioning of administration than the personal integrity of the civil servant.

rationale for such a tendency has been that casuist legislation was overly ironclad and that the adjudicator should be permitted to assess the totality of the circumstances. (1)

When the case calls for such a consideration of the blameworthiness of the behaviour of the offender not only the adjudicator but also the prosecutor must assess the totality of the circumstances. He must consider whether or not prosecution is called for, the third question referred to above.

Many factors influence the decision of a law enforcement official on whether or not an alleged offence should be processed through the criminal justice system. The principles of mandatory prosecution or prosecutorial discretion opportunity do not operate as differently in practice as one might assume at first glance.

An important illustration of this is the "material concept of a crime", as used in Socialist legal practice. Although Socialist countries have adopted the principle of mandatory prosecution, an act that in other respects fulfills the essential element of an offence is not considered such unless it presents a danger to society. The concept involves two interrelated conditions. One is the formal condition that the act fulfills the elements of an offence stated in law; this was dealt with above. The second is the material condition that the offence demonstrates more than a negligible degree of danger to society. (2) If there was no social danger, no offence has been committed.

For example, art. 7(2) of the RSFSR Penal Code states that "An action of omission to act shall not be a crime, although it formally contains the indicia of an act provided

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(1) Wolfgang (1982, pp. 47-56) relates this tendency in part to what he calls a neo-classical revival "(f)rom Finland to Florida, from England to California", that emphasizes the gravity of the crime alone in the assessment of blameworthiness. He suggests that "although the absence of attributes about the offender is now considered appropriate in a sanctioning system, the presence of victim attributes might be considered acceptable" (ibid, p. 49), and proceeds to argue in favour of the definition of offences in such a manner. See also Mendelsohn 1982, pp. 62 ff.

(1) Andrejew, pp. 49-54. See also Feldbrugge, pp. 89 ff.; Solnar, Nezkusil and Lukes, pp. 198-199; Zipf, pp. 106-114. The material concept of a crime is laid down in the following articles of the penal codes of the respective countries: Albania, art. 3(3); Bulgaria, art. 9(1) and (2); Czechoslovakia, art. 3(1) and (2); the German Democratic Republic, sec. 1(1) and 3(1); Hungary, art. 10(1) and 22(e), 28 and 36; Poland, art. 1 and 26(1); Romania, art. 17 and 18(1); the RSFSR, art. 3 and 7(2); and Yugoslavia, art. 8(1) and 8(2). See Schulze-Willebrand, pp. 329-331; Tak, pp. 3-4.

for by the special part of the present code, if by reason of its insignificance it does not represent a social danger."

From the point of view of the theme of this study it is significant that the position and behaviour of the victim are considered in assessing the social danger of the act. Furthermore, this assessment is made not only on the basis of the act itself but also on the underlying circumstances. The legislation of some Socialist countries refers to the possible "disappearance" of the anti-social danger of an act. The relevant provision in Czechoslovakia and the German Democratic Republic specifically states that if the offender compensates the damages arising from the offence this may erase its anti-social danger. (1)

To again take the RSFSR Penal Code as an example, art. 50(1) states that

"A person who commits a crime may be relieved from criminal responsibility if it is deemed that by the time of the investigation or the consideration of the case in court, as a result of a change in the situation, the act committed by the guilty person has lost its socially dangerous character or the person has ceased to be socially dangerous." (2)

The assessment of the act and the underlying circumstances is also important in those non-Socialist countries that adhere to the principle of discretion in prosecution. (3) Where the discretionary principle is expressed some reference is generally made to the public interest in prosecution. (4)

Similarly, even in non-Socialist countries that adhere in theory to the principle of mandatory prosecution legislation or established practice has adopted several mechanisms easing the rigour of this principle. These mechanisms permit the waiving of measures (reporting, prosecuting, sentencing) under certain conditions. Thus, the policeman and the prosecutor may use some subjective elements in their definition

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(1) See art. 24(Ia) of the Czechoslovakian Penal Code, sec. 25 of the Penal Code of the German Democratic Republic, sec. 36 of the Hungarian Penal Code, and art. 50 of the Penal Code of the USSR. See also Schultze-Willebrand, pp. 381-382; and, e.g., Strafrecht der DDR, pp. 114-116.

(2) See also art. 6 of the Code of Criminal Procedure of the RSFSR, which deals with the termination of a criminal case due to a change in the circumstances.

(3) Belgium, Cyprus, Denmark, France, Great Britain, Iceland, Luxembourg, the Netherlands, Norway and Switzerland. See Tak, p. 33.

(4) Tak, p. 27.

of the seriousness of the offence and in their decision on whether or not to proceed. (1)

It can therefore be stated in general that in all the countries covered by this study, the prosecutor's definition of the blameworthiness of the behaviour of the offender to some extent determines whether or not he will proceed. The extent to which offences are waived by the prosecutor varies from country to country although it would appear that only a small minority of offences are officially waived. (2)

6.2. Reporting and non-reporting

6.2.1. General remarks

It was noted above that, for a case to enter into and proceed through the criminal justice system it must go through a number of stages. In general terms, at each stage along the way the case must pass three "hurdles" to be processed further: perception, definition and decision. (3)

The perception stage requires that the actor in question realize that an event has occurred that might require some type of reaction. This takes place even before the case enters the system: the victim, a bystander or a law enforcement officer must be aware that something has occurred that might be of interest to the criminal justice system. For example, in the case of theft the first "hurdle" is that the victim (or another person) realizes that property is missing.

The definition stage requires that this event be classified as criminal. In the above example the victim may decide that he has misplaced the property in question and thus no crime is involved. The victim might also assume that the property has been borrowed temporarily and it will be returned in due time. Defining the ontoward event as a crime is thus only one possible response.

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(1) Tak, pp. 26-42. See also, e.g., Fiselier, p. 270 (provocation lessens the probability of prosecution); Davis and Smith, passim (if the victim and the offender had known one another previously, there was a higher probability of dismissal at the various stages).

(2) Even approximate comparisons of the situation in the different countries are, however, risky. The informational value of a statement such as "In Finland, 4 per cent, but in Sweden 10 per cent of all offences reported to the prosecutor are waived" would depend above all on the extent to which the police report offences to the prosecutor and on the legal possibilities for waiving various offences.

(3) Cf. Burt's conceptual framework, pp. 261-269.

The decision stage refers to the reaction of the victim (bystander, law enforcement officer). To continue with the example the victim may decide that even though the property was stolen it is not something that necessitates turning to the police. (1)

6.2.2. Who reports?

The general belief that most offences are reported to the police or other authorities has been seriously shaken since the publication of the first victimization surveys. These surveys, which ask members of the public if they have been the victims of offences, have indicated time and again that a large share of offences - for many offences, the majority - are not reported to any law enforcement agency. (2)

It is the victim who has a key role in determining what offences will be dealt with by the criminal justice system. In respect of the so-called traditional offences involving direct victims, those that come to the attention of the authorities are generally reported to the police or other law enforcement authorities by the victim, by friends or relatives of the victim, or by bystanders. (3) The law

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(1) Shapland et al (p. 15) noted that victims who reported offences found it difficult to express concrete reasons for considering the offence a matter for the police. It appears that for many reporting victims turning to the police is just a "natural response" and not the outcome of rational thought.

(2) See, for example, Block 1974, pp. 555-569. As an example, 1980 Finnish data indicates that only 20 per cent of thefts and 10 per cent of the assaults involving at least minor injury are reported (Lättilä and Heiskanen, pp. 18 and 38). The surveys have been limited to certain offences. In many respects, however, these have been the offences that most appreciably concern the everyday life of citizens - theft, assault, robbery and rape, for example. The survey methodology is not very suitable for offences such as economic or environmental offences, which may be more serious from the point of view of society than such traditional offences.

(3) See Hindelang and Gottfredson, p. 76. According to research carried out in the Federal Republic of Germany, over 90 per cent of all reported offences are reported by the victim or another private citizen (see e.g. Eser, p. 218). Fiselier (p. 268) reached a figure of 85 per cent for one medium-sized Dutch town. Similar results were obtained by the Shapland study, which also noted that 50 per cent of the offences in the sample of violent offences were reported by someone other than the victim (Shapland et

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enforcement officials themselves play a significant role primarily only in connection with those offences uncovered in connection with specific forms of supervision, such as the supervision of traffic, narcotics, alcohol, prostitution, taxation and customs - offences which generally do not have individual victims in the sense used in the present study.

The importance of reports by victims becomes even greater when it is noted that this report is also critical in solving the offence. For many offences, whether or not the victim reports the offence very soon after its commission, together with the particulars of the offence and of suspects necessary for the investigation, will determine whether or not the offence can be solved. (1)

Victimological research on hidden crime has focused on why offences are not reported. It would appear that reporting is most clearly connected with the seriousness of the offence. It would also appear that reporting is only weakly correlated with the individual characteristics of the victims. (2)

It may first be noted that there are very few offences where bystanders (to say nothing of the victim) have an obligation to report the offence to the authorities. (3)

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al, pp. 15 and 18; cf. Ruback et al). Somewhat more than half of the reporting bystanders noted in the Shapland study were pub licensees and private security personnel, i.e. people in charge of, or working at, the scene of the offence (see also Burrows, passim).

The Hungarian report to the Seventh United Nations Congress cites 1980 statistical data showing that in 67,7 per cent of the cases investigations were begun upon the report of the victim; p. 9.

(1) Fiselier, p. 268; Shapland 1984, p. 132.

(2) Skogan suggests that even though the correlation is weaker than for offence seriousness (i.e. the "characteristics of victim experiences"), very young offenders (12-19 year olds) are less likely to report offences and those with extremely high incomes are more likely to report property offences and less likely to report personal victimization. Women are slightly more likely to report offences then men (Skogan 1981, pp. 50-51). See also Anne Schneider et al, passim.

(3) This is dealt with in sec. 4.5. The Spanish 1882 Code of Criminal Procedure, however, includes an obligation on all citizens to report offences which

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In considering whether or not the offence is serious enough to report the victim bases his judgment not on the legal caption of the offence and the expected punishment but on the degree to which the offence has threatened his person, violated his personal space, inflicted injury or financial damage. (1) The degree to which reporting is considered a "civic duty" is in doubt. While some research indicates that a moral obligation to report offences motivates reporting in only a minority of cases, (2) other research in contrast suggests that for many victims who do report, reporting is a natural reaction to an offence. (3)

Clearly in the case of property offences, when the property was insured and the insurance company will pay compensation only if the offence is reported this will be a strong motive for reporting. (4) The motive for reporting in other cases is less evident but it can be assumed that the victim may consider such factors as the possibility that the police

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come to their attention (art. 259). Pradel 1985, p. 14; Bueno Arus, p. 192.

A special situation exists where confidentiality and professional privilege are involved. Here, for example the physician who treats what he believes to be the result of (e.g.) child abuse may find himself in an ethical bind. See, e.g., sec. 121(5) of the Austrian Penal Code, sec. 203(2) of the Penal Code of the Federal Republic of Germany, art. 378(1) of the French Penal Code and sec. 136 of the Penal Code of the German Democratic Republic. On the other hand, an obligation on physicians to report, e.g., aggravated assault is provided in the Polish Professional Physicians Act, art. 13.

(1) Skogan 1981, pp. 50-51; Waller 1982, p. 173; Harland 1980, p. 20.

(2) Biles, passim. More important reasons cited by Biles include having property returned, preventing the offence from happening again, collecting on insurance, having the offender punished, and the victim's fear of further harm.

(3) Smith and Maness, passim; Shapland et al, p. 15. According to the former study, the main reasons for reporting, in order of priority, were: obligation; have offender apprehended; obtain restitution; and obtain police protection.

(4) It should be recalled that most losses in property offences are small, and would have to be covered by the victim himself, because of the common provisions on deductibles (i.e., the minimum sum a loss must exceed before it will be covered). Also, cash is generally not covered by insurance, altough it is a tempting target of theft.

will apprehend the offender, the bother involved in reporting the matter and in giving evidence, and the effect that the reporting will have on his possible relations with the offender. (1)

The decision whether or not to report an offence is not necessarily one that the victim makes automatically. Studies have indicated that many cases would not be reported except for the pressure of those with whom the victim discusses the matter, such as friends and family. (2) On the other hand, the immediate environment may serve to discourage reporting. Such discouragement may be active (for example, by friends and family members who say that the offence is too trivial to bother about or will only "make trouble") or passive. In the latter case, the victim considers what the likely effect of reporting will be on his immediate environment; he considers, for example, what his friends or neighbours will think of him. The fear of negative publicity through the media might also play a role in this, especially in the cases of more serious or more newsworthy events.

The offender himself may be an important factor in discouraging reporting. The offender, or someone acting on his behalf, may intimidate the victim into refraining from reporting the matter. This is most clearly the case when the victim and the offender are in constant interaction, as in the case of domestic violence.

6.2.3. Reporting to the police

Throughout the European countries the police are the law enforcement authorities that receive the greatest number and variety of reports of offences. The importance of the police role is due not only to the specific responsibility of the police for investigating offences but also to their general service function: while other authorities generally deal only with a specific field of administration and are available only under certain circumstances (in a certain place, at a certain time), the police are on call at all hours and under almost all circumstances. They therefore must deal not only with reports of obvious offences but also with a great array of personal problems that, on closer analysis, may lead to the investigation of new offences.

The attitude of the police towards the victim may easily influence victim motivation to have the offence prosecuted and his general cooperation with the police. Research indicates that the majority of those who come into contact with

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(1) Karmen, pp. 52-57.

(2) Ruback et al note (p. 320) in one study that most persons reporting an offence first sought advice, assurance and additional information from other persons on whether or not the offence should be reported. This was especially true of burglary, larceny and the theft of motor vehicles.

the police are satisfied with police performance, i.e., their effectiveness. However, a substantial minority are dissatisfied with their treatment by the police. Specific complaints concern, for example, the insufficiency of the information that the police provide them on the progress of the investigations and the lack of information on compensation possibilities and crime prevention. (1)

A more amorphous complaint refers to police callousness, a lack of empathy with the victim. The victim often seeks reassurance from those he turns to in respect of the offence. Since the police are often the first authority to whom he turns in the event of an offence the initial official reaction is important. Should he receive the impression that the police are ignoring or belittling the occurrence or even casting doubt on the victim's version of the events, this can come as an unpleasant surprise.

To the extent that such police callousness exists it may be due to several factors. One factor is simply that the police are quite correct in denying the victim's version of the incident. The victim may be in error in classifying an incident as criminal.

Another factor is that what to the victim is generally a unique and disturbing occurrence is to the police a routine situation. In order to avoid burn-out the police must of necessity develop some emotional detachment. Furthermore, the paramilitary organization of the police in many areas, their specialization and often the "macho" norms of the police subculture may be factors in preventing the police from acting as a source of reassurance. (2)

One further point in connection with reporting to the police deserves mention. The fact that an offence is reported to the police is no guarantee that the police will initiate investigations, or even that the police will officially take note of the report. The stages of perception, definition and decision on the part of the victim have corresponding stages in connection with the police. The police may define the report as one not calling for action and not even record it in the official files. (3)

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(1) van Dijk 1986b, p. 113.

(2) Karmen, pp. 138-140.

(3) A study undertaken by Fijnaut in the Netherlands noted that about 45 per cent of cases reported to the police are not officially recorded. The use of informal police discretion has been the subject of considerable study. Among the factors found to be significant in this discretion are the relationship between the victim and the offender as well as the police perception of victim blameworthiness. For a summary of the research, see e.g. Williams 1976, pp. 178-179 and passim. See also McCabe and Sutcliffe; Ashworth, pp. 14-18; Ziegenhagen, pp. 83-86; Kürzinger, passim.

Should the police fail to recognize a particular incident as a crime the alternatives available to the victim are considerably constrained. Unless he chooses to bring the matter to civil court or, in those few countries where this is possible, prosecute the matter himself he must either attempt to use administrative channels to change the police attitude or satisfy himself with private means of settlement. (1)

6.2.4. Reporting to other authorities

As noted above, the police are traditionally regarded as the authority to which suspected offences are reported. It is indeed their function to investigate reports of offences. However, they are far from the only authorities to which offences are reported.

First, the offence may be reported to other criminal justice agencies. In Italy, the public prosecutor investigates offences, and may receive direct notice of allegations from victims. In France, the victim may constitute himself as a partie civile before the examining magistrate (the juge d'instruction). If the offence is a minor one and the offender is known, he may use what is known as a "citation directe" before the "tribunal de police" or the "tribunal correctionnel". (2)

Lawyers or the criminal courts may also be directly informed of alleged offences. In these cases, the investigation is usually again given to the police. There are few situations in which the court would proceed in practice without a preliminary police investigation; most of the cases (in particular contempt of court) are not relevant from the point of view of the present study. However, where private prosecution cases exist, the case may be brought directly to the court.

Supervisory and administrative bodies may also receive notice of alleged offences. Taxation and customs officials routinely investigate offences in their fields of concern and may receive tips of suspected offences. Other supervisory bodies may also deal with reports as administrative concerns that may possibly lead to criminal prosecution: examples would be labour practices, health and sanitation. In connection with professions and businesses, central associations (such as the Bar Association) may be asked to deal with suspected violations of professional ethics. Consumer

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(1) On the victim's possibilities of bringing the matter directly to court, see section 7.3., infra.

(2) Pradel 1980, pp. 403 ff. In France as in Italy also the prosecutor may be informed of offences (cf. art. 40 of the French Code of Criminal Procedure). However, Weigend 1980, pp. 389-395 notes the limited role of prosecutorial investigation in reality.

protection bodies may receive reports of alleged fraud or of unsafe products. Several European countries (in particular the Nordic countries) have an ombudsman, who receives complaints on an array of different matters. (1)

Especially in the area of non-conventional crime, alleged offences may be reported to various bodies. Examples are the Commission for Racial Equality and the Equal Opportunities Commission in England, which deal with allegations of discrimination. Other examples are commissions on judicial conduct and on civil or human rights. Industrial tribunals, where they exist, may receive reports of offences against labour safety. The bodies receiving such reports may also be private bodies. Examples here include organizations with a specific victim orientation, such as consumer or feminist organizations.

Finally, it may be noted that hospitals and health agencies treat a number of patients suffering from injuries which they may suspect have been deliberately inflicted. They may also have to deal with health problems arising from offences against the environment; where the pollution is immediately evident, an increase in certain types of infections or cases of poisoning may be the first indications that an environmental offence may have been committed.

6.3. Controlling entry into the criminal justice system: some concluding remarks

The victim's perception and definition of what has occurred and his decision on what to do about it can be called the key one in the operation of the criminal justice system. Although bystanders and various other parties report offences, and the police themselves detect some offences, most offences that are directly relevant to the victim will not enter the criminal justice system unless he himself decides to report them to the police. It is in this sense that he is the most important gatekeeper in the criminal process.

His decision is influenced by several factors, which range from the socially acceptable (such as the need to prevent an offence from recurring), to the socially neutral (an error about the obligation to report offences, a desire to feel important) to the less acceptable factors (revenge, using the threat of reporting as blackmail). The decision is thus very much a subjective one. Research has shown that the usual decision is not to report the offence. Thus, most offences occurring in society are never dealt with by the criminal justice system.

Should the victim decide to report the offence, however, the victim's discretion and control over what happens next in the criminal process is very limited, as will be noted in the remainder of this study. The public interest in the

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(1) Several Finnish examples of offences which can be prosecuted only on request of certain authorities are given in Träskman 1980, pp. 156 ff.

processing of the case will take predominance over the private interest. The case will be defined and categorized according to the criteria prevailing in the criminal justice system.

The public interest, of course, is the proper criterion in deciding on the reaction to serious offences. Cases of homicide, robbery, serious theft and other serious offences require a careful investigation of the circumstances in order for society to decide on the measures that should be taken.

There are, however, a number of cases where the criminal process itself may seriously inconvenience the victim or even harm interests that he regards as important. The fact that the victim reported the offence does not necessarily mean that he desires a public investigation, followed by conviction of the offender. He may have reported the offence because he believed that this was the normal and proper thing to do once an offence occurs; after he has had the opportunity to discuss the matter with other persons (including the police), he may decide that a private settlement or even simply forgetting the matter is preferable.

This opportunity is available to the victim for some offences in those countries that have adopted a system with complainant or private prosecution offences. Here, the victim retains an effective measure of control over the process. Where this right is relative, the State can intervene to prosecute offences despite the absence of a complaint when it is in the public interest to do so. Such a mechanism allows for a balance between the need to respect private interests, and the importance of prosecution in the public interest.

Regardless of the method of deciding on prosecution, the victim's lack of control over further measures may become apparent already in his contacts with the police. The police, based on their greater experience with crime, may choose to adopt a definition that is at odds with that of the victim. Here, however, there is the danger that the police definition is based not on a balanced assessment of what actually happened and of the public interest in proceeding with the case, but on factors such as administrative expedience.

As the police are the first authoritative representatives of the criminal justice system with whom most victims comes into contact in respect of the offence, the way in which the police deal with the victim determines to a large extent the impression the victim receives of how the community as a whole considers the offence. (1) If the police trivialize the incident, the victim may well form the judgement that the community does not consider the incident criminal.

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(1) Council of Europe 1985, p. 16.

The entry into the criminal justice system thus has a second key stage, following the decision of the victim to report the offence. The first stage set the criminal process in motion; it is this second stage, the interaction between the victim and the police, that greatly influences the victim's attitude towards the system.

7. PROCESSING THE CASE

7.1. General remarks

Once the case has entered the criminal justice system the uniformity of the process in the various European countries decreases considerably. Even within a single jurisdiction there can be great disparity in the types of processes through which a case may continue. Trivial cases may be terminated by the police or the prosecutor with or without a sanction; they may go through a special form of simplified procedure; they may be brought before one or more judges; in some countries they may be brought before a jury.

There are even greater disparities in the role of the complainant. However, certain issues of particular importance to the victim have been singled out in the United Nations Declaration and the Council of Europe guidelines. (1) These are:

- the victim's right to be informed of the process;
- the victim's right to have his views and concerns presented;
- the victim's right to obtain proper assistance in the proceedings;
- the possibilities of minimizing inconvenience and maximizing the protection of the victim;
- the avoiding of unnecessary delay; and
- the sensitization of those concerned to the needs of the victim.

These questions will form the basis for a comparison of how the core countries have arranged the position of the complainant in the course of criminal proceedings.

7.2. Informing the complainant of the process

One of the main problems faced by complainants is the difficulty in obtaining information. The need for information covers a broad range of questions: where to obtain necessary medical help, where to turn for emergency help of a practical nature, where to turn for crime prevention information, where to go for counselling and psychological assistance, and so on. The United Nations Declaration deals with the victim's need for such general information in paragraph 15. (2)

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(1) See also Karmen, p. 143.

(2) See section 5.6.

The complainant also needs information on the criminal justice system itself, and on criminal proceedings. The questions here are of two types. First, the complainant might need to know what he can and should do in order to secure his rights; he requires procedural information. Second, he will probably want to know what has been done: are the police investigating the case, has the suspect been identified and apprehended, will the prosecutor bring charges, has the case been decided, and so on. He wants information on decisions.

Paragraph 5 of the United Nations Declaration states that victims should be informed of their rights in seeking redress through formal or informal procedures. This thus refers to the first category of information, procedural information.

Paragraph 6(a) states that the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by

> "Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and they have requested such information."

The Council of Europe Recommendation contains several guidelines on what information should be given to the complainant. Guideline 2 states:

> "The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation."

According to guideline 3, "The victim should be able to obtain information on the outcome of the police investigation." Guideline 6 refers to the prosecutorial decision: "The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information."

Finally, guideline 9 states:

> "The victim should be informed of:
> - the date and place of a hearing concerning an offence which caused him suffering;
> - his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice;
> - how he can find out the outcome of the case."

Paragraph 15 of the United Nations Declaration deals with both categories of information, procedural information as well as information on decisions already taken. Guidelines 2 and 9 of the Council of Europe Recommendation refer primarily to procedural information, and guidelines 3, 6 and 9 (point three) to information on decisions.

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(1) General Assembly res. 2200 A (XXI).

A point of comparison may be made with the suspect/defendant. According to art. 14(3)(a) of the International Covenant on Civil and Political Rights (1), "In the determination of any criminal charge against him, everyone shall be entitled ... in full equality ... to be informed promptly and in detail in a language he understands of the nature and cause of the charge against him." Further, in accordance with art. 14(3)(d), he has the right to have legal assistance where this is required by the interests of justice, and to be informed of this right.

The obvious initial source of procedural information is the police, to whom the offence is normally reported. This is noted explicitly in guideline 2 of the Council of Europe Recommendation. The extent to which the police provide information obviously varies with the individual circumstances: the police perception of what information is needed and available, the pressure of other duties, the request of the complainant, and so on.

Several European States - notably the socialist States, but also the Federal Republic of Germany, France and the United Kingdom - require the police to inform complainants of their rights and role. In the socialist States this requirement is often embodied in legislation. (1) In Western Europe,

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(1) Sec. 17 (and cf. sec. 93 and 96) of the Code of Criminal Procedure of the German Democratic Republic notes that the court, the prosecutor and the investigating organs are obliged to inform the complainant of his rights. See for example Luther, p. 313; Luther and Weber, p. 14; Strafverfahrensrecht, pp. 126-127. Sec. 136 of the Code of Criminal Procedure set this out in greater detail for the investigation stage: "... The investigator shall explain (to the complainant) the rights provided by sec. 53 of the present Code, and in an instance when the person declared a complainant is also a civil plaintiff, shall explain the rights provided by sec. 54 of the present Code." Sec. 274 is a corresponding provision in respect of the courts (see also sec. 192, 198, 202, 225(5) and 248(5)). In Poland, there is a general obligation to notify all parties in the proceedings (including the complainant) of their rights and duties (art. 10 of the Code of Criminal Procedure). There are also some special provisions obliging the various organs to notify the complainant of his rights during the proceedings (see, e.g., art. 280(3) and 297(2) of the Code of Criminal Procedure). See also art. 136 of the RSFSR Code of Criminal Procedure. The obligation of the court to inform the complainant of his rights and role is contained in e.g. sec. 49 of the Czechoslovak Penal Code, and sec. 59 and 105 of the Yugoslavian Law on Criminal Procedure. Sec. 4(3) of the Hungarian Code of Criminal Procedure provides a general obligation to all authorities to keep the parties informed.

however, it is generally expressed in administrative regulations or guidelines. (1)

Although all Western European countries appear to lack a general obligation for authorities to inform complainants of their rights and role, some particular legislation does exist in certain countries.

In Sweden, for example, chapter 22, section 2(2) of the Code of Judicial Procedure stipulates that

> "During the investigation of an offence, if the investigation authority or the prosecutor finds that a private claim may be based on the offence, he shall, if possible, notify the injured person in sufficient time prior to institution of the prosecution."

In Austria, the Federal Republic of Germany and Norway, there are similar provisions requiring the appropriate authorities to inform the complainant about the possibility of presenting a civil claim in connection with criminal proceedings. In Finland, this is standard practice. (3)

Certain countries have developed standardized means of informing complainants of their rights and role even without the benefit of explicit provisions in law. Such a procedure is in general use in Scotland, where the procurators fiscal routinely send all identifiable victims a leaflet explaining the compensation procedure in court (compensation orders).

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(1) Brief instructions have been published in the Federal Republic of Germany by the Ministers of Justice of the "Länder" together with the Federal Ministry of Justice. The French guidelines, developed by the police together with the Ministry of Justice, were given in January 1985; the complainant is to given a "depot de plainte", containing an outline of the procedure as well as a definition of key terms. In Ireland, the Director of Public Prosecutions issued "Practice Directions" in 1983 to the police and prosecuting barristers on how to deal with victims of rape. Also in Scotland, guidelines were issued to the police on this same subject in 1985, by the Scotish Home and Health Department. In the Netherlands, the Ministry of Justice issued guidelines to the police and prosecutors on how to deal with the victims of serious crimes. These guidelines became effective 1 March 1986. A Swedish working group established by the Government developed guidelines for dealing with child and female victims of assault and sexual assault.

(2) Sec. 365 of the Austrian Code of Criminal Procedure; sec. 236 and 426 of the Norwegian Code of Criminal Procedure (see NOU p. 83); sec. 403 of the Code of Criminal Procedure of the Federal Republic of Germany. It would appear, however, that this provision is very much a dead letter in the Federal Republic. See Amelunxen, p. 22. For Finland, see Tirkkonen, p. 278; Lappalainen, p. 40.

Along with the leaflet the victim is provided with a form on which he can note the extent of the damages. The procurator fiscal then gives the form to the sentencing judge. (1)

In 1982 the Ministry of Justice of France published a book entitled "Guide for Victims". The book is sold at bookstalls, with the proceeds used to finance victim support schemes. The book provides information not only on the court procedure but also on the possibilities of obtaining State compensation. (2)

In the countries with an active victim support movement voluntary organizations often attempt to inform victims of their rights and roles through the distribution of brochures or individual counselling. In some countries such schemes are directed at victims in general. Most initiatives, however, appear to be directed at specific groups of victims, in particular victims of sexual or domestic violence, or consumer fraud. (3)

Similarly, the legislation or administrative regulations of some States oblige the police to provide information in the case of certain types of offences or on certain types of rights. For example, during the early 1980s the legislation of Denmark, Norway and Sweden was changed so that victims of certain offences in particular need of assistance can be provided the services of an advocate (as is the case in Denmark and Norway) or of a "support person" (as in Sweden) at State expense. (4)

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(1) Shapland et al, p. 131. The form also contains information on State compensation for crime losses.

(2) Suggestions for the publication of similar books elsewhere have been made, for example in Scandinavia by Luterkort, p. 352; NOU, pp. 83-84.

(3) Some of these schemes operate with the cooperation of the authorities. In Hanau in Hessen as well as in Hannover in the Federal Republic of Germany, for example, official experiments are underway to increase the availability of information. (See e.g. Schädler, passim). Organizations such as the Weisser Ring in the Federal Republic of Germany and Austria provide the police with brochures for distribution to victims, suggesting that they contact the local representative of the organization.

(4) See e.g. Roll-Mathiesen, pp. 348-349; Snare, p. 207; NOU, pp. 88-89, and chap. 66a of the Danish Code of Judicial Procedure, chap. 9a of the Norwegian Code of Criminal Procedure and chap. 20, sec. 15a of the Swedish Code of Judicial Procedure. The legislative drafts of the laws indicate that the victims of sexual assault were particularly in the mind of the legislators.

Research has suggested that the victims of crime feel the lack of information on what they can and should do very keenly. This lack of information not only decreases the possibilities that the victim has of obtaining redress, it may also have the result of decreasing the satisfaction of the complainant with the operation of the criminal justice system. (1) One point that is often overlooked is that the victimization experience is unique for many victims. Up to the time that they become victims they generally had not paid any particular attention to the public information campaigns on crime prevention, on the operation of the criminal justice system, or on the possibilities of obtaining State compensation for crime loss. (2) When they do become a victim, all of this information suddenly becomes very relevant.

Information is thus generally sought only when the victim has become victimized. As the victim generally turns to the police to report the matter or to obtain assistance in its clarification, it would seem to be natural for the police to be the source of any information on what to do. Given the press of other police duties (for understandable tactical reasons the police focus on the apprehension of the offender and the gathering of the necessary evidence, and not on the assistance of the victim beyond what is immediately seen to be required) it would seem appropriate to prepare brochures setting out the basic information that most victims would need: where to turn for medical and social assistance, what arrangements should be made for insurance or possible State compensation, what the court proceedings will be like, what will be expected of the victim as complainant, and so on. So far, such brochures have primarily been prepared thrcugh private initiative.

Brochures, however, cannot tell the complainant all of the details of what to do in his own particular case. Moreover, once the matter leaves the hands of the police, the police are often unable to provide information on decisions and on the course of the case, even though the complainants generally expect such information. (3) For this reason the possible sources of information become the prosecutor or the court. The questions on which the complainant might desire information include the time and place of any hearings as well as the contents of any decisions.

There are two methods of obtaining information on what decisions have been made. One is to go through the documentation on one's own and the other is to be informed by the decision-maker or some other knowledgable source.

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(1) See, for example, Kelly, p. 16, and Shapland et al, p. 85.

(2) See Shapland et al, pp. 123 ff.

(3) See Shapland et al, pp. 49 and 95.

The first alternative places considerable demands on the complainant, but it can provide important information on what has been done and what facts have been ascertained. In general, those who become parties to a trial have the right to acquaint themselves with the official documentation once this has been prepared. (1) The limitation of this right to documentation that has been prepared is important in that, for example, the complainant generally has no blanket right to examine the records of the police investigation until the investigation has been concluded. The commentary to the Council of Europe Recommendation, in connection with the guideline obliging the police to keep the complainant informed, noted that

> "It is not envisaged that (the police) will necessarily give the victim detailed information about the conduct of the investigation, in particular when such information may hamper the investigation. Equally, the response to the victim's enquiry may be to await a decision by the prosecuting authorities. The victim should, however, be able to find out whether anyone is to be prosecuted as soon as a decision on that matter has been taken." (2)

Given the complexity of the criminal justice system and the lack of legal expertise of most complainants, a more significant method of obtaining information is for the decision-making authorities themselves to inform complainants of any decisions. This is especially important in respect of two types of decisions: a decision establishing a right for the complainant, and a decision terminating measures and placing the burden of further action on the complainant.

In the foregoing it was noted that the prosecutor in Sweden, Austria and the Federal Republic of Germany in theory has the responsibility of informing the complainant of the possibility of presenting a claim in connection with criminal proceedings. In a number of countries (e.g. the Federal Republic of Germany, Finland, France, Hungary, Romania,

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(1) See, for example, sec. 47(2) of the Austrian Code of Criminal Procedure; sec. 397(1) of the Code of Criminal Procedure of the Federal Republic of Germany (cf. sec. 385(3) of the same Code); art. 118(3) of the French Code of Criminal Procedure; sec. 53(2) of the Hungarian Code of Criminal Procedure; art. 304 and 372 of the Italian Code of Criminal Procedure; sec. 242 of the Norwegian Code of Criminal Procedure; art. 142(1) and 142(2) of the Polish Code of Criminal Procedure, and art. 236 of the RSFSR Code of Criminal Procedure. The right to acquaint oneself with the police investigation records in the USSR, however, does not apply to petty cases where only an inquiry (as opposed to an investigation) has been made. See Encyclopedia, p. 133. In the Netherlands, the complainant has the right to see the files once the summons have been issued (art. 333(2) of the Code of Criminal Procedure).

(2) Council of Europe 1985, p. 17.

Sweden and Turkey) the prosecutor is also obliged to inform the complainant in the event that he decides not to prosecute the alleged offender. The complainant will then have the possibility of taking other measures, such as filing a civil claim. (1)

Paragraph 6(a) of the United Nations Declaration, it may be recalled, suggests that victims be informed of their role and on the scope, timing and progress of proceedings and the disposition of their case "especially where serious crimes are involved and they have requested such information".

The authorities' assessment of seriousness is usually based on the category of the offence (e.g., the type of property or violent offence), the extent of harm, or the severity of the expected punishment, either in abstracto or in concreto. The complainant may have a completely different assessment. The drafts of the United Nations Declaration give no indication of what assessment was intended. As the obligation in the provision is on the authorities it would appear reasonable to assume that it is also their assessment that should be the point of departure. However, with reference to the fact that even an act that is petty from the point of view of the law (such as vandalism) may involve considerable harm to a complainant, his point of view should also be considered. The fact that a claim for damages may be forthcoming should in itself generally be adequate reason to inform the complainant of any decisions on whether or not the case will come to trial.

The demands of the provision could be met by the preparation of guidelines to authorities working within the criminal justice system, in particular the police. These guidelines would establish, first, the type of information that should be provided and the stage at which the complainant should be informed of any pending measures or of any decisions. The Council of Europe Recommendation is considerably more specific in this respect than the United Nations Declaration, in that it recommends inter alia that the victim be informed of the decision made by, respectively, the police, the prosecutor and the court. The Recommendation also specifies that it is the police who should inform the victim about the possibilities of obtaining assistance, advice and compensation.

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(1) This is an important right in France, where art. 88 and 420-1 of the Code of Criminal Procedure entitle the complainant to turn to the court if no prosecution is forthcoming. See section 7.3.3.

For other provisions, see, e.g., sec. 749 of the Danish Code of Judicial Procedure; sec. 171 of the Code of Criminal Procedure of the Federal Republic of Germany; sec. 136 of the Hungarian Code of Criminal Procedure; and sec. 14 of the Pre-Trial Investigation Decree of Sweden. Furthermore, in Hungary the police and the court have a corresponding duty to notify the victim if the procedure on their part is terminated and measures are waived; sec. 129(1), 140(2) and 170(3) of the Hungarian Code of Criminal Procedure.

The guidelines should also establish the criteria of seriousness. One practical step that might be taken when the complainant is questioned by the police is to inform the complainant of the possibility of receiving such information and ask whether or not he would appreciate information on any subsequent developments and to note this, as a matter of routine, in the protocol along with the address or telephone number. (1)

7.3. Allowing the presentation of the views and concerns of the complainant

7.3.1. The interest in having views and concerns presented

The question of to what extent the complainant should be allowed to express his views and concerns in the criminal justice process caused considerable debate in the drafting of the United Nations Declaration. The original draft from the Ottawa meeting had stated that the State should allow the victim to initiate and pursue criminal proceedings where appropriate, and furthermore that the State should provide for an active role for victims at all critical stages of judicial proceedings for example by allowing the victim to be present and heard. (2) Ultimately, what was accepted was that

> "6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
> ...
> (b) Allowing the views and concerns of the victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system..."

The questionnaire circulated by the United Nations Secretariat indicated three areas in which such presentation and consideration might take place: in connection with arrest, in connection with sentencing, and at a prison parole hearing.

The selection of these for inclusion under the topic of "consideration of the victim's views and concerns" may perhaps have been unfortunate in that the result may have been a focus on essentially punitive decisions (what sentence should be given, whether or not to release on parole) at the expense of other areas of victim involvement (for example, presentation of civil claims in criminal proceedings). However, it serves to illustrate one of the different ways in which this issue might be viewed. One of the ideologies that has been seen to lie behind the victim movement is that

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(1) See Council of Europe 1985, p. 18, point 6.

(2) See art. VII(7) and VII(8)(a) of Annex I to A/CONF. 121/IPM/4.

of retribution, which seeks punishment in proportion to the harm done. (1)

An emphasis on retribution is often used as an argument for seeking harsher punishment of offenders. It is against this background that one can understand the distaste with which some of the drafters regarded the notion that they perceived to underlie subparagraph 6(b) of the United Nations Declaration. (2)

The phrase "Allowing the views and concerns of the victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected" can, and should, be understood differently. It was not intended by the drafters to emphasize retributive elements in the criminal justice system. First of all, it should be noted that the phrase is heavily qualified: it refers to appropriate stages where the personal interests of the victims are affected, consistent with the relevant national criminal justice system. If victim involvement at a certain stage of criminal proceedings does not accord with the criminal policy of a country, this country can argue that such involvement is inappropriate and not consistent with the criminal justice system, and moreover, that the personal interests of victims are not involved.

Furthermore, a distinction should be made between actual involvement in the decision-making (for example, even to the extent of having a right of veto over certain decisions, such as release on parole) and consultation or representation in the process of gathering information in preparation

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(1) See section 2.2.

(2) Similarly, one can understand the explicit reservation made by the delegation of the United Kingdom, when the United Nations Declaration was approved at the Seventh United Nations Congress: "In the view of this delegation, the rights of victims should not extend in any way to sentencing, case disposal or course of trial." A/CONF.121/L.18, page 2, footnote 1.

American research has dealt with another essentially punitive stage at which the victim might be involved, the American institution of the plea-bargain. Ziegenhagen (pp. 101-102) notes that prosecutor resistance to including victims in the plea bargaining process is due to the view that the victim would present inappropriate points of view, possibly also ones based on revenge; victim involvement would also lead to administrative expense and inefficiency. Among the benefits of victim involvement at this stage, on the other hand, is that it may be used for purposeful delay, or it may be used as an argument to the court in favour of motions by the prosecutor - "even the victim agrees to this". Some states by statute allow victim involvement in the plea bargain. See NOVA, p. 12 and passim.

for the decision. If complainants are given a clear decision-making role, there might well be strong pressures on them to work in a certain direction. It would also appear that, at least in the light of the existing research in European countries, victims in general are not especially punitive nor do they necessarily wish to be given decision-making power over the punishment. (1)

This section of the present study will primarily deal with the ways in which complainants are consulted or represented in the second manner referred to above. In particular, it should be noted that traditionally the complainant has had a role in the trial, even though his profile has been very low in most countries. If the "consideration" of the views and concerns of the complainant means that he is only provided with an opportunity of making these known to the court, the danger of inappropriate pressure is considerably less.

Even so, the benefit remains of the possibility of vindication of the complainant in criminal proceedings. Research indicates that the complainant often expects to be consulted in some manner during the progress of the case through the criminal justice system. Furthermore, the complainant may have a need for authoritative reassurance that, for example, he was not to blame for the offence, and that the community condemns the offence. (2)

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(1) Shapland et al notes that the opinions of victims of the court procedures were often favourable. "Most victims did not appear to wish to play a more active decision making role in the present system. They did want to be consulted, particularly on decisions that would make a significant difference to the charges.." (pp. 80, 94 and 180-181). See also Weigend 1985, section V3C, esp. footnotes 113, 114 and 120; Kelly, p. 21; Lang, p. 32; and van Dijk 1986b, p. 114. For citation of research on the extent to which the victim desires the punishment of the offender, see footnote 2, p. 142, supra.

(2) One of the papers considered in the drafting of the Declaration suggested a specific point on this. It stated "Without prejudice to the rights of the accused in criminal proceedings, or a respondent in civil proceedings, justice entitles the victim to moral vindication, depending upon the nature of the wrongdoing and the means available, not only for personal satisfaction, but also to restore the social standing of the victim and to express public condemnation of the wrongdoing" (Bassiouni 1985b, Principle 15).

The term "reordering ritual" was used at the European Seminar on victim policy arranged by the Helsinki Institute (HEUNI 2, p. 3) to refer to the process through which the victim is reassured that the offence was something out of the ordinary, that the

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Such involvement of the victim in the criminal justice system need not be formal, in the sense that the victim is considered at law to be a party to the proceedings. However, it may be noted that the complainant (as recognized by law) does have a formal role in all European criminal justice systems, as shown in the following section.

7.3.2. The procedural position of the complainant: the alternatives

The criminal justice systems of Europe can be divided into three categories with respect to the nature of the role of the complainant. The complainant may have the right to prosecute for the offence; he may be permitted to present a civil claim in criminal proceedings; and he may have the role of witness. In the first category of countries, he may present penal demands (and generally also civil claims); in the second, at most civil claims; and in the last, no demands or claims at all.

This simple division will be used as the framework for further analysis of the different roles of the complainant. It should be noted, however, that the actual picture is made more complex by several factors.

One such factor is that even if formal measures are taken by the criminal justice system the case need not be brought to trial. Measures may be waived by the police or the prosecutor or the case may be referred to another authority. The use of simplified procedures may also seriously alter the complainant's possibilities of having his views and concerns taken into consideration. (1)

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behaviour of the offender was blameworthy, and that the values of the victim himself were not in error. As van Dijk writes (1986b, p. 117), "What crime victims seem to need most of all is to be reassured by authoritative others that they still live in a basically civilised world."

Quite opposite views have also been expressed of the nature of legal proceedings. Garfinkel, for example, refers to the trial and the legal process as a whole as a degradation ceremony (pp. 420-424).

(1) The possibilities of waiving measures or using alternative measures may in itself be dependant on the wishes of the complainant. The fact that a complainant was injured or suffered a loss and wishes that formal action be taken may be a strong argument for proceeding to a full trial. According to Guideline 5 of the Council of Europe Recommendation, "A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender."

A second factor is that most European countries have mixed systems, whereby the complainant can at times present civil claims in criminal proceedings while at other times he is required to serve the role of witness. Where the complainant may prosecute, this right is generally limited to subsidiary or private prosecution and the public prosecutor attends to prosecution in the bulk of the cases.

Finally, a distinction must be made between theory and practice. The fact that provisions exist in a country on the presentation of penal demands or civil claims does not necessarily mean that they are widely used in practice. For this reason, reference will be made in the following not only to the provisions themselves but also, when this is available, to data on the extent to which the provisions in question are actually used.

The above functional distinction in the role of the complainant is preferable to the terminological distinction that depends on whether or not the complainant is regarded as having the status of a party in the proceedings. A review of the law and the literature in the various European countries indicates that, broadly speaking, any person with a right to intervene to some extent in the procedure is regarded as a party, regardless of the way in which he can intervene and regardless of whether the intervention affects the prosecution or only the civil claim.

Thus, despite the considerable difference in the actual role of the complainant he is nonetheless regarded as a party to the proceedings in systems as disparate as those of France, the German Democratic Republic, Norway and the Union of Soviet Socialist Republics. (1)

7.3.3. The complainant and the presentation of penal claims

The role of the complainant in criminal prosecution can be divided into three main categories: (2)

1) State monopoly of prosecution
2) Competing State and complainant (public) rights of prosecution
   2.1. equal State and complainant (public) prosecution
   2.2. general State prosecution, subsidiary prosecution by the complainant
   2.3. general State prosecution, private prosecution by the complainant
3) Complainant monopoly of prosecution

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(1) See Vouin, pp. 492-497 for comments on France. See also sec. 17 of the Code of Criminal Procedure of the German Democratic Republic, art. 54-56 of the RSFSR Code of Criminal Procedure, and sec. 404 of the Code of Criminal Procedure of Norway.

(2) Adapted from Aragoneses Alonso, p. 132.

All of the above models except the last are represented in Europe. (1) From the point of view of the importance and number of cases dealt with, most of the countries in Europe fall into the first category (State monopoly of prosecution) although, strictly speaking, the countries with a technical possibility of private prosecution form the majority.

The State enjoys a monopoly of the right of prosecution in Czechoslovakia, Greece, Iceland, the Netherlands, Portugal, Romania, and Switzerland. (2) In these countries the decision of the prosecutor in the case is a critical one for the continuation of the procedure. If the complainant disagrees with the decision of the prosecutor and he cannot have this decision changed either through informal pressure or through formal channels of appeal he can do little to alter the path of the case through the criminal justice system. The formal role of the complainant, should the case come to trial, is limited to the presentation of civil claims (where possible) or to serving as a witness (when requested to do so).

In the other European countries there is an overlap between the State's right of prosecution and those either of the public at large (as in England and Wales, and Scotland) or of the complainant (as in Finland).

One key issue for the complainant in respect of the criminal justice system is whether or not the case will be brought to court for adjudication. The possibilities of blocking the intervention of the criminal justice system were noted above in section 6. (3) There is another time at which the complainant may want to intervene: should the prosecutor decide to waive measures the complainant may want alternative means of bringing the matter to court. This is especially important in those countries in which the State has a monopoly over prosecution. There is considerable variation in this regard among the European states.

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(1) One could speak of complainant monopoly in the sense that the initiation of prosecution is dependent on the complainant's formal request. Most European countries have some complainant offences (see section 6.1.2.). However, in no country in Europe does the complainant have total control over the prosecution of all offences directed against himself - or even of an appreciable portion.

(2) Tak, p. 18. See, for example, Solnar et al, p. 242. Note, however, art. 39 of the Bern Code of Criminal Procedure, on the right of private prosecution.

(3) Section 6.1.2. deals with complainant offences. The complainant may also not wish to assist in the prosecution in other cases and may refuse to cooperate with the prosecutor. In such cases the prosecutor may still choose to proceed. See, for example, Shapland et al, pp. 46-47, 88. However, a "heel-dragging" complainant can at times effectively forestall prosecution.

Four different methods of complainant intervention in the prosecutorial decision can be noted. These are: requesting the decision-maker to review his decision, appealing to the administrative superior of the decision-maker or to an independent board of complaints, appealing to court, and bringing the case to court on one's own. All four are subsumed in Guideline 7 of the Council of Europe Recommendation, which simply states:

> "The victim should have the right to ask for review by a competent authority of a decision not to prosecute, or the right to institute private proceedings."

First, the complainant may ask the prosecutor to reconsider his decision. The complainant may, for example, refer to evidence indicating that the alleged offence was more serious, or otherwise more deserving of prosecution than the prosecutor had apparently assumed. This possibility would appear to exist, at least as an informal alternative, in all European countries.

Second, the complainant may appeal the prosecutor's decision to a superior authority through administrative procedure. Formal arrangements for such a possibility exist in a few countries. For example, in the Netherlands should the prosecutor decide to waive prosecution the complainant can appeal his decision through a mandamus procedure. (1) If the appeal is successful the superior will order the original prosecutor to initiate prosecution.

Polish law also provides for the possibility of administrative review of the prosecutorial decision. According to art. 260(2) of the Polish Code of Criminal Procedure the complainant may become acquainted with the files and lodge a complaint with the prosecutor's superior if the prosecutor refuses to start proceedings. The law also provides that the complainant is to be informed of these rights by the prosecution agency. (2) Should the prosecutor decide on a conditional discontinuance, the complainant may appeal the conditions, but not the justification for the decision. The suspect, on the other hand, may appeal both the conditions and the justification. (3)

A third possibility is to turn to the court. In the Federal Republic of Germany there is a combination of these second and third possibilities in accordance with sec. 172 of the Code of Criminal Procedure of the Federal Republic of Germany through a procedure known as "Klageerzwingungsverfahren". If the prosecutor refuses to prosecute the com-

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(1) Art. 12 of the Netherlands Code of Criminal Procedure. See also, e.g., sec. 7 and 148(1) of the Hungarian Code of Criminal Procedure, on the general right to appeal decisions.

(2) Art. 22 of the RSFSR Code of Criminal Procedure is similar.

(3) Bieńkowska 1986, pp. 7-10.

plainant may appeal to his superior but only on such technical grounds as an assessment of the sufficiency of evidence for prosecution. If the superior also refuses to have prosecution initiated the complainant may turn to the court for a decision on this (in which case he must be represented by attorney). Should the court decide that prosecution is called for the prosecutor must prosecute. The complainant will be considered a subsidiary prosecutor. (1) It may be noted that the court, in such cases, may require a security deposit for anticipated costs. (2)

Similarly, in Belgium, France, Luxembourg, Spain and Turkey the complainant may bring his claim to court. If the court finds it called for it may require the prosecutor to take over the case. (3) In Italy, the prosecutor's decision not to prosecute always goes to the investigating magistrate for confirmation. The decision of the magistrate may be appealed.

The fourth possibility is to provide the complainant with his own right of prosecution. Here the European countries have adopted a number of models. In a few countries, the complainant (and in theory in the common law countries, any citizen) can always prosecute for the offence. This right may be primary, in that he may prosecute regardless of the action of the public prosecutor, or it may be secondary, in that he may prosecute only if the public prosecutor decides not to prosecute. In most European countries, the complainant may prosecute for certain specific offences, the private prosecution offences.

In this connection, attention will also be paid to the role of the complainant as "subsidiary" prosecutor, where he in effect joins in the prosecution undertaken by the public prosecutor. This, of course, is not intervention in the sense that the complainant is attempting to have the prosecutor's decision reviewed. Instead, he is joining in the prosecution by adding his own points of view. (4)

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(1) "Nebenkläger"; sec. 395 ff. of the Code of Criminal Procedure of the Federal Republic of Germany.

(2) Sec. 176 of the Code of Criminal Procedure of the Federal Republic of Germany. See e.g. Tak, p. 23.

(3) Tak, p. 11 and 22; Pradel 1985, p. 19 and Vérin, p. 2; see e.g. art. 101 of the Spanish Code of Criminal Procedure and art. 165 of the Turkish Code of Criminal Procedure.

(4) Here, the special case of Austria should be noted separately, in order to avoid terminological confusion. If a complainant has joined a trial as a private party ("Privatbeteiligter") and the prosecutor refuses to prosecute, the complainant may ask leave of the court to become a "Subsidiarankläger". See sec. 48 of the Austrian Code of Criminal Procedure, dealt with below in the text.

One important possibility of bringing the case to court exists in those few countries where the right of prosecution is a general one. In England and Wales, Ireland and Cyprus any person may prosecute for an offence and in Finland any complainant may prosecute for an offence directed against himself, totally regardless of the prosecutor's decision.

In England and Wales there is a check on the use of this general right. In order to control capricious prosecution, the Prosecution of Offences Act 1985, sec. 6(2) permits the Director of Public Prosecutions, if he considers it appropriate, to take over any case and seek the leave of the court to offer no evidence against the accused. In the case of a trial by indictment the Attorney General may enter a nolle prosequi, which effectively terminates the proceedings.

In Ireland the public at large also has a wide right of prosecution in theory. Although the Director of Public Prosecutions has a virtual monopoly on indictment, private individuals and organizations may still prosecute as common informers in summary jurisdiction cases. (1)

In Finland, the right of prosecution is always held by the complainant, when recognized as such by law. He is not bound in any way by the decision of the prosecutor. He can therefore bring a case directly to court without waiting for the prosecutor's decision, or he may bring charges different from those brought by the prosecutor.

It should be mentioned that in all countries providing such a general right of prosecution the complainant generally leaves the right of prosecution to the prosecutor. Prosecution by other bodies or persons on a wide scale is primarily to be found in England and Wales, where for example British Rail and the postal service prosecute for certain offences directed against them. Even here, prosecution by private citizens is a rarity. The principal exception is in the case of shoplifting; many prosecutions are brought by shopkeepers. (2)

The general right of prosecution may also be secondary in that it can only be used after the prosecutor himself has refused to raise charges. This is the case, for example, in Sweden, where chap. 20, sec. 8(1) of the Code of Judicial Procedure states that the complainant may not institute prosecution for an offence falling within the domain of public prosecution unless he has made an accusation to the competent authority and the prosecutor has decided that no

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(1) The restriction in regard to indictable offences is based on sec. 9 of the Criminal Justice (Administration) Act, when read together with sec. 2 of the Prosecution of Offences Act 1974. See Ryan and Magee, p. 71.

(2) Lidstone et al. This right is preserved by the Prosecution of Offences Act 1985, sec. 6(1).

prosecution will take place. (1) For Norway, somewhat similar provisions are to be found in sec. 402-406 of the Code of Criminal Procedure. In Austria the complainant also has such a secondary right of prosecution, but not against juvenile offenders. If the prosecutor decides to take over prosecution the complainant loses this prosecutorial position. (2)

A third possibility of bringing a case directly to court is that of private prosecution. Private prosecution, in those countries in which it exists, (3) is largely limited to those minor offences that are regarded as so trivial that there is no public interest in prosecution. Often, although not necessarily, private prosecution offences are at the same time complainant offences, in other words offences that can only be prosecuted on the request of the complainant. (4) Generally, the private person or body can take the case directly to court irrespective of the decision of the prose-

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(1) In Sweden, a 1976 Committee proposed that even this secondary right be abandoned, and that the complainant only be allowed to appeal to the prosecutor's superior. The Committee argued that this was in the interests of procedural economy; the secondary right dilutes in principle the system of non-prosecution; and the secondary right has been little used. See SOU, pp. 331-333. Ekelöf (p. 63, footnote 121a) notes that public prosecution is a better guarantee than private prosecution of a thorough investigation of the matter.

(2) Roeder, pp. 81 ff. Sec. 2 and 48 of the Austrian Code of Criminal Procedure.

(3) Austria, Bulgaria, Denmark, the Federal Republic of Germany, Hungary, Iceland, Liechenstein, Norway, Poland, Romania, the RSFSR, Scotland, Spain, Switzerland, Turkey and Yugoslavia. Tak, p. 8 ff.; Dünkel 1985a, p. 22. See, e.g., sec. 2(2) and 46(2) of the Austrian Code of Criminal Procedure; sec. 244(5) and 275(1) of the Danish Penal Code and sec. 719 and 725 of the Danish Code of Criminal Procedure; sec. 374 ff. of the Code of Criminal Procedure of the Federal Republic of Germany; sec. 311-329 of the Hungarian Code of Criminal Procedure; sec. 234-239 of the Icelandic Penal Code; chap. 28 of the Norwegian Code of Criminal Procedure; art. 49-51 of the Polish Code of Criminal Procedure; art. 205-206 of the Romanian Penal Code; art. 27 of the RSFSR Code of Criminal Procedure; art. 104 of the Spanish Code of Criminal Procedure; art. 39 of the Bern Code of Criminal Procedure; and art. 11(2) of the Yugoslavian Code of Criminal Procedure. In the Federal Republic of Germany, private prosecution is not possible against juveniles. See Jugendgerichtsgesetz sec. 80(1). Eser (p. 221) notes that even for adults, its use is very slight.

(4) Complainant offences are dealt with in section 6.1.2.

cutor. However, in Denmark and Switzerland, private prosecution can only take place after the prosecutor has waived his right of prosecution.

The Scottish model appears to lie between secondary prosecution and private prosecution. The complainant may institute proceedings with the concurrence of the public prosecutor. If the latter refuses to concur the complainant may apply to the High Court for permission to prosecute. (1)

There is no private prosecution in the German Democratic Republic or the Netherlands. In Italy, private prosecution is possible by law only in connection with some offences committed in electoral procedure.

From the point of view of the complainant it is almost always preferable to have the offence prosecuted by the public prosecutor. This is due to the factors of expertise, cost and convenience.

First, the prosecution of an offence calls for at least a minimum of knowledge of criminal and procedural law. In order for the complainant to bring a case to court himself he must realize that the act was an offence and he must be able to demonstrate to the satisfaction of the court that the essential elements of the offence have been fulfilled. He must also know how the defendant is to be summoned, what papers are to be prepared and delivered, how the evidence is to be presented, what procedural deadlines are to be met, and so on. This is all part of the routine daily work of the prosecutor. For the complainant, however, this may be the first time that he has ever appeared in court, and he will thus generally be placed at a considerable disadvantage.

These difficulties can be overcome in part if the case can be given to a lawyer for preparation and presentation. This is generally no problem for large corporations. For private individuals, however, the costs involved might make this option inpracticable. This is so especially in the light of the probability that the offence involved is in itself a very petty one. Although the offender, on conviction, may be ordered to pay the complainant's costs, this may in itself involve difficulties resulting from the inability or unwillingness of the offender to pay. The personal interests involved will have to yield to the cost factor.

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(1) Gittler, p. 179; Gane and Stoddart 1983, pp. 52 and 56-78; Renton and Brown, pp. 24-26. Renton and Brown note (p. 24) that the "ancient system of private prosecution at the instance of a party wronged or injured by the crime is practically unknown". Only four cases are cited - from 1633, 1823, 1909 and most recently from 1982, when the High Court authorized the issue of criminal letters for rape. However, some private prosecution still occurs for lesser offences. See ibid., pp. 234-236.

Even if experience and cost were not a factor prosecution by the complainant may simply be inconvenient. For example, it may be difficult for him to gather the evidence necessary. The public prosecutor can generally rely on the police for assistance in this regard, while the complainant's possibilities are generally much lesser. For example, the complainant cannot lawfully use coercive measures in the investigation of the offence. Prosecution may also be inconvenient in the sense that the complainant may fear revenge or scandal or he may be dissuaded by the possibility that his lack of experience may render him open to a suit for malicious prosecution.

Prosecution by the complainant does not involve drawbacks only for the complainant. It may also be disadvantageous to the State and its criminal policy. The prosecutor can be expected to weigh the merits and disadvantages of prosecution objectively with due reference to over-all criminal policy. The attitude of the complainant to the prosecution of the case, on the other hand, may understandably be coloured by personal factors, perhaps even revenge. (1) Furthermore, unless there has been a police investigation of the matter, the case may be brought to the court with very little or no advance preparation. This would complicate the task of the court in ascertaining what happened.

All of the models of prosecution referred to above are based on the possibility that the complainant wishes to bring the matter to court himself or to overturn the prosecutor's decision not to do so. This is not the only way in which the complainant can participate in prosecution. Most of the cases recorded by the police will lead to prosecution by the state prosecutor. One important means of participating in the presentation of criminal claims is through serving as a subsidiary ("supporting") prosecutor. Such a role allows the complainant the opportunity, for example, to suggest or even submit evidence, to suggest the examination of witnesses and to be heard in court personally also on the penal claim.

This form of participation in prosecution is important for two reasons. First, since in practice in all of the countries covered by this study the public prosecutor will generally attend to the preparation and presentation of the case, participation as a subsidiary prosecutor ensures that the complainant has ample opportunity to make his concerns and views known to the court. If he did not have the possibility of serving as a subsidiary prosecutor he would generally not be able to intervene at all, with the possible exception of in respect of civil claims. Second, as the case will be presented primarily by the public prosecutor the complainant is relieved of the responsibility for presenting evidence and legal arguments, and he will by and large avoid the other drawbacks just referred to. What

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(1) See for example Heuman, pp. 67-80. In part to counterbalance these dangers the court may be given the opportunity to throw out an unfounded private prosecution: an example is provided by sec. 416 of the Norwegian Code of Criminal Procedure.

little empirical evidence is available suggests that considerable use is made of this institution even in the Federal Republic of Germany, where the other modes of complainant participation in the criminal trial are little used. (1)

A formal role as subsidiary prosecutor exists in Austria, the Federal Republic of Germany, Malta, Sweden and Yugoslavia. (2) In Malta, however, sec. 422(1) and 422(3) provide that the complainant himself may not participate; instead, he can engage an advocate or legal procuratore to assist them.

In Poland, the complainant may also be given the status of subsidiary prosecutor if this is in the interests of the exercise of justice. If, however, participation hampers the proceedings the court may deprive him of this status. In 1976, the Polish Supreme Court issued directives on the status of the complainant. According to directive 14, a refusal to grant the complainant the position of subsidiary prosecutor should be the exception. (3)

In the other Socialist countries the complainant is also generally permitted (and at times encouraged) to take an active role in the proceedings. This role means at least that he has the right to acquaint himself with the file. From the point of view of prosecution it is significant that he can generally suggest the collection of further evidence and suggest questions to be asked of witnesses. (4) He also generally has the right to be heard, primarily in the form of giving concluding comments at the end of the trial. (5)

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(1) According to Weigend (1985, footnotes 191-192 of part V and accompanying text) this is used in ca. 10 per cent of all criminal proceedings and in roughly one third of the cases where it would be possible.

(2) Sec. 48 of the Austrian Code of Criminal Procedure; sec. 374, 385 and 397 of the Code of Criminal Procedure of the Federal Republic of Germany; art. 422 of the Maltese Code of Criminal Procedure; sec. 404 of the Norwegian Code of Criminal Procedure; chap. 20, sec. 8(2) of the Swedish Code of Judicial Procedure and art. 63 of the Yugoslavian Code of Criminal Procedure.

(3) Art. 44-48 of the Polish Code of Criminal Procedure. See Bieńkowska 1986, pp. 10-11.

(4) The right to present evidence is dealt with in sec. 43(1) of the Czechoslovakian Code of Criminal Procedure, sec. 17(1) of the Code of Criminal Procedure of the German Democratic Republic, art. 326 of the Romanian Code of Criminal Procedure and art. 53(2) of the RSFSR Code of Criminal Procedure. See also art. 295(4) and 300 of the Yugoslavian Code of Criminal Procedure.

(5) The right of a complainant who has joined in the pro-

(continued on the next page)

7.3.4. The complainant and the presentation of civil claims in criminal proceedings

With the minor exceptions noted above in section 7.3.3., the role of the complainant in criminal trials in the Western European countries covered by the study is generally limited to the presentation of a civil claim in criminal proceedings and acting as witness. (1) It is only in Finland and the socialist countries that the complainant has a wide right to present both penal and civil demands.

The two terms generally used to describe the complainant's role in the presentation of civil claims in criminal proceedings are that he is a "partie civile" or that the proceedings are "adhesive". While the former has traditionally been used to describe the complainant's role in Belgium, Italy and France and the latter has been used in the countries with a Germanic legal tradition, they in fact reflect much the same phenomenon. (2) In both, the main proceedings are the criminal one, where the prosecutor deals with the

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ceedings are noted in, e.g., sec. 43(1) of the Czechoslovakian Code of Criminal Procedure; sec. 212(2) of the Hungarian Code of Criminal Procedure; art. 352 of the Polish Code of Criminal Procedure; art. 295(1) of the RSFSR Code of Criminal Procedure; and art. 310 and 312 of the Yugoslavian Code of Criminal Procedure. Examples of Western European legal systems providing this right are Austria (sec. 47(2) of the Code of Criminal Procedure) and Italy (art. 305 and 468 of the Code of Criminal Procedure).

(1) In respect of the core countries, see sec. 47-50 of the Austrian Code of Criminal Procedure; sec. 685 of the Danish Code of Judicial Procedure; sec. 403 ff. of the Code of Criminal Procedure of the Federal Republic of Germany; chap. 14, sec. 8 of the Finnish Code of Judicial Procedure; art. 2-5(1) of the French Code of Criminal Procedure (cf. art. 281, 312, 332, 354); sec. 17(1) and 198 of the Code of Criminal Procedure and sec. 24 of the Penal Code of the German Democratic Republic; sec. 55 of the Hungarian Code of Criminal Procedure; art. 22 and 91 ff. of the Italian Code of Criminal Procedure; art. 332 ff. of the Code of Criminal Procedure of the Netherlands; sec. 3(1) and chap. 28 of the Norwegian Code of Criminal Procedure; art. 52 and 362 of the Polish Code of Criminal Procedure; chap. 22 of the Swedish Code of Judicial Procedure; and art. 29 and 54 of the RSFSR Code of Criminal Procedure.

(2) The term "adhesion procedure" is not, however, used in the German Democratic Republic, where the literature stresses that the presentation of claims for damage on the basis of the offence is an integral part of the criminal process. See, e.g., Luther and Weber, p. 15.

defendant's criminal liability. At the discretion of the court, the complainant is allowed to present his civil claim during the criminal procedure. The court will thereupon decide on both at the same time. However, if the consideration of the civil claim will considerably prolong the process, the court can generally divert it to separate civil proceedings. (1)

In all of the countries covered by this study, a civil claim will be considered in criminal proceedings (if at all) only if it is based on the criminal act being prosecuted. The civil action may generally be for all kinds of damage flowing from the criminal act in general, both physical and moral. (2) However, the action must generally be one for damages, or for civil relief through compensation from the offender or the restitution of property. For example, in countries where adultery is an offence, an action for divorce will generally not be considered ancillary to the prosecution. (3)

Several arguments can be made in favour of combining criminal and civil proceedings. (4)

From the point of view of the State and the courts there is the argument of procedural economy. Two cases can be combined into one, thus decreasing the amount of judicial and administrative work and time needed. Combining the two also assures that the decisions on both the penal and the civil questions are not in conflict. (5)

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(1) Lappalainen (p. 36) notes that in Sweden and Finland the court dealing with the criminal case may deal with the civil claim in all its particulars, but in the Central European countries the civil claim is considered specifically as an ancillary claim: "the criminal court only examines whether the assessment of the charge at criminal law gives rise to an award for damages." Weigend notes (letter to the author, 30 October 1986) that this is not true at least of the law in the Federal Republic of Germany.

(2) In Hungary, claims for moral damage will not be considered in criminal proceedings.

(3) See, on this, Larguier, pp. 688-695; Pradel 1980, pp. 211-213 and 236 ff. However, Røstad notes (letter to the author, 6 October 1986) that a claim for divorce may be put forward in Norway in criminal proceedings under sec. 3 of the Norwegian Code of Criminal Procedure.

(4) See the issue of Revue internationale de droit pénal 1974, pp. 648-688, dealing with the deliberations of the Eleventh Congress of the International Association of Penal Law.

(5) Lappalainen, pp. 38-39

From the point of view of the complainant the use of criminal proceedings is often quicker, simpler and cheaper than the use of civil proceedings. The prosecutor will generally demonstrate the guilt of the offender, thus largely relieving the complainant of the need to demonstrate the circumstances in which his loss arose. In some jurisdictions the prosecutor will also take over the presentation of the civil claim. Furthermore, some of the more important investigatory means provided in criminal proceedings (such as search) are not permitted in purely civil actions. (1)

From the point of view of over-all criminal policy the consideration of civil liability together with criminal liability provides an opportunity for strengthening individual prevention ("crime doesn't pay"), considering the attitude of the offender towards compensation in assessing the punishment, and demonstrating to the public that the offender is liable to both the complainant and the State for the offence. (2)

The adhesion or partie civile procedure has also been criticized. Just as is the case with civil proceedings, it requires initiative by the victim, and some knowledge of procedural questions. It is believed by some to complicate and delay the criminal process. (3) The complication primarily lies in the fact that civil and criminal proceedings call for a different assessment of liability. The delay, in turn, often lies in the assessment of damage. In most countries in Europe, civil and criminal cases are generally dealt with by different courts, or at least different judges. The criminal court judges would then have less experience with civil proceedings. (4) In the common law countries, where no adhesion is possible, the major barrier to combining the civil and the penal action is the imbedded

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(1) Pradel 1980, pp. 205-206. Lappalainen also notes (p. 39) that the cheapness of the process is an important factor in those cases where the offender has no means, and therefore the complainant would otherwise have had to cover the court costs.

(2) See also Lappalainen, pp. 49-51.

(3) This has been emphasized in particular in the Federal Republic of Germany, where the adhesion procedure is little used. See, e.g., Riess, pp. C35-C38 and the literature cited.

(4) Although Denmark, Finland and Sweden have a combined Code of Judicial Procedure, most countries of Europe have separate codes for civil and criminal procedure. See Lappalainen, pp. 54-67 on the most significant differences in the forms of procedure. He cites, among other factors, the non-mandatory nature of the civil process, the use of forcible measures in the criminal process, and the strength of the principle of favor defensionis in the criminal process (in dubio pro reo, the assumption of innocence, in dubio mitius).

distinction between torts and crimes - a distinction not necessarily understood by the complainants themselves.

The primary argument in the common law countries for maintaining the distinction between crime and tort, and relegating civil claims to the civil courts, is that criminal proceedings are primarily concerned with the relationship between the offender and the State, and not between the offender and the victim. Including the question of restitution in criminal proceedings, and in particular providing the victim with some active role in criminal proceedings would confound the consideration of guilt and punishment: the criminal court judges would have to expend time on the nuances of civil law and civil proceedings (for example, on the assessment of fault), the involvement of the victim in the proceedings may enlarge discretion or lead to the danger of populistic decisions, and in general the overstrained criminal justice system will lose what little semblance of order and rationality it now has. (1)

A further difficulty in considering civil claims in criminal proceedings is that the damage done may be so extensive that it is difficult to state the amount specifically. (2) It is also possible, in particular in the case of serious injury, that the final damage and injury will not be known for some time. As it is in the interests of procedural economy and of general criminal policy to have the punishment determined as soon as possible after the event, as a general rule the courts have the right to separate civil from criminal proceedings at its discretion. The complainant must then institute separate civil proceedings if he wishes to have his civil claim dealt with.

A partly related criticism is that, since the civil claim is generally ancillary to the penal claim, it is possible that the civil claim will not be considered to its full extent. This possibility is especially present in cases where the court deems the evidence insufficient for conviction on some (or all) charges, without considering the civil claim on the basis of its own merits. (3)

Yet another criticism is related to the tieing of criminal with civil liability. If payment of the damages is considered a mitigating factor and in particular if it may lead

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(1) See, e.g., Weisstub, esp. pp. 204-209. Radzinowicz and Hood, pp. 654-655, contains a somewhat off-handed dismissal of restitution and compensation in the framework of the criminal justice system. Note also Henderson's bland dismissal (p. 1007): "As a theoretical matter, the civil courts are the proper forum for victims to claim damages."

(2) Larguier notes (p. 688) that "It is said that the French appellant courts, passing upon penal proceedings, must devote approximately seventy per cent of their time to resolving civil questions."

(3) Lappalainen, pp. 52-53.

to the waiving of punishment, this may be regarded by the public as "buying yourself off".

The criticism of the combining of criminal and civil proceedings notwithstanding, it would appear that the adhesion procedure or the partie civile system work satisfactorily in those countries where it has been instituted. (1) This was also the position taken at the 1974 Congress of the International Association of Penal Law, where a majority of the participants favoured the principle that "the victim must have the right to choose between an ordinary civil proceeding and the adhesion process." (2)

The Council of Europe also favoured wider use of the adhesion or action civile procedure. With reference to comparative studies showing that such procedures are not used very often in practice "in some states", the Council of Ministers recommended that "impediments be removed and judges as well as lawyers be encouraged to inspire the law with life." (3)

7.3.5. The complainant as witness in the criminal process

Where the complainant can participate in the proceedings either as a prosecuting party or as civil claimant he has the right to present some of his views and concerns. This is not the case where his role is limited to that of witness.

In England and Wales, Ireland and Scotland, the complainant in fact rarely institutes proceedings. In these countries,

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(1) It is in wide use, for example, in the Nordic and the socialist countries. A significant exception to this pattern of wide use is the Federal Republic of Germany, where it is used extremely rarely (Jescheck 1958, p. 593; Amelunxen, p. 23; Eser, p. 225). Tiegs (letter to the author, 29 October 1986) notes that adhesion proceedings are used relatively rarely also in Austria. The situation is in marked contrast to the Democratic Republic of Germany, where the presentation of a civil claim is an integral part of criminal proceedings. Luther and Weber, p. 15.

Little use is made of the adhesion principle in the Netherlands, due to certain built-in difficulties. For example, the civil claim may not exceed 1500 guilders (ca. 600 USD; the limit is 600 guilders in the kantongerichte, that deal with simple offences), and the complainant must present his claim on his own initiative at the very beginning of the trial. The victim may not "split" his claim by taking the claim in excess of this 1500 guilders limit to the civil court. See, e.g., van Bemmelen 1984, pp. 241 ff; Timmerman, pp. 218-219.

(2) Revue international de droit pénal 1974, pp. 648-688.

(3) Council of Europe 1985, p. 20.

as well as in Malta and Northern Ireland, he may generally serve as witness if called upon. (1)

The crucial differences between serving as a prosecuting party or a civil claimant, on one hand, and as a witness, on the other, lies not only in the degree of involvement but also in who has the initiative. As prosecuting party or civil claimant the complainant can generally follow the entire proceedings and he generally also has a right to acquaint himself with at least some of the documentation. Above all, he will generally be provided with various possibilities of making a statement on the offence; he will have a voice in the proceedings.

The witness, on the other hand, is usually requested to remain outside of the court room until summoned to present his testimony. Even during the brief time that he is in court he is limited to answering the questions put to him. Although a sympathetic questioner (in particular, the prosecutor) may ask questions calculated to bring out the extent of the complainant's loss, the role remains a basically passive one.

One point of overlap between the different roles of the complainant lies in the presentation of penal or civil claims, and serving as a witness. In Finland and Sweden, the complainant may not serve as a witness in a case even if he does not present claims. A complainant may serve as a witness in Austria (this is specifically noted in sec. 172 of the Code of Criminal Procedure), Denmark, the Federal Republic of Germany, the German Democratic Republic (sec. 25 of the Code of Criminal Procedure), Hungary, the Netherlands, Norway, Poland and the RSFSR. (2)

7.3.6. Discussion of the procedural role of the complainant

This section has dealt with three basic ways in which the complainant may be involved in criminal proceedings. He may present penal demands, as is the case in practice in all offences in which he is considered a complainant at law in Finland and in the socialist countries. Here, he will normally serve in a subsidiary capacity in relation to the

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(1) The limitation, "when called upon" is an important one. Even in the selective sample of victims used in the study by Shapland et al, only 17 per cent of the victims gave evidence in court. Shapland et al, p. 51.

(2) See Lappalainen, pp. 36-37, footnote 113; van Bemmelen 1984, p. 241 and Groenhuijsen, e.g. pp. 130-134 (the Netherlands); art. 331(2) of the Polish Code of Criminal Procedure; art. 69 of the RSFSR Code of Criminal Procedure. The right to serve as a witness is indirectly noted in sec. 199(3) of the Hungarian Code of Criminal Procedure. In France, the complainant may also be heard, but not under oath. Heuman, p. 30.

public prosecutor. He may also present penal demands in certain petty offences as a private prosecutor in most European countries. In theory (although less so in practice) he has extensive possibilities of prosecuting in the common law countries. Finally, he may seek review of the prosecutorial decision.

Second, in almost all European countries he has the theoretical right to present civil demands in criminal proceedings. This right does not exist in the common law countries, nor is it in wide use in Austria, the Federal Republic of Germany or the Netherlands.

Third, he may serve as witness for the prosecution.

However, it is not necessarily the formal role of the complainant that is the most important in providing him with the opportunity for presenting his views and concerns. While it is true that the role of prosecuting party theoretically provides the complainant with a greater opportunity to involve himself in the trial (often including the crucial right of initiating the procedure) than does the role of civil complainant, and the role of civil complainant, in turn, theoretically offers greater opportunities of participating than does the role of witness, the actual difference between the three models lies in how the respective criminal justice systems operate in fact. It is possible to consider the views and concerns of the complainant without giving him a formal role.

To take the example of England and Wales, it may be considered unsatisfactory in theory that the complainant has "only" the role of witness and that he rarely has the possibility of performing even in this role in court. However, it does not follow that he should be given a prosecutorial or civil claimant role.

One reason is due to policy. The general criminal policy in England and Wales would appear to oppose an increased prosecutorial role for the complainant. While the right of prosecution is held by the public at large, the law has been amended to give the Director of Public Prosecutions the right to forestall capricious prosecutions. (1)

A second, and theoretically more important reason is that there are alternative ways in which the views and concerns of the complainant can be presented. His role is not limited to the active role of prosecutor or civil claimant, or to the somewhat passive role of witness.

In England and Wales this can be seen in respect of civil claims. The courts of the United Kingdom have the power to give compensation orders. Thus, even though the complainant does not have the benefit of the adhesion procedure or of

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(1) Reference also was made on p. 180, footnote 2 to the reservation made by the delegation of the United Kingdom to the paragraph of the United Nations Declaration now in question.

the status of partie civile in the United Kingdom, there remains the possibility of collecting compensation even without bringing a separate civil suit.

There is thus a complainant role that has not been considered so far in this section, that of a general source of information. His experience, his loss or injury, and his reaction to the victimization may influence the operation of the criminal justice system in a myriad of ways not given to easy analysis. It has already been noted that offences may be defined with reference to victim characteristics and behaviour and to victim-offender relationships. The criminal and procedural law of the various countries may, furthermore, oblige the decision-makers to consider the interests of the complainant as at least one of many factors in deciding on the appropriate measure. (1)

This complainant role is noted in the Council of Europe Recommendation. In the preamble to the Recommendation, the Committee of Ministers noted that it had considered, inter alia, "that the needs and interests of the victim should be taken into account to a greater degree, throughout all stages of the criminal justice process". Guideline 7, as noted above, called for giving the complainant the right to ask for review by a competent authority of a decision not to prosecute or the right to institute private proceedings.

The important guidelines in this respect, however, are numbers 4 and 12. According to Guideline 4 of the Council of Europe Recommendation,

> "In any report to the prosecuting authorities the police should give as clear and complete a statement as possible on the injuries and losses suffered by the victim".

According to Guideline 12,

> "All relevant information concerning the injuries and losses suffered by the victim should be made available to the court in order that it may, when deciding upon the form and the quantum of the sentence, take into account:
> - the victim's need for compensation;
> - any compensation or restitution made by the offender or any genuine effort to that end."

In the explanatory report, the Council of Ministers notes explicitly that "(t)he injuries or losses suffered by the victim (are) a decisive element of any disposition the court will take in the case". Thus, the information noted in Guidelines 4 and 12 should be made available to the court. (2)

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(1) Reference can be made here to what was noted about police discretion (see section 6.2.3.), to the victim-related factors considered by prosecutors in deciding on non-prosecution (see Tak, pp. 64-65) and to the significance of the injury or loss to the complainant in influencing the decision of the court.

(2) Council of Europe 1985, p. 20.

Although this information can be presented in a way that pays little if any attention to the "views and concerns of the victim", when the two Council of Europe guidelines are read together with what is stated in the preamble, "the needs and interests of the victim should be taken into account to a greater degree", the implication is that in all the Member States of the Council of Europe the above information should reflect how the complainant himself experiences his situation.

This interest that the criminal policy of the countries of Europe has in considering the views and concerns of the complainant is not limited to the Member States of the Council of Europe. One indication of this is the complainant's role in decisions on release on bail, the determination of the punishment, or release on parole. Although in some of the countries the complainant may be consulted on such issues during the pre-trial investigation or the trial itself, he has no direct decision-making role on these questions in any of the core countries. Even so, in inquiring as to whether or not victim concerns were considered in these decisions almost all of the 20 European countries replying to the United Nations questionnaire replied "yes" in respect of arrest and sentence, and one-half replied "yes" even to the question of parole. Ten of the fifteen core countries replied to this question; eight replied in the affirmative in respect of arrest and sentence, and four replied in the affirmative in respect of the decision on parole. (1)

Thus, regardless of the role of the complainant, the courts and other criminal justice agencies obviously do take into consideration his views and concerns in coming to a decision on the matter. The extent to which the courts consciously and formally acknowledge this consideration may vary. While this consideration may appear very limited from the point of view of the complainant, it does exist.

7.4. Providing the complainant with proper assistance

It was noted in section 7.2. that the complainant often needs assistance in dealing with the criminal justice system. Often, this need is met simply by providing him with information. However, the needs of some complainants for assistance may go even further.

Paragraph 6 (c) of the United Nations Declaration voices a concern for facilitating the responsiveness of judicial and administrative processes to the needs of complainants by

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(1) Irene Melup, letter to the author, 2 March 1986. The report itself merely noted, e.g., that "(t)he majority of countries ... also reported policies that allowed participation by the victim in other phases, for example at the arrest or pre-sentencing stage." The examples given from the United Kingdom and Cyprus refer primarily to ways in which the wishes of the complainants are taken into account. (A/CONF.121/4, para. 43; cf. also paras. 41-47).

"(c) Providing proper assistance to victims throughout the legal process".

The main area of concern here is legal assistance: the complainant may have legal rights arising from the offence and may therefore need legal assistance in obtaining restitution or other satisfaction. This is noted explicitly in Guideline 2 of the Council of Europe Recommendation, which recommends that the police inform the victim about the possibility of obtaining legal advice, and Guideline 9, which recommends similar information in respect of the court proceedings. (1)

Perhaps the most effective means of rendering this legal assistance is for the criminal justice agencies to provide it themselves sua sponte. It was noted in section 7.2. that in general in the Socialist countries, the police, prosecutors and courts are obliged to provide the complainant with such assistance.

In the other countries a complainant desiring legal assistance generally does not have the same assurance embodied in law. He can, of course, consult and even retain a lawyer and then require the offender to provide restitution for his legal costs. However, it may be noted that offenders are often unable to pay for the damages, to say nothing of the expense of trained counsel.

Few Western European states provide for the possibility of State-paid counsel to complainants in case of financial need. (2) A point of comparison here is provided by art. 14(3)(d) of the International Covenant on Civil and Political Rights, which states inter alia that the defendant in criminal proceedings is entitled to have legal assistance assigned to him where the interests of justice so require and without payment by him where he lacks sufficient means. (3)

A special area in which the complainant may need such legal assistance and perhaps other forms of expert assistance is in securing his civil claim. The prosecution itself will normally be dealt with by the public prosecutor.

Again, the Socialist countries have generally provided that the criminal justice agencies are to assist the complainants in this regard. In the German Democratic Republic, for

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(1) Other forms of assistance are dealt with in section 6.6.

(2) Among the exceptions here are Finland (Cost-Free Legal Proceedings Act), Norway (Cost-Free Legal Assistance Act) and Sweden (Legal Assistance Act). Sec. 379(3) of the Code of Criminal Procedure of the Federal Republic of Germany provides for free legal assistance for private prosecutors; an extension of this right to other complainants is being considered.

(3) General Assembly Res. 2200 A (XXI).

example, it is specifically provided that the court, the prosecutor and the investigating authorities must produce the evidence not only as to the guilt of the defendant but also as to the amount of the damage; thus, the complainant is largely relieved of this burden of proof. (1) In Hungary, the legislation does not provide an absolute obligation on the prosecutor to assist the complainant: it only notes that the prosecutor may secure the civil claim and the complainant (and other parties) may exercise their rights by proxy. (2)

In Norway and Sweden, the law obliges the prosecutor to accept a proxy from the complainant and represent him cost-free if this can be done without considerable inconvenience and the claim is not apparently devoid of merit. In Denmark and Finland, this is common practice. (3)

Furthermore, as noted earlier, (4) in Denmark, Norway and Sweden, victims of certain offences (primarily sexual assault) may be provided with the assistance of an advocate (in Denmark and Norway) or a "contact person" (in Sweden) regardless of need. Such a person may provide not only legal advice but also emotional support throughout the course of the trial.

7.5. Minimizing inconvenience and protecting the complainant

The United Nations Declaration deals with a variety of concerns in paragraph 6 (d):

> "6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
> ...
> (d) Taking measures to minimize inconvenience to victims, protect their privacy, where necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation".

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(1) Sec. 8, 17(3) and 22 of the Code of Criminal Procedure of the German Democratic Republic. Luther and Weber, p. 14.

(2) Sec. 55(4) and 58(1) of the Hungarian Code of Criminal Procedure.

(3) Herlin, p. 358; Hov, p. 134; Ekelöf, pp. 177-178 See chap. 22, sec. 2 of the Swedish Code of Judicial Procedure and sec. 427(2) of the Norwegian Code of Criminal Procedure. Koktvedgaard et al note (p. 134) that this is done in principle in Denmark when it does not cause essential difficulty; Lappalainen, p. 39 notes that it is common practice in Finland.

(4) Section 7.2.

This subparagraph thus deals with three separate issues: avoiding inconvenience, protecting privacy, and ensuring safety.

The latter two aspects are dealt with separately in the Council of Europe Recommendation. According to Guideline 15, which deals with privacy,

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

Guideline 16 deals with safety:

> "Whenever this appears necessary, and especially when organized crime is involved, the complainant and his family should be given effective protection against intimidation and the risk of retaliation by the offender.

The avoidance of inconvenience involves above all considering the needs of the complainant in the scheduling of hearings where his presence is required, as well as avoiding, whenever possible, repeated continuances. Each hearing may lead to a number of practical problems that apparently are rarely officially recognized by the criminal justice system: the problems of arranging transportation to and from court, arranging the care of children, and getting time off from work, for example.

Another matter of possible inconvenience is the use of the property of the complainant as evidence. The property is understandably of importance for the courts in order to acquaint themselves with the details of the offence. The clothing of the complainant, for example, may provide critical evidence of the method and severity of an assault. Often, however, the complainant himself needs his property and cannot wait for the duration of the trial and of possible appeals. The securing of the necessary evidence might be accomplished through the use of statements of the investigating officer, perhaps accompanied by photographs or other documentation. (1)

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(1) This was suggested in the United States by the President's Task Force (see pp. 59-60, 68-69 and 81).

Shapland et al (p. 38) note that their study showed that forensic evidence was rarely gathered and badly used: "It also exemplifies a rather thoughtless attitude on the part of the police towards victims." The English Theft Act 1968 only contains a provision (sec. 28) on the return of property at the sentencing stage.

The question of the protection of privacy is a double-edged one. The question is of particular importance in the case of offences causing serious problems of emotional adjustment, such as with sexual offences or traumatic violent offences. It can also be of importance where being the victim of an offence may involve embarrasing elements. Certain special groups have been singled out for special attention in research. These are young children, the mentally ill, and victims of sexual offences.

The complexity of the question lies in its interface with the principle of the publicity of trials. This principle is intended to ensure both the fair defence of the suspect and the confidence of the public in the proceedings. Article 10 of the Universal Declaration of Human Rights is only one of several provisions in international instruments that can be found supporting this principle. It states that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." On the national level, the right to a fair and public trial is usually embodied in the Constitution.

Article 14(1) of the International Covenant on Civil and Political Rights is more specific in this regard, and also provides certain exceptions: (1)

> "In the determination of any criminal charge against him ... everyone shall be entilted to a fair and public hearing... The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case ... shall be made public except where the interest of juvenile persons otherwise requires ..."

The exceptions noted in the above provision of the International Covenant on Civil and Political Rights are echoed in national legislation. The laws of the countries covered by this study all allow for the possibility of holding sessions in camera if this is regarded as particularly important for some reasons. (2)

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(1) See also article 6(1) of the European Convention on Human Rights.

(2) See sec. 229 of the Austrian Code of Criminal Procedure; sec. 29(2) of the Danish Code of Judicial Procedure; sec. 172 of the Court Organization Act of the Federal Republic of Germany; sec. 5 of the Finnish Publicity of Trials Act; art. 308 of the French Code of Criminal Procedure; sec. 211 of the Code of Criminal Procedure of the German Democratic Republic;

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For example, sec. 11(2) of the Hungarian Code of Criminal Procedure notes that the court may exclude the public from a whole trial, or a part thereof, if this is deemed necessary for the safeguarding of state or official secrets or for reasons of morality. Art. 8 of the RSFSR Code of Criminal Procedure refers, as factors to be considered in deciding on in camera proceedings, to the age of the defendant (under sixteen), whether or not it is a question of a sexual offence, and in general whether or not intimate aspects of the lives of the participants will be revealed. The Italian provision (art. 423 of the Code of Criminal Procedure) is more general; it refers to the nature of the case, the quality of the person, the security of the State, public order or morality. Perhaps the most general provision among the core countries is art. 273 of the Code of Criminal Procedure in the Netherlands; it refers to "important grounds" for holding the session in camera.

In the United Kingdom if a child under 17 appears as witness and the proceedings relate to an offence against decency or morality as well as cases where publicity in itself may defeat the object of the action (for example proceedings aimed at preventing the disclosure of confidential communications), the case may be heard in camera. (1) The same is true if considered necessary for the due administration of justice or if publicity would prevent justice from being done.

The publicity of the hearings and trial is not related solely to whether or not the public may be present. Another aspect is whether or not information regarding an ongoing trial may be published. (2)

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art. 11(2) of the Hungarian Code of Criminal Procedure; art. 423 of the Italian Code of Criminal Procedure; art. 273 of the Code of Criminal Procedure of the Netherlands, together with art. 20 of the Law of Judicial Organization; sec. 126 and 131 of the Norwegian Courts Act; art. 308(1-2) and 336(2) of the Polish Code of Criminal Procedure; chap. 5 of the Swedish Code of Judicial Procedure and the Swedish Secrecy Act; and art. 18 of the RSFSR Code of Criminal Procedure. For Scotland, see sec. 169 of the Criminal Procedure (Scotland) Act, and for England and Wales, see sec. 6 of the Criminal Justice Act 1967 and sec. 37 of the Children and Young Persons Act 1933.

(1) See the citation in the preceding footnote. See also Berliner and Stevens, passim.

(2) The publication of news of the proceedings in the press may well be upsetting to the victim. The Shapland et al study found that victims were much more likely to be upset than pleased by any reporting

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In the United Kingdom, the Contempt of Court Act 1981 provides that any publication while proceedings are active that create a substantial risk that the court of justice in those proceedings would be seriously impeded or prejudiced may in certain cirumstances render the publisher liable to prosecution. Furthermore, in the specific case of rape, sec. 4 of the Sexual Offences (Amendment) Act 1976 provides that after a person is accused of a rape offence, no matter likely to lead members of the public to identify a woman as the complainant may be published in England and Wales in a written publication available to the public or broadcast in England or Wales, except as authorized by a direction given by the court. In the former provision, the primary interest being protected is the course of justice; in the latter, it is explicitly the privacy of the complainant.

In Scotland, sec. 169 of the Criminal Proceedings (Scotland) Act 1975 also provides the court with the possibility of limiting press reporting of certain cases. The provision refers to proceedings involving persons under 16. (1)

The Council of Europe, in noting that the principles of public proceedings and freedom of expression are honoured in all democracies, notes that "(a)t the same time, it is clearly necessary to protect the complainant - and the offender - against any loss of privacy or dignity". The Council therefore recommends that information on offences committed should not include details of no direct relevance to the offence and possibly injurious to the person and dignity of the complainant and offender. Noting that such discretion is required also by officers of the criminal justice system, the Council directs its attention to the media. The Council suggests: (2)

> "It would therefore be advisable to make journalists aware of the adverse effects of undue publicity, and of the necessity to draw up and firmly and consistently apply rules of professional conduct in this matter."

The question of ensuring the safety of the complainant, in particular against intimidation and retaliation by the suspect or agents of the suspect, is also a two-edged one. The suspect has the right to confront his accuser and this requires, for example, the gathering of information on the nature of the case that the complainant has against him.

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of their case. 50 of the victims in the sample (N = 278) were actively displeased, but only 10 were pleased (p. 40). Those who were displeased were worried primarily about the reactions of their acquaintances but also about the possibility of being identified in public as victims.

(1) See Gane and Stoddart 1983, pp. 564-566, and Gordon 1981, pp. 40-41.

(2) Council of Europe 1985, pp. 21-22.

However, the complainant has a right to safety. It is apparent that, faced with the threat of punishment by the court, at least some offenders may try to deter the complainant from bringing the case to the attention of the authorities, or presenting his evidence in court. (1)

Various possibilities exist for attempting to prevent such harassment and retaliation. An obvious one is criminalization. General provisions on menaces (the use of illegal threats) and assaults exist in the laws of all of the countries covered by this study. In addition, special legislation exists in some countries on this issue. For example, sec. 257 of the Hungarian Criminal Code criminalizes "unfair measures against person who made a report of public interest", e.g., reported an offence. Similarly, in Sweden chap. 17, sec. 10 of the Penal Code criminalizes assault of a person motivated by the fact that this person "has in a court or before another authority filed a complaint, brought suit, testified or else made a statement or a hearing, or to prevent him from doing so."

A second obvious measure is directed at the suspect during the pre-trial period; he may be taken into custody in part to protect the complainant. As noted in section 6.3., the danger that the suspect presents to the complainant is apparently one important factor in deciding whether or not the suspect should be held in custody. In France the complainant is allowed the express opportunity to give an opinion on the request of the accused to be released. (2)

A third possibility is simply to prohibit the suspect from contacting the complainant. If bail is a possibility, one possible condition for release is that he stay away from the complainant. Such a condition can be imposed in England, although it is rarely used. (3) As the defence should have the opportunity of contacting the complainant to ascertain certain points related to the coming trial, any prohibition from contacting the complainant should not be extended to

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(1) In the Shapland et al selective sample, 14 per cent of the victims experienced some form of retaliation; less than one half of these reported the matter to the police. When the matter was reported most victims were dissatisfied with the police response. Shapland et al, pp. 109-111.

(2) Vouin, pp. 492-497.

(3) Shapland et al, p. 51. The study noted that not knowing whether a suspect was in custody or on bail was a particular worry, but if the victim did know that the suspect was on bail he was not unduly worried. For Scotland, see sec. 1(2) of the Bail etc. (Scotland) Act.

A point of comparison may be made with the United States, where restraining orders or temporary injunctions may be used. See, e.g., Pagelow, pp. 265 and 396-401.

legal counsel of the suspect or any other appropriate person acting in a legitimate matter on behalf of the suspect.

The most extensive form of security from harassment is the providing of police protection. In connection with certain very serious offences (such as wide-spread organized crime), it may even be necessary to relocate the complainant in another area and provide him with a different identity. The Council of Europe notes that an opinion has been expressed in "some member states" that if the day-to-day life of the complainant has been disrupted by the need for police protection and who is thus unable to engage in his usual occupation, he might even claim a subsistence allowance. (1)

7.6. Avoiding unnecessary delay

The need for a smooth and rapid process has been embodied in the statement that "justice delayed is justice denied." The United Nations Declaration paragraph 6 (e) refers to the need for

> "(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims."

Avoiding unnecessary delay is, of course, of importance not only to the complainant in order to secure his rights. It may also be important to the suspect in order to have an authoritative pronouncement on his alleged guilt as soon as possible. Article 14(3)(c) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charges against him everyone is entitled to be tried without undue delay in full equality. (2)

Here, however, is one of the areas in which the human rights of the suspect may be in conflict with those of the complainant; the suspect must have the right to all adequate presentation of his defence. Article 14(3)(b) of the Covenant cited above provides that everyone is entitled to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing. Due process may thus well require that some continuances be granted.

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(1) Council of Europe 1985, p. 22. At the Seventh United Nations Congress, the Italian delegation included the following observation in the report (A/CONF.121/L.18, p. 2, footnote 1): "Steps should be taken to ensure that the witness-victim should, when necessary for his/her protection, be transferred to another residence and made economically independent in his new residence."

(2) With reference to the potential conflict between the interests and rights of the complainant and the defendant it may also be noted that at least for an accused released on bail or faced with very severe punishment there is a strong interest in delay if he actually committed the offence.

The avoidance of delay is important to the courts and the authorities in planning the most effective use of their resources. The passage of time may also weaken the strength of the evidence. Moreover, the avoidance of delay is important from a functional point of view: delay may make the complainant reluctant to continue to cooperate with the prosecution. (1)

The procedural laws of the countries in the study contain a variety of provisions designed to reduce the number of continuances. Continuances are generally granted only at the discretion of the court and are rarely a matter of right, unless there are special grounds. A continuance may be refused if the court believes that it will not contribute significantly to the clarification of the matter. (2)

Socialist laws generally emphasize the importance of avoiding delays and call for an uninterrupted process. For example, sec. 196 of the Hungarian Code of Criminal Procedure states that "the court shall begin the trial and preferably not interrupt it until the case has been determined." (3)

The newest Criminal Procedure Code among the countries in the study, the 1981 Code in Norway, contains a general provision on this. Sec. 113 of the Code states simply that "an attempt shall be made to avoid unnecessary waste of time and inconvenience to witnesses."

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(1) Karmen, pp. 148-149.

(2) E.g., chap. 16, sec. 4 of the Finnish Code of Judicial Procedure states that a continuance may be granted on the request of a party "if there is reason", and the court itself may declare a continuance only "if demanded by special circumstances."

(3) More specific legislation is to be found in the German Democratic Republic, where sec. 103, 201(3) and 294 of the Code of Criminal Procedure establish time limits on the beginning of various stages in the criminal process. See also Luther and Weber, p. 16. See also sec. 21 (on proceedings against juveniles) and sec. 218 and 246(3) (on the length of interruptions).

In Scotland, proposals were made for a three month time limit on beginning prosecution in summary procedure, calculated from the time the prosecutor came to know of the offence (such three month limits on the initiation of prosecution exist in some statutes on specific fields, such as excise). The proposals did not lead to legislation. However, sec. 14 of the 1980 Criminal Justice (Scotland) Act did bring about a new time limit: there is now a twelve month period for commencing the trial in solemn procedure from when the accused first appeared on petition in respect of that offence. See Gordon 1981, p. xvi.

The call in paragraph 6(e) of the United Nations Declaration for avoiding unnecessary delay in the disposition of cases and the granting of awards is not limited to the trial during the first instance. It calls in general for the avoidance of delay in the execution of orders of the court or other authority.

These delays are generally due to one of two factors: the possibility of appeal and the difficulties in enforcing civil judgments. (1)

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(1) The complainant's own possibility of appeal basically depends on his procedural role. In general, in all of the cases in which he is allowed to present penal demands, he may also appeal the decision on guilt. In the cases in which he may present a civil claim, he may generally appeal on this issue. Because of the ancillary nature of the civil pleadings, this appeal would continue through civil procedure, unless at the same time the decision of the court on the issue of guilt is being appealed, for example by the prosecutor or the defendant.

To the extent that the complainant participated as prosecutor and/or civil complainant in the first instance, he may appeal the decision on both the guilt of the offender and the award in Finland (chap. 25 of the Code of Judicial Procedure), the German Democratic Republic (sec. 17 of the Code of Judicial Procedure; cf. sec. 198(2) and 292 (however, see sec. 310), Hungary (sec. 242 of the Code of Criminal Procedure), Poland (art. 395-396 of the Code of Criminal Procedure) and the RSFSR (art. 53 of the Code of Criminal Procedure. For Italy, see, e.g., art. 25 and 27 of the Code of Criminal Procedure.

There are, however, several exceptions to these general rules. One significant exception is in the Netherlands, where, if the civil claim presented in adhesion procedure is denied or the defendant is found not guilty, the complainant may neither appeal or turn to civil court. (See van Bemmelen 1984, p. 241.) In the Federal Republic of Germany, the complainant does not have a general right of appeal, but he may turn to the civil court of the first instance in respect of his civil claim (sec. 406a(1) of the Code of Criminal Procedure; see sec. 390 and 401 of the Code of Criminal Procedure on the right of appeal of, respectively, the "Privatkläger" and the "Nebenkläger"). In France, the partie civile may only appeal the award (art. 497 of the Code of Criminal Procedure).

In Sweden, the complainant can appeal the decision if the prosecutor does not do so. Ekelöf, p. 58.

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An example of a way in which unnecessary delay may be avoided in the case of appeal is the granting of interim awards. No data is available on whether any European country permits their use in criminal procedure; this would appear doubtful as long as the case is pending. On the other hand, as will be noted in section 9, some State compensation schemes permit the use of interim awards.

The problems in the enforcement of a judgment on a civil claim generally arise from the fact that the enforcement in most countries is at the intiative of the victim. The State rarely assists in the collection of the award and the victim must himself deal with the complexities of, e.g., attachment of earnings. There are, however, notable exceptions to this, such as the use of compensation awards by criminal courts in England and Scotland. These are enforced in the same way as a fine; only the court may enforce the compensation order. (1)

In the German Democratic Republic compensation awards may be executed by the civil court bailiff. Non-fulfillment of the obligation to pay compensation may lead to the execution of threatened imprisonment.

Yet a third possibility which appears in the law of a few countries but is seldom used in practice is recovery of the loss from property confiscated from the offender. (2)

7.7. Sensitization to the needs of the complainant

Paragraph 16 of the United Nations Declaration, under the heading of "Social Assistance", states that

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> Where the victim presented neither penal nor civil demands, he also generally has no right to appeal any part of the decision.
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> In Scotland, and England and Wales, therefore, the victim has no recourse in respect of the decision of the criminal court. If no compensation order is made, the victim can only turn to the civil court. (Walker, p. 9)

(1) See Guideline 14 of the Council of Europe Recommendation. NOU, p. 85, suggest that in Norway the tax authorities assist the victim in collecting an award.

(2) See, e.g., sec. 77 of the Danish Penal Code; sec. 73(1) of the Penal Code and sec. 111g, 111h and 111k of the Code of Criminal Procedure of the Federal Republic of Germany; chap. 2, sec. 16(4) of the Finnish Penal Code; art. 185(1)-189 of the Italian Penal Code; sec. 33c(2) of the Penal Code and sec. 118 and 352 of the Code of Criminal Procedure of the Netherlands; and sec. 37d of the Norwegian Penal Code.

"Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid."

The Council of Europe Recommendation refers to somewhat similar matters in Guidelines 1 and 8, which state:

"1. Police officers should be trained to deal with victims in a sympathetic, constructive and reassuring manner."

...

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

This concern of the Declaration and the Recommendation is perhaps one of the most important. Most of the other provisions in the two documents call for the establishment and strengthening of various measures for assisting complainants. The success or failure of these measures will largely depend on the way in which the persons with whom the complainant comes into contact react.

The police are mentioned first in both documents for a very good reason. They are generally the first representatives of the State to come into contact with the complainant. Furthermore, their intervention will come at a time when the complainant is most likely to be suffering from the immediate shock of the offence. Their attitude will considerably influence not only what the complainant decides to do but also what impression he receives of the administration of justice and of how the community as a whole regards the offence. The police should show sympathy to the complainant in order to demonstrate that the authorities are on his side, and reassure the complainant so that he does not, for example, blame himself for the offence or exaggerate the likelihood of further victimization. (1)

It had been noted in section 6.2.3. that the police may in time develop a callous attitude, one that the complainant may assume shows disbelief of the complainant's statement or

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(1) Council of Europe 1985, pp. 16-17. In Australia, the concept of "mental first aid" has been developed in training the police in respect of the first contact with the complainant. This involves emphasizing three things to the complainant: that he is safe now, that the police is sorry this happened to the complainant, and (if this is true) that the complainant was not to blame for the offence. (Whitrob, oral presentation at the Third Postgraduate Course on "The Victim and the Criminal Justice System", Dubrovnik 1986).

other negative attitudes. (1)

The situation is much the same for many other professionals who deal with complainants and difficult situations on a day-to-day basis. Many practitioners also deal with complainants and other victims within the framework of a bureaucracy that in itself exerts an influence on the interests of the practitioner in assisting the complainant. (2)

What is called for would therefore seem to be training on a continuous basis, a constant reminder of the need to understand the position of the complainant and treat him accordingly. Guidelines are also needed on what procedures should be used in dealing with complainants - the circumstances in which complainants should be questioned, the type of information and services that should be provided, the possibility of follow-up contacts in person or over the telephone, referrals to special agencies or victim counselling groups, and so on.

7.8. The complainant in procedure: concluding remarks

This section has dealt with what can be considered the core stage of criminal justice, the processing of the case. It is during this stage that the decision-makers prepare the case and gather the necessary data. Also during this stage, a number of "subdecisions" are made which guide the case through the criminal justice system.

It was noted that the complainant often wishes and needs information on procedural matters (what he can and should do) and on decisions (what has been done and decided).

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(1) Shapland et al note that "other studies, on victims of different offences and from different countries, have found remarkably similar results: that victims are generally well satisfied with the police at the initial encounter and that any dissatisfaction is related primarily to an uncaring, routine or hostile attitude on the part of the police, to police refusal to take action and to general unthoughtfulness or disregard of the obvious victim needs."

The authors recommend (pp. 180-181) a "victim-oriented system" where changes are more attitudinal than structural. The complainant should be given more information and assistance, not as charity but in exchange for the complainant's time and effort.

(2) Wolfgang (1972, p. 21) observes that "working in, for, and with the system has a tendency to promote in one a conservative ideology. I don't mean politically conservative. I mean conservation of the status quo, an ideology with vision tunnelled by the boundaries of the system itself..."

Although the need for information is evident and strong, it would appear that little has been done on an organized basis in the European countries. The exceptions to this negative over-all impression are:

- the Socialist countries, which have incorporated legislation intended to insure that the parties are kept informed of their rights and of what is decided. Empirical data on the application of this legislation was not available for the present study.

- many Western Europe countries, where victim movements have initiated some projects intended to assist complainants. As these projects are recent little can be said of their influence or of the possibility that they will lead to an institutionalization of a system in which the complainant is provided with more information.

- in Denmark, Norway and Sweden some complainants are provided by the State with a contact person who will render assistance throughout the criminal process.

- in most countries the complainant is provided with information on selected issues such as on a decision by the prosecutor not to prosecute.

- in some countries the complainant may received cost-free legal assistance in cases of financial need.

The above listing reflects to a considerable extent the situation in respect of subparagraph 6(c) of the Declaration and Guideline 2 of the Council of Europe Recommendation on providing the complainant with proper assistance throughout the legal process. It can be summarized by saying that some complainants receive some information on some issues and decisions in some countries. With the possible exception of the Socialist countries, the general need that the complainant may have for information has not been satisfied.

It would appear that the complainant's need for information can be met through the implementation of guidelines. These guidelines should establish criteria on the following issues:
(1) what information should be provided?
(2) in what cases should information be provided?
(3) at what stage should this information be provided?
(4) who should provide the information? and
(5) who should receive the information?

The need for proper assistance can be met in this way only to a limited extent. Proper assistance often calls for the designation of one person or body on whom the complainant can rely throughout the process. A very good example of this is the "contact person" institution in Scandinavia. However, any extensive use of such a system would be expensive and would moreover raise questions about entitlement - who should be granted the right to such a contact person, and whether or not a similar right should be granted to the defendant, on grounds of equality. This last point will be returned to below.

The second issue dealt with in the present section was the procedural position of the complainant, in particular the possibility of having his views and concerns presented and considered in criminal proceedings.

From the formal point of view the systems in Europe may be divided into three. In the first system described (primarily the socialist countries and Finland) the complainant is granted some prosecutorial rights and generally also the right to present civil claims. In the second system (all the other core countries with the exception of Scotland, and England and Wales) he is granted the theoretical possibility of presenting civil claims on the basis of the offence in criminal proceedings at the discretion of the court. (It was noted that this theoretical possibility is very limited in practice in Austria, the Federal Republic of Germany and the Netherlands.) He may also have some prosecutorial rights in certain petty cases. In the third system (Scotland, and England and Wales; European countries outside of the core countries embodying this system are Ireland, Malta and Northern Ireland) the complainant's position is primarily limited to that of a witness for the prosecution.

These divergent approaches illuminate the heated discussions at the Seventh United Nations Congress on the drafting of subparagraph 6(b) of the Declaration, the subparagraph referring to the advisability of considering the views and concerns of the complainant.

The discussions were predicated on the edited draft from the meeting in Ottawa and the short draft, according to which the complainant should not only have the right to initiate and pursue criminal proceedings, but also to be heard at all critical stages of the procedure.

It would perhaps not be an exaggeration to suggest that such a provision would have been fated for oblivion in most jurisdictions, while it would not have changed perceptively the rights of the complainant in the few jurisdictions that grant him a prosecutorial role. Most jurisdictions would apparently not grant the complainant such a strong role as a matter of policy. The right to initiate and pursue criminal proceedings would appear to be a system-bound legal institution. Furthermore, it would appear that there is no jurisdiction among those studied that would be prepared to grant the complainant a right to be heard at all critical stages of the procedure - especially if this were interpreted to include the stages of sentencing and parole.

On the other hand, the formulation developed at the Seventh United Nations Congress - a reference only to allowing the victim the possibility of having his views and concerns presented and considered at appropriate stages, where his personal interests are affected and consistent with the national criminal justice system - was adopted by consensus, although only after heated debate. The differences between the two formulations are very significant. Much is left to the discretion of the individual jurisdiction, especially regarding what is an "appropriate stage". It may well be that the resistance of some participants to the new formulation was based on the assumption that the two phrases in

fact oblige the State to provide similar rights, when in fact this is not the case.

It is especially notable that the formulation does not call for the adoption of any particular role for the complainant in criminal proceedings. The deletion of the reference to the right to initiate and pursue criminal proceedings means that there is no implied obligation to provide the complainant with a prosecutorial role. Other than the suggestion in paragraph 9 regarding the use of restitution as a sentencing option, there is also no implied obligation to adopt an adhesion procedure or incorporate the role of the partie civile.

The subparagraph contains three other important limitations: the stages referred to are those where the personal interests of the victim are affected; allowing the presentation of the views and concerns of the victim in the proceedings should take place without prejudice to the accused; and it should take place consistent with the national criminal justice system.

Indeed, with reference to the discussion in section 7.2., and with further reference to the elasticity of the idea of "where appropriate", it would appear that all criminal justice systems studied already have adopted procedures and methods which allow the views and concerns of the complainant to be presented and considered at the appropriate stages. The fact that a person is assumed to have been victimized sets off the operation of the criminal justice system and data regarding the complainant and the offence is obviously of critical importance in deciding the case.

This data, however, is primarily "hard" data, evidence of the offence and its effects. Subparagraph 6(b) may also be seen to refer to "soft" data on what the complainant considers to be important. In section 5.2 reference was made to research suggesting that the victim is generally not punitively oriented, and the limited empirical research would appear to indicate that the complainant does not want a greater role in the actual decision-making. The limited evidence instead suggests that, for at least some victims, the criminal proceedings form a "re-ordering ritual;" the victim wishes to be assured that he has indeed been wronged, and that the community condemns the offence.

In this respect, reference should be made to the provision in paragraph 16 of the United Nations Declaration, and Guideline 1 of the Council of Europe Recommendation, on sensitization to the needs of the complainants. The various authorities in the criminal justice system should be more aware of the views and concerns of the complainant. These provisions can also be implemented through the establishment of guidelines. Indeed, as the contact between the authorities and the complainant often revolves around information, the sensitization issue can be satisfactorily met by alerting the authorities to the importance of empathy in their dealings with the complainant.

Subparagraphs 6(d) and 6(e) of the United Nations Declaration and Guidelines 8, 15 and 16 of the Council of Europe

Recommendation deal, broadly, with convenience and protection. Both of these can be satisfied, to a considerable extent, through the preparation of guidelines on how the complainant should be treated throughout the process, and the development of means to ensure that these guidelines are adhered to. The convenience issue refers in particular to the need to avoid unnecessary delay, something with which most parties involved would agree at least in theory.

The protection of the complainant against the suspect, and his right to privacy, however, bring up the problem of possible conflict with the rights of the suspect. In subparagraph 6(b) of the United Nations Declaration, special reference is made to the fact that the presentation of the views and concerns of the complainants should not take place with prejudice to the accused. The Ottawa draft, as well as several other earlier drafts, contained a separate provision to the effect that the rights outlined in the Declaration "should not be construed as to infringe upon the rights of the alleged offender." (1) This was deleted entirely from the final draft, but no data is available regarding the reasons for this. One possibility is that the deletion was made because its substance was considered self-evident. If this is in fact true, it may have been ill-advised; the discussion of the role of the complainant should not take place without considering its implications for the position of the defendant. Including the reference would have helped to emphasize this point.

A second possibility is that the deletion was made because a provision regarding the defendant would have been out of place in a Declaration on assistance to victims. Such an attitude can be seen to involve the above danger to an even greater degree: it would imply that assistance to the complainant should be provided regardless of its implications for the position of the defendant.

The provisions of the United Nations Declaration and the Council of Europe Recommendation are important and they are capable of being enforced in all the countries covered in this study. However, they should not be carried out in a way that overturns the centuries of progress in protecting the rights of the defendant. The use of the criminal justice system implies that force may be directed by the State at the defendant. The recognition of, for example, the basic principle of the presumption of innocence, and the dangers that the power of the State may subject the defendant to unfair treatment, have led to the establishment of numerous legal safeguards for the defendant. It may be noted that these safeguards are embodied in international instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. These international instruments are binding on their signatories

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(1) Paragraph IV(11) of the Annex to the Ottawa report, A/CONF.121/IPM/4.

to the extent that no reservations have been made; they thus have greater force than do the provisions of a non-binding United Nations Declaration or Council of Europe Recommendation.

The following areas of potential conflict between the provisions of the United Nations Declaration and the Council of Europe Recommendation on one hand, and the rights of the defendant on the other, can be singled out.

First, there is the defendant's right to bail. Both the Declaration and the Recommendation call for measures to ensure the safety of complainants, their families and witnesses on their behalf. In the light of the responses to the questionnaire circulated by the Secretariat of the United Nations, it would appear that the complainant's concerns for his safety are generally considered a factor in deciding on release of the suspect pending trial. However, it is clear that the fears of the complainant for his safety should always be balanced against other factors, such as the actual danger to the complainant's safety, the seriousness of the charges, and the length of detention. The complainant's fears as such are not and should not be decisive.

The defendant has a right to a fair and public hearing. All the countries covered by this study provide for the possibility of in camera hearings in exceptional cases, such as when intimate details of the lives of those involved may be revealed. Even in these cases, however, the judgment of the court must generally be made public, although there may be exceptions, for example, on the grounds of national security. The possibility of such exceptions should be weighed against the drawbacks of in camera hearings; the exceptions should be possible only on grounds established by law.

The defendant has a right to face his accuser. It is possible in some systems for the complainant or a witness to be questioned without the defendant being present; this is intended to eliminate to a large extent the use of inappropriate psychological pressure and intimidation of the complainant by the defendant. In such cases the testimony must generally be read to the defendant afterwards and he is to be provided with an opportunity to rebut it. The cumbersomeness of such an exceptional procedure, however, deprives the defendant of his possibility of intervening immediately to ask questions regarding various details of the testimony. Also, although the testimony is generally read to the defendant afterwards, he is not able to assess the emotional impact of the testimony or the many nuances in the testimony that could not be reflected in the protocol, but that may influence the deliberations of the court.

The defendant has a right to have adequate time and facilities to prepare his defence. In calling for the avoidance of unnecessary delay and for minimizing inconvenience to complainants, the Declaration quite rightly emphasizes the importance of a speedy process. This right, however, should not come at the expense of the defendant's right to have time to prepare.

Also in this connection, the Declaration calls for providing the complainant with the necessary assistance. In section 6.2., the problems of establishing the criteria for qualification for such assistance were mentioned. Also here, a balance must be sought between the legitimate interests of the complainant in obtaining redress and the equally legitimate interests of the defendant in due process.

There are thus many points of possible conflict between the interests of the complainant and the rights of the suspect. The strengthening of the position of the suspect has been possible largely due to the fact that the State has taken over the major role in the prosecution of the offence from the complainant. In so doing, the State has developed various institutions intended to provide the victim / complainant with means of having his views and concerns presented during the criminal process, in a way that would still be consonant with the safeguarding of the rights of the suspect.

However, the fact remains that in most of the core countries reviewed in this study, the complainant retains only a minor role in the process. Only a few countries grant him large prosecutorial rights; somewhat more countries grant him the possibility also in practice of securing his civil claim in connection with the criminal process. In all of the countries, the fact that the authorities dominate and guide the process involves the danger that less and less attention will be given to the views and concerns of the complainant. The requirements of administrative convenience, the ideology that the offence is directed at the State and not at the offender, and the gradual inuring of all the authorities involved to these views and concerns may lead to secondary victimization of the victim.

8. EXIT FROM THE CRIMINAL JUSTICE SYSTEM

8.1. General remarks

The purpose of the criminal process is to gather and weigh information concerning the alleged offence and allocate the penal responsibility for it. The decision that results generally contain three main elements: a decision on the guilt of the defendant, a determination of the responsibility for restitution (in cases where this is an issue), and the setting of the proper punishment.

Of these elements, the determination of guilt is the crucial issue on which the other two factors depend. The proper assessment of guilt generally includes consideration of the factors dealt with above in section 4.2.1., the extent of possible victim participation in the offence. Secondly, the process of the assessment of guilt may incorporate the presentation of the views and concerns of the victim, as dealt with above in section 7.3. As these issues have already been dealt with, they will not be covered separately in the present section of the study.

The other two elements, however, involve several issues that have not yet been dealt with. They will be considered here under the heading of "exit from the criminal justice system".

The focus here is not intended to imply that all criminal cases necessarily proceed to conviction and judgment. Research indicates that, in fact, only a minority of cases are decided at this level. Leaving aside the considerable number of offences that are never officially recorded, cases "exit" the system at various levels. This should be borne in mind in the following discussion. (1)

8.2. Restitution

8.2.1. General remarks

Much attention has been paid in the victimological literature to the pecuniary compensation of the victim. This is an important subject, as the victim often has a need to "be made whole again" in the financial sense (doctor's bills must be paid and damage to property must be repaired). However, the focus on compensation at the cost of attention

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(1) On reporting and nonreporting, see section 6.2.

to possible emotional injury or need for vindication may be due to the fact that pecuniary loss is often quite tangible and readily understandable; it is also relatively easy in principle to remedy. It is also possible that decision-makers (if not victimologists) may feel that the loss to the victim may be largely offset by mere payment of money.

The present section shall deal with the question of restitution for losses due to crime. The term "restitution" is understood in different ways. The term is used, for example, by the United Nations Declaration to refer to payments or performances by the offender or responsible third parties to the victim, as is evident from paragraph 8:

> "Restitution.
>
> 8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights."

The scope is further specified in the case of environmental damage in paragraph 10:

> "10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community."

Different terminology has been used elsewhere. In England, for example, "compensation" is generally used as a term for the financial reparation by an offender to a victim for loss, injury, suffering or damage resulting from an offence, while "restitution" is used in the more narrow sense of the return of property to the person from whom it was unlawfully taken. The term "reparation" has also been used as an umbrella term for compensation (the payment of money), restitution (the return of property) and service or labour. (1)

The Council of Europe refers to "compensation from the offender" and "State compensation". (2) Although this is conceptually perhaps the clearest distinction, the terminology adopted by the United Nations Declaration will be preferred in the present study due in part to its brevity.

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(1) Hodgson Report, p. 5. The Hodgson Committee further defined forfeiture as the power of the Court to take property that is immediately connected with an offence, and confiscation as the depriving of an offender of the proceeds or the profits of a crime. See also Harland 1980, p. 2; Thorvaldson 1980. p. 17; Galaway 1983, p. 9.

(2) See Council of Europe 1985, p. 15.

Thus, in the following "restitution" shall refer to payments by the offender to the victim or return by the offender of property unlawfully taken. "Compensation" shall refer to State payments to the victim for his losses.

As was noted in section 2, restitution, which formerly had a central role as a major social control mechanism, has lost this significance in many of the criminal justice systems of Europe. However, the comments on the "disappearance of restitution from the criminal law" and the severing of the connection between restitution and punishment would not apply to the European countries to the extent as to, for example, the United States. (1)

8.2.2. Presentation of claims for restitution

Claims for restitution can be dealt with informally or in formal administrative, civil or criminal proceedings. All of these models are used in European countries, although their importance varies from one jurisdiction to the next and from case to case.

As noted in section 5.2., a considerable extent of crimes do not come to the attention of the authorities. It was also noted that to some extent, crimes remain hidden because the offender and the victim have reached an informal agreement. The informal approach may also be officially encouraged, as in connection with the social court procedures of some of the Socialist countries and the experiments with mediation and conciliation.

Administrative proceedings have only a limited scope of application in obtaining restitution. As noted in section 5.4., they may enter the question in particular when the State itself is considered to be responsible for the offence, or when administrative regulations (e.g., on economic crime) have been violated. Administrative proceedings may be involved, for example, when the victim alleges that the State has deprived him of his property or liberty on unlawful grounds and that this amounts to an offence. They may also be applicable when the offence was subject to the special supervisory authority of the State; examples are violations of laws on environmental protection, unsafe products and labour protection. (2) Finally, administrative proceedings may enter the question in connection with special welfare or State insurance schemes, for example in connection with motor traffic.

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(1) Lamborn 1985a notes the extent to which the situation has changed recently in the United States. Several states now have statutes mandating restitution unless the judge states reasons to the contrary.

(2) Applications for State compensation are also dealt with through administrative procedure. This issue is dealt with in section 9.

For most crimes the more important alternatives facing the victim are civil and criminal proceedings, and State compensation. The following possibilities exist: (1)

1. Pure civil proceedings for the collection of damages. This possibility exists in all European countries; it was dealt with above in section 5.5.

2. A combination of civil and criminal proceedings. The victim may present his civil claim in criminal proceedings at the discretion of the court. This alternative was dealt with in section 7.3.4., but further reference will be made to it in section 8.2.3.

3. State compensation. State payment to the victim for crime damages is generally organized through a special administrative procedure. The subject will be dealt with in section 9.

It was noted in section 8.3. that in the overwhelming majority of European countries claims based on an offence can be taken up in the course of criminal proceedings, subject to the discretion of the court. This is possible in all the core countries with the exception of Scotland, and England and Wales. It is also possible in, e.g., Belgium, Czechoslovakia, Greece, Liechtenstein, Luxembourg, Romania, Switzerland, Turkey and Yugoslavia. (2)

In England and Wales, the Republic of Ireland, Northern Ireland and Scotland claims for restitution are to be presented in the civil courts. However, the courts of England and Wales have the right to order the accused who has been found guilty of an offence to make restitution to the victim even if a claim has not been presented by the victim. (3)

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(1) Cf. the classification in Schafer 1973, pp. 112-116 and Schafer 1977, pp. 107-110. In addition to the three possibilities noted here, Schafer also notes the possibility of punitive (civil) damages such as the compensatory fine ("Busse") in Switzerland and the use of multiple damages in the United States of America.

(2) See section 7.3.4., above. See also Dünkel 1985a, p. 18; IAJ Conclusions and the IAJ country reports from Belgium (p. 2), Liechtenstein (p. 1), Luxembourg (p. 2); HEUNI 2, e.g., pp. 114; Harland 1983, p. 194. In the Netherlands, however, there is an upper limit of 1500 fl on such a claim. It was also noted in section 6.3.4. that in itself the possibility of presenting civil claims in criminal proceeding does not necessarily mean that it is applied in practice; little use is made of this mechanism in the Federal Republic of Germany and Austria, for example.

(3) See section 7.3.4., above, and Dünkel 1985a, p. 18; IAJ Conclusions.

8.2.3. Restitution by the offender or responsible third parties

The primary responsibility for restitution to the victim lies with the offender. This principle was noted in earlier drafts of the United Nations Declaration. The formulation in the final document was considerably weaker: the offender or a responsible third party "should, where appropriate, make fair restitution".

Several arguments have been presented for imposing an obligation on the offender to make restitution. (1) The perspectives in these arguments range from the victim and the offender to society, and from the philosophical to the practical.

The obvious benefit of restitution from the point of view of the victim is that it involves redress by the offender for the harm that he has caused. He returns what he has unlawfully taken, or repairs what he has unlawfully injured, and thus returns the victim to his position before the offence.

The basic philosophical argument associated with this victim perspective is that restitution has an intrinsic moral value of its own. It restores the balance upset by the offender through the offence.

From the point of view of the offender, both positive and negative aspects have been noted. The negative aspect is that restitution prevents the offender from enjoying the fruits of his offence. The positive one is that restitution may have a salutory rehabilitative effect on the offender. It allows him to exercise a sense of responsibility and raise his self-esteem. However, it should be noted that little research exists on the veracity of this argument.

From the point of view of society and the criminal justice system, restitution offers a specific sanction with clear requirements in terms of completion. Tieing restitution to the sanction reinforces the predictability of the sanctions. It may also be considered an "intermediate" sanction, between the severity of imprisonment on one hand and the waiving of measures on the other. The general disillusionment in European criminal policy with the treatment approach has led to a search for new sanctions; this may well explain the strong interest in restitution. Furthermore, as an element of criminal policy, restitution emphasizes the interests of the victim. It may thus have symbolic value in garnering support for the criminal justice system.

Whatever the underlying motivation, the principle that it should primarily be the offender who provides restitution for the harm caused is apparently accepted globally. The disagreement whether or not civil claims should be dealt with in connection with criminal proceedings has already

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(1) The points following in the text are a summary of arguments presented by, e.g., Chappel, p. 299; Williams and Fish, passim; Harding, pp. 17-18; and Galaway 1983, passim.

been noted. (1) Further theoretical problems are connected with the issue of shared responsibility and with the issue of what to do with an offender who is criminally irresponsible. (2) It is these that are the cases referred to in the phrase, "third parties responsible for their behaviour" in paragraph 8 of the United Nations Declaration.

The third parties in question can be classified primarily in four groups: legal guardians, employers, the State and parties who otherwise had an obligation to act to prevent the offence or assist the victim.

The question of the responsibility of legal guardians is of particular and practical importance when the offences in question have been committed by children, although the issues are much the same when the offender is criminally irresponsible for other reasons. Since the lack of criminal responsibility generally bars criminal proceedings, the matter may be transferred to civil proceedings and, perhaps, also to administrative proceedings. However, it is also possible that the legal guardians are held responsible for neglect as a criminal offence. If so, the position of the victim will be eased in that the prosecutor may attend to the presentation of the case. (3)

The questions in respect of employer and State responsibility are essentially different from those involved in the responsibility of legal guardians. When an employee or a State official commits an offence the offender is often "faceless" in that the victim may have difficulties in knowing which individual made the decision in question. (4) The reference in the United Nations Declaration to "third parties responsible" envisages such a possibility. If the paragraph is implemented in national law the victim may

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(1) Shapland et al noted for England the "almost unquestioning acceptance of the appropriateness of the principle of compensation from offenders, its place in the criminal justice system and particularly, the preference for it among those who receive such orders is striking. It contrasts vividly with the doubts of the legal commentators." (p. 140)

(2) In this section, the discussion will deal with "third parties responsible for the behaviour of the offender". However, it should be recalled that the issue of shared responsibility also often refers to the participation of the victim in the offence and of his contributory negligence. See section 4.4.4.

(3) Juvenile court proceedings may present some special features in this respect.

(4) Here, State responsibility refers to all responsibility for the acts or omissions of authorities. In a concrete case the responsibility may lie not with the national authority, but, for example, with a local authority.

collect restitution from the individual employee or official or from the employer or State.

With specific regard to State responsibility, paragraph 11 of the United Nations Declaration provides as follows:

> "11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims."

This paragraph raises the issue of the responsibility of a successor State. The responsibility of a State for the act of predecessor Governments is one of international law. Although much has been written on the subject and there is a considerable number of precedents, actual agreement on the effects of state succession is limited. Much depends on whether the successor State claims to be a new State or a continuation of the old one, and on how other States react to the succession. (1) In practice, many of the problems have been avoided by agreements between the predecessor and the successor. Such agreements, called "inheritance agreements" or "devolution agreements", have been widely used in connection with the granting of independence to former British and French colonies. (2)

The general rule is that, unless otherwise noted, the new State inherits the rights and obligations of the old State. However, this is subject to many reservations. The smoothness of the succession is generally aided by the fact that the new State has much to gain from the maintenance of continuity. This may well not be the case when the new State wishes to dissassociate itself from the actions of the predecessor State, for example from its widespread abuses.

Particular reference was made in the drafting of the Declaration to the experiences in some countries where an outgoing Government, as one of its final acts, declared blanket amnesties for any and all acts committed in its name. (3)

One of the most notable examples of a successor Government accepting financial responsibility for the crimes of a predecessor Government is provided by the "Wiedergutmachung" legislation of the Federal Republic of Germany, on the basis

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(1) Broms, pp. 200 ff. and Akehurst, pp. 198 ff. A general review of state succession is contained in Joutsen.

(2) Akehurst, p. 201; see also T. Elias, chapter 6.

(3) This was mentioned specifically by Pedro David at a working group convened by the Helsinki Institute in October of 1983.

of which extensive compensation was paid to victims of persecution by Nazi Germany. (1)

The fourth, miscellaneous, category mentioned above contains parties who had an obligation to prevent the offence and assist the victim. Section 4.5. noted some statutes assigning bystanders with a positive obligation to act. (2)

8.2.4. The form of restitution (3)

Paragraphs 8 and 9 of the United Nations Declaration provide a wide scope for restitution, including the following:
- return of property;
- payment for the loss or harm suffered;
- reimbursement of expenses incurred as a result of the victimization;
- the provision of services; and
- the restoration of rights.

In the case of substantial harm to the environment restitution is broadly understood as a return to the status quo, somewhat comparable to the "return of property" referred to above. This would include
- restoration of the environment,
- reconstruction of the infrastructure, and
- replacement of community facilities.

Where such a return to the status quo is not possible, the paragraph provides that restitution is to cover reimbursement of the expenses of relocation.

Direct restitution - the return of the stolen property, for example, or payment by the offender for losses - is the simplest and most graphic means of restitution. However, among the problems are the fact that in many cases the offender is not apprehended or convicted. Moreover, even if he is convicted the offender may be destitute; if property was stolen, perhaps it cannot be recovered. Finally, even if payment can be enforced there is the question of compensation for the loss of the use of the object during the interim period.

The principal problem in practice would seem to be the lack of means of many offenders. Four factors make the problem

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(1) See Schwarz, passim.

(2) Karmen, pp. 193-196 contains a discussion of suits in the United States of America against third parties alleged to be partly to blame for the harm suffered by the victim, primarily because they did not act to prevent a reasonably forseeable crime.

(3) This study will not deal with the specific content of restitution. This is largely a matter of civil law, where the details vary considerably from one country to the next.

an acute one. First, apprehended offenders often have no income at all or an income that hovers around the minimum level of subsistence. (1) Second, many offences involve harm or injury without corresponding profit to the offender. A violent offence against the person, for example, may lead to expensive medical bills for the victim, but to no financial benefit for the offender. Third, even if theft or other misappropriation is involved the stolen property is generally fenced at only a fraction of the purchase price and the money obtained is often spent quickly. (2) Fourth, the present system of sanctions in itself may hinder the offender's ability to pay, either by obliging him to pay a fine (which generally has precedence over restitution) or by placing him in prison where wages are low or nonexistent.

Given the potential problem with the inability of the offender to provide restitution the question arises of whether or not full restitution should be ordered. The alternative would be restitution that is adjusted in proportion to the means of the offender.

Although the point can be made that, as generally no one other than the offender can be considered responsible for the offence, it is "simple justice" that the offender pays in full, it appears that in practice in most countries restitution can be set in proportion to the offender's means and other obligations. The offender is allowed an amount for his own maintenance, and for the maintenance of dependants. (3)

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(1) In Finland, one indicator of this is the large proportion of day fines set at the minimum level of eight marks per day, which corresponds to a reported monthly income of at most 720 marks (ca. USD 140). (See, e.g., Criminal cases tried by the courts 1984, Official Statistics of Finland XXIII B:120, p.69). It is, of course, generally acknowledged that many defendants underreport their income, and thus the validity of this measure is highly questionable. However, it remains indicative.

(2) See, e.g., Aromaa, esp. pp. 118-125.

(3) Shapland et al (p. 147) noted that victims are apparently willing to accept restitution orders adjusted to the means of the offender.

The Ottawa draft had included one paragraph (IV(3)) to the effect that "In determining the amount of reparation, especially in criminal cases, the means and circumstances of the offender and the interests of justice should be considered." The United Nations Declaration refers only to "fair restitution". No indication is available of whether this change was made in the interests of brevity, whether it was thought best to leave the matter to the individual jurisdiction, or whether the phrase in the Ottawa

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If restitution cannot be made through the return of property (as, for example, in the case of violent offences against the person or vandalism), and the offender is unable (or unwilling) to pay, another alternative would be to require the offender to repair the damages or work for the victim. The reference in the paragraph 8 of the Declaration to "the provision of services" would include such activity.

This alternative is favoured by some as a "natural form of justice", especially in the case of juvenile offenders. One of its virtues has been considered to be its pedagogic effect; it forces the offender to face the results of what may have been an offence committed through thoughtlessness. At the same time, according to the proponents of this approach, it may teach the offender responsibility for his own actions.

The "provision of services" can be given a wider meaning, one incorporating not only services to the victim, his family or dependants, but also the community. (1)

At the present, community service is a possibility (either on an experimental or a permanent basis) in Denmark, the Federal Republic of Germany, France, Luxembourg (in connection with pardons of sentences of imprisonment up to one year), the Netherlands, Norway, Portugal, and the United Kingdom. The work may involve, for example, cleaning or maintenance duties in a public or charitable institution or in a park. (2)

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draft was altered on the ground that it was objectionable to some. The Declaration phrase "fair restitution", when compared with such a possible alternative as "full restitution", may suggest that some adjustments can be made with reference to the means and obligations of the offender. This is backed up by the phrase "where appropriate".

(1) The Declaration is concerned with the rights of victims, and to the knowledge of the author paragraph 8 was not drafted with community service in mind. However, for example some victim-offender restitution programmes in the United States of America have often involved work for the community.

(2) Albrecht and Schädler, passim; see also Dünkel 1985a, p. 17. The schemes in the United Kingdom generally involve from 40 to 240 hours of unpaid work under the supervision of probation officers; see e.g. Community Service by Offenders (Scotland) Act 1978; Treatment of Offenders (NI) Order 1976); Criminal Justice (Community Service) Act 1983 (for Ireland).

Although some parallels may be drawn, this sanction should be kept distinct from a non-voluntary sanction used in some Socialist countries, variously called

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Such community service is on a voluntary basis, as the offender consents to do the work. His consent, though, must be seen against the fact that he is aware that other sanctions may follow if he does not agree.

Community service can thus be seen as an expansion of the narrow meaning of "restitution". However, although victimological arguments may also be used in justifying community service schemes, it is noteworthy that the primary argument made for adopting (or reviving) this sanction is that it lessens the use of imprisonment. (1)

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limitation of liberty, reformative work or probation at the place of work (Erziehung durch Arbeit). The offender is assigned work and part of his wages are deducted for the State. See art. 48 of the Bulgarian Penal Code; sec. 34 of the Penal Code of the German Democratic Republic; sec. 49 of the Hungarian Penal Code; art. 33-35 of the Polish Penal Code; Decree no. 218 (12 July 1977) of Romania; and art. 23(2) of the RSFSR Penal Code. Schultze-Willebrand, pp. 364-366. In Poland, the measure called "limited freedom" is perhaps the closest parallel among the European socialist countries to community service. It involves supervised, unpaid work for social purposes for 20 to 50 hours a month, for a period of between 3 months and 2 years. See art. 34(1) of the Polish Penal Code, and E. Weigend, passim; Grajewski and Lammich, p. 416. Cf. also sec. 29, 33(4), 45(3) and 70(2) of the Penal Code and sec. 342(5) of the Code of Criminal Procedure of the German Democratic Republic.

(1) This is also clear in the legislation of several countries, which specifically provide for community service as an alternative only to short-term imprisonment. See, e.g., Balder, pp. 109-110 (Denmark); van Kalmthout, p. 54 (the Netherlands); de Miranda Pereira, p. 142 (Portugal). The overall picture is not essentially changed by the fact that in Italy and Switzerland (and for some modalities in the Federal Republic of Germany) community service can be ordered in the place of a fine.

An extensive and recent survey of the use of community service in Europe (Albrecht and Schädler) repeatedly stressed the meaningfulness of this sanction to society and the offender in terms of avoiding imprisonment, but the complainant was allotted no attention at all in any of the national reports. Almost as an afterthought the editors conclude (p. 194) that, with the growing concern for the victims of crime in the present development of criminal policy in Europe, also the future form of community service will have to take the victim into consideration.

Using community service as a form of restitution, however, involves many difficulties, not the least of which is the possible involvement of the victim in the sentencing. Community service is more clearly a sanction than, for example, direct payment to the victim. Some of the difficulties here will be noted below, in section 8.3. Such victim involvement is regarded with particular distaste in the European countries. A second difficulty lies in the fact that the requirement for victim consent, the need to find suitable work and differences in work skills will mean that some offenders will benefit and others will not: some would be able to "work off" their punishment while others would be sent to prison or fined. This would violate the principles of equality and predictability in sentencing.

8.2.5. Facilitation of early restitution

Although restitution can be and often is imposed as a part of the final court judgment, this does not assure that the judgment will be implemented. By the time that the judgment is issued the offender may have disposed of the property. Furthermore, during the trial process the victim is generally deprived of the use of the property. For most victims, what is most important is obtaining restitution. Clearly, the victim would then be interested in restitution at as early a stage as possible; he might be even be willing to forego any demands for punishment (should he have this possibility) in exchange for an assurance of restitution.

There are two primary methods for encouraging restitution at an early stage. One is to consider restitution as a mitigating factor in sentencing, or even as a factor relieving the offender from punishment entirely. This will be dealt with in section 8.3.1., immediately below.

The second possibility is to make restitution a condition for the waiving or suspending of measures. This is in fact what is often done, formally and informally, by the police in "station house adjustments": the police merely exhort the offender to return what he has taken, and perhaps provide restitution also in other ways.

On a more formal basis, the police may decide to waive measures, or the prosecutor may decide to waive prosecution. This decision is usually based on the pettiness of the offence, although also for example the general public interest in prosecution, any settlements made in the matter or a host of other factors may be influential. (1) Guideline 5 of the Council of Europe Recommendation encourages greater attention to the issue of restitution in this decision:

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

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(1) See the systematization in Tak (esp. pp. 59-66), which includes ample reference to the law and practice in the different European countries.

The victim can always turn to the civil process in order to attempt to secure his claim. His private interest in compensation as well as the fact that it may be easier for him to use the adhesion procedure or the status of partie civile in criminal court (where this is possible) than to act as the plaintiff in civil court should not be a factor in the prosecutor's determination of the public interest in prosecution. Even less should it serve in his assessment of the probable guilt of the suspect. Although in many countries the prosecutor can act as the representative of the victim, this function comes only after the decision on prosecution itself has been made; it should not determine the decision itself. (1)

However, the payment of restitution or the fact that a settlement has been reached may influence the prosecutor's determination of the public interest in prosecution.

In this connection, reference may be made to the possibility of the "disappearance of danger to society" inherent in the Socialist material concept of crime. (2) An act is not considered a crime in the socialist countries if it is not dangerous to society. The Czechoslovakian and German Democratic Republic legislation on this point specifically refer to the payment of damages as one factor to be considered.

Restitution may thus be a factor in deciding whether or not prosecution should be undertaken. In some countries, the prosecutor may also require restitution as a condition for the waiving of prosecution. When used as a prerequisite, the prosecutor notes that the restitution has been made and thus there is no longer sufficient public interest in prosecution. When used as a condition, the prosecutor notes that he is waiving prosecution on the assumption that the offender will provide restitution.

Restitution as a condition for waiving prosecution is possible only in those European countries where conditional non-prosecution is in general possible. This is the case in Bulgaria, Denmark, the Federal Republic of Germany, Iceland, Luxembourg, the Netherlands, Norway, Poland and Scotland. (3) The available data indicates that restitution as such a

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(1) See Lappalainen, pp. 41-42; Lahti 1974, p. 340.

(2) The disappearance of danger to society is referred to in art. 24Ia of the Czechoslovakian Penal Code, sec. 25 of the Penal Code of the German Democratic Republic, and art. 50 of the RSRSR Penal Code. Schultze-Willebrand, pp. 381-382. Luther notes (private correspondence with the author, letter of 27 October 1986) that this concept is little used in practice in the German Democratic Republic.

(3) Tak, pp. 67 ff.

condition is not used very widely. (1) In Hungary measures can be waived only in the case of one specific offence, maintenance default. (2)

Prosecution can also be waived in Belgium, the Federal Republic of Germany and Greece pending the institution of a civil suit for damages or of a private settlement. (3) The threat of prosecution also here may encourage early restitution.

Once the matter reaches the court, most countries appear to consider the case an indispositive one, where any private settlement between the victim and the offender will not lead to a stay in the proceedings. (4)

Although the case will thus, as a rule, be carried through to conviction, most countries reserve the right to defer or suspend punishment on the condition that the offender provides restitution. Among the core countries, this is a possibility in Austria, Denmark, England and Wales, the Federal Republic of Germany, France, the German Democratic Republic, Italy, the Netherlands, Norway, Poland, Scotland and Sweden. (5)

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(1) Tak, pp. 69-70. NOU p. 85 is somewhat more positive regarding the situation in Norway. The Norwegian State Prosecutor's Circular of 21 December 1981 called for wider use of this measure with realistic conditions.

(2) The offence involves failure to fulfill one's obligation of maintenance. Section 196 of the Hungarian Penal Code. Cf. sec. 137(3) of the Hungarian Code of Criminal Procedure; investigations may be waived for up to six months.

(3) Tak, p. 65.

(4) However, according to sec. 153a(2) of the Code of Criminal Procedure of the Federal Republic of Germany, the court may conditionally dismiss a case with the consent of the prosecutor.

(4) Sec. 43 and 51 of the Austrian Penal Code; sec. 56-57 of the Danish Penal Code; sec. 1 of the Powers of the Criminal Court Act of England and Wales; sec. 56b(2) of the Penal Code of the Federal Republic of Germany; art. 469-2 and 469-3 of the French Code of Criminal Procedure; sec. 33(3) and 61(2) of the Penal Code of the German Democratic Republic (see also sec. 24(2) and 29 of the Penal Code); art. 165(1) of the Italian Penal Code; art. 14c of the Penal Code and art. 277 of the Code of Criminal Procedure of the Netherlands; sec. 53(4) of the Norwegian Penal Code; art. 28(2), 35 and 75(2) of the Polish Penal Code; and sec. 27(5) of the Swedish Penal Code. In Scotland, the sentencer may defer or suspend punishment for restitution to

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An illustration of such provisions is sec. 1(1) of the Powers of the Criminal Courts Act 1973 of England and Wales, according to which the court "may defer passing sentence on an offender for the purpose of enabling the court to have regard, in determining his sentence, to his conduct after conviction (including, where appropriate, the making by him of reparation for his offence)..."

The waiving of measures or the use of suspended or deferred punishment in anticipation of restitution does not exhaust the possibility that the criminal process has of encouraging early restitution. The offender may be unwilling or unable to pay even if ordered by the court to do so. Therefore, even after conviction there may be scope for promising alleviation of sanctions if restitution is provided. Accordingly, restitution may be imposed as a condition of early release from prison, or work release, in Czechoslovakia, the Federal Republic of Germany, Greece, Iceland, Italy, Norway, Poland, Switzerland and Turkey. (1) According to art. 66(1) of the Greek Penal Code and art. 417 of the Turkish Code of Criminal Procedure restitution can be a condition for the removal of any disabilities entailed by conviction.

The Federal Republic of Germany has experimented with "prisoner debt regulation models", where the persons to whom a prisoner owes money agree to renounce a portion of their claims in exchange for payment from a central fund. The prisoner is then obliged to pay an agreed amount into this fund. (2)

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take place; Nicholson, para. 2.07. Finland recently abolished conditional imprisonment, on the condition of restitution, on the grounds that it was rarely used. Grönqvist et al, p. 9.

Dünkel 1985a (p. 16) notes that deferment or suspension of the sentence on the condition of restitution is possible also in Belgium, Greece, Iceland, Ireland, Malta, Portugal, Switzerland, Turkey and Yugoslavia, and (p. 18) that even fines may be suspended on similar conditions in Austria, Belgium, France, Italy, Luxembourg, the Netherlands and Portugal.

(1) See e.g. sec. 39(2) of the Danish Penal Code; sec. 57(3) of the Penal Code of the Federal Republic of Germany; art. 106 and 107 of the Greek Penal Code; art. 176 and 177 of the Italian Penal Code; sec. 38 of the Norwegian Prison Act; art. 94 of the Polish Penal Code; 38(3) and 45 of the Swiss Penal Code; art. 19(9) of the Turkish Act on the Enforcement of Penalties.

(2) Dünkel 1985b, pp. 34-35.

The use of restitution as a condition in decisions on measures in general is also supported by Guideline 13 of the Council of Europe Recommendation:

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

However, the Council of Europe draws attention to the major source of inequity in such measures. (1) Allowing for the waiving, deferment or suspension of punishment on condition of payment of restitution places offenders in a different position on the basis of their financial status. It is for this reason that both Guidelines 5 (on the prosecutorial decision) and 12 (on sentencing) emphasize that attention be paid not only to actual restitution but also to any serious or genuine effort to that end by the offender.

8.3. The victim and sentencing

8.3.1. Restitution as a sanction

Section 8.2. dealt with one facet of restitution, that of satisfaction to the victim for his loss. Most countries have permitted the inclusion of civil claims in criminal proceedings, thus avoiding the necessity of what are often lengthy, expensive and cumbersome civil proceedings.

It may also be argued that restitution is an appropriate aim of criminal justice; restitution is in the interests of society as a whole. (2) In cases in which the offender is unable or unwilling to provide restitution, the suggestion has been made that the court-ordered sanction itself should be designed to force him to do so. Such restitution combined with punishment has been called "punitive restitution." (3)

Restitution as a sanction has been recommended both by the United Nations and the Council of Europe. Paragraph 9 of the United Nations Declaration recommends that governments review their practices, regulations and laws to consider restitution as a sentencing option "in addition to other criminal sanctions". Guideline 11 of the Council of Europe Recommendation states that

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(1) Council of Europe 1985, p. 18.

(2) See section 8.2.3..

(3) See e.g. Thorvaldson 1980, passim. Also the term "correctional restitution" has been used; see Separovic, p. 154. A philosophical approach to restitution as a sanction can be found in Dagger, passim.

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

Both recommendations note that restitution (compensation) may be awarded in addition to penal sanctions. This can be understood as a reference to decisions on civil claims in the criminal process through the adhesion process or the partie civile system; these were dealt with in section 7.3.4. above. It was noted that in all of the core countries with the exception of England and Wales, and Scotland, such a claim may be entertained, although limited use is made of this possibility in Austria, the Federal Republic of Germany and the Netherlands.

Among the core countries, restitution (compensation orders) can be imposed as a separate sanction in England and Wales, Scotland and the Union of Soviet Socialist Republics. Compensation orders can also be used for juveniles in the Federal Republic of Germany. (1)

The compensation order has in generally been little used. This can in part be explained by the fact that the countries where it exists (with the notable exception of the Union of Soviet Socialist Republics) do not permit the combining of civil claims and criminal proceedings. The criminal courts thus have limited experience with the essentially civil matters underlying restitution, and its introduction as a punitive measure has met with difficulties. (2)

In England, however, its use appears to be expanding. The Criminal Justice Act (1982) provided that if a court wishes to impose a fine and a compensation order, and the offender apparently lacks the means to pay both compensation and the fine, the court is to issue a compensation order only. Thus, the compensation order was elevated to the status of a

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(1) Sec. 35-38 of the Powers of Criminal Courts Act 1973 and sec. 67 of the Criminal Justice Act 1982 of England and Wales; sec. 58-63 of the Criminal Justice (Scotland) Act 1980; art. 21, point 8 of the RSFSR Penal Code; sec. 15(1) of the Juvenile Court Act of the Federal Republic of Germany. See Walker, pp. 250-254 (England and Wales), Gane and Stoddart 1983, pp. 514-523; Gordon 1981, pp. 75-82 and Nicholson, pp. 47-49 (Scotland).

In addition to the core countries, the compensation order can also be used in Cyprus, Greece and Northern Ireland. See sec. 26(d) of the Cyprus Criminal Code and art. 77 of the Greek Penal Code. In Northern Ireland, this can be used as an ancillary order. See sec. 3(1) of the Criminal Justice (NI) Order 1980, and Boyle and Allen, pp. 94-105.

(2) In Cyprus, it is used rarely, and only when there is no dispute over the amount of damage. Council of Europe 1978, pp. 34-35; Pikis, pp. 15-16.

full sentence. (1) This is the same position stated in art. 77 of the Greek Penal Code. The idea is reflected to some extent in sec. 36(1) of the Code of Criminal Procedure of the German Democratic Republic, which states that in setting the fine consideration must be paid to the circumstances of the offender and his liability for damages.

In Scotland, sec. 62 of the Act stipulates that where a person has been both fined and had a compensation order made against him in respect of the same offence or different offences in the same proceedings, the compensation order takes precedence over the fine in respect of payments by the offender. (2)

Although Swiss law does not recognize the compensation order as a sanction, art. 60 of the Swiss Penal Code allows the judge to give the proceeds from any fine (or, indeed, from a confiscated object or bail) to the victim if the victim is considerably harmed and reduced to a state of need, and the offender will presumably not repair the damage caused. (3)

Finally, it may be mentioned that the courts of the German Democratic Republic, Poland, Portugal and the Union of Soviet Socialist Republics may decide on compensation even if the victim has not presented a claim. (4)

There are a few examples of restitution as a sanction in other forms. In some countries the wages of prisoners may be garnished for the benefit of the victim. (5) In France the Decree of 26 March 1982 was designed to increase the use of the rarely applied provisions in question. Since the decree came into effect on 1 April 1982, 10 per cent of the wages earned by prisoners is to be paid by the Penitentiary

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(1) Shapland et al, pp. 2 and 133. The authors also argue that, since sec. 35(1) of the Powers of the Criminal Courts Act states that a compensation order may be given "on application or otherwise", the court may give such an order sua sponte without even an oral application by the victim in court. They note that most court clerks interviewed disagreed with this view (p. 143).

(2) Nicholson, p. 49.

(3) However, because of the restrictive conditions, it would appear that this is an almost unused provision. Falb, pp. 333-334; Council of Europe 1978, pp. 56-57.

(4) Sec. 245(5) of the Code of Criminal Procedure of the German Democratic Republic; art. 54 and 363 of the Polish Code of Criminal Procedure; art. 29(4) of the RSFSR Code of Criminal Procedure; IAJ. Art. 59a of the Penal Code of Poland makes compensation orders obligatory for certain offences (Act of 10 May 1985).

(5) See Schafer 1973 for a discussion and survey.

Administration directly and automatically to the victim. (1)

To turn from the law and practice of the use of restitution as a sanction to the theory, it may be noted that it involves much the same problems as using it as a condition for the waiving of measures. The question of equality and proportionality are perhaps the most important of these problems.

There are several issues involved here. As noted above in dealing with the waiving of measures, one is the risk that the well-to-do will be able to "buy themselves off", while the poorer offenders would have to serve an alternative sentence - a sentence that would often be prison. (2) This risks a feeling of injustice on the part of the poorer offenders, but it also risks giving the public in general the impression that offences can be committed with impunity as long as any damages or losses are paid for - if the offender has the bad luck to be caught at all. (3)

A second issue relates to the comparative seriousness of different offences. If direct restitution (as opposed to symbolic restitution or community service) is accepted as the sole punishment for at least some offences, this would mean that those offences involving damage or loss would be the only ones for which this apparently mild punishment would be possible. The stress will therefore be on the consequences of the offence rather than on the guilt of the offender or on the possible abstract danger of the offence.

Such a risk can, of course, be obviated by developing a method for assessing the size of the restitution with reference also to the abstract danger of the offence. This adds to the difficulties that the court must face in juggling the different criteria of the restitution. There are already two other factors to consider. First of all, of course, the court has the problem of determining the extent of the harm or loss suffered by the victim. Next, the court must relate this to the offender's ability to pay the restitution.

It has been suggested that these difficulties can be decreased by developing a tariff of punishments based, for example, on the harm or loss suffered by the victim as a

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(1) Art. 113 of the French Code of Criminal Procedure. See Boland and Martin, pp. 501-502. In Poland and Italy a portion of prisoners' earnings are placed into a fund for the benefit of the victims of crime. See section 9.6.

(2) Harland 1980, p. 17. He also notes on the basis of a 1972 national survey of jail inmates in the United States that over half had an income below USD 3000 for the 12 months prior to incarceration.

(3) However, Harding 1982 (pp. 34-41), in summarizing research on restitution, concluded that the public at large were favourably disposed to this measure.

measure of the social harm of the offence. (1) Such proposals in effect seek to combine restitution with the fine, with the profits accruing to the victim.

The third issue in considering restitution as a sanction from the point of view of equality and proportionality is the assessment of the proper amount of the restitution. If it includes only objectively assessable loss this issue is not as burning as it is if also pain and suffering, for example, are included. (2) However, even in the case of objective loss the certainty of punishment may decrease. For example, some losses may not appear until years after the offence.

A fourth factor relates to all innovations designed to make the criminal justice system more humane, decrease the severity of punishment and increase justice. The innovations do not necessarily lead to the results their proponents had desired. (3) Innovations in the criminal process may lead to the so-called "net-widening effect"; instead of replacing more severe procedures or sanctions, they may be used to replace less severe procedures or sanctions. Early studies noted the use of restitution in an "add-on" fashion; instead of replacing a measure, it is used in a way that makes the over-all effect more severe. (4) Despite this tendency, the fact that restitution has been adopted as a theoretical sentencing alternative may lead to less interest in seeking other alternatives - yet another factor increasing the severity of the system. (5)

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(1) Thorvaldson 1985, pp. 8 and 11; see also Shapland 1984, pp. 145-146.

(2) Bentham suggests that a neutral observer always be used to assess satisfaction:
"How shall we judge if the satisfaction be perfect, with respect to him who receives it? The balance in the hands of passion will always incline to the side of interest. To the miser you can never give enough; to the revengeful, the humiliation of his adversary never appears sufficiently great. It is necessary, then, to imagine an impartial observer.." (p. 30)

(3) Cohen argues against the view that the development in criminal justice can be seen in terms of an uneven progression towards a better system. He observes that a more realistic view would be that the managers of the criminal justice system use well-meaning innovations in order to promote their own administrative or other ends. See Hulsman 1985, passim.

(4) Harding, p. 19.

(5) Harland 1980, p. 25. He notes that this misleading of the public and the legislature about the actual outcome may also work to the detriment of the victim. Public and legislative opinion may erroneously assume that the victim is being compensated adequately, whereas much of the restitution ordered is not paid.

Other arguments against restitution as a sanction can also be noted. For example, although it is often suggested that this sanction is rehabilitative, (1) little empirical evidence demonstrates this. The possible violation of the principles of equality and proportionality may well outweigh any rehabilitative benefits. It might also be noted that using restitution for rehabilitation would almost of necessity limit it to offences by individuals; doubts may well arise over its rehabilitative value when used as a sanction on corporate bodies.

As to the argument that restitution as a sanction may have a deterrent effect ("no one should profit from crime"), deterrence would require greater certainty (and perhaps severity) than that found in such a disposition. The certainty suffers not only because of the low apprehension risk for crime in general but also because of the degree to which the victim has control over the presentation of demands for restitution. (2)

Restitution as a sanction has also been argued to have an expressive effect. (3) This would seem to be the strongest of the theoretical arguments in favour of its use as a sanction, but even this does not answer the problems posed by the potential violation of the principles of equality and proportionality.

Given the arguments for and against restitution as a sanction, it would appear that its scope as the sole sanction should be limited to the pettier offences. (4) Here the dividing line between restitution combined with the waiving of measures and restitution as a sanction grows very thin.

Restitution as a sanction, however, has been suggested not only as a sole sanction, but also as a sanction that may be set in connection with other sanctions. In particular, it has been suggested repeatedly that restitution could be paid from the proceeds of inmate earnings. (5)

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(1) Andrew, pp. 573-576; Galaway 1977, pp. 82-83; Dagger, p. 10.

(2) McDonald 1978, p. 102. In a letter to the author dated 10 July 1986 Lamborn notes that it is hardly a deterrent element to have to return stolen goods the one time out of ten that the offender is caught. It would not even be a deterrent element if the thief was caught every time he stole property; in effect, he loses nothing.

(3) Dagger, p. 10.

(4) McDonald 1978 (p. 106) notes that "a substantial proportion of violations in criminal law are in actuality more like civil matters than like real crimes."

(5) See K. Smith, passim; but also, e.g., Schultz; and Mueller and Cooper, p. 91.

The simplicity in theory of restitution through prison labour hides a considerable number of difficulties in practice. While prisoners might be willing to work when they themselves will receive the remuneration, it may be difficult to motivate them to work for the benefit of another. In particular if the victim is well-off and the prisoner is not, the prisoner may feel that he is being exploited. There are also difficulties in finding suitable prison work; there may be conflict, for example, with those doing the same work as private entrepreneurs, or with the unemployed. Prisoners will have different aptitudes, and thus the limited line of available work will favour a few; this could well be considered discrimination. (1)

Perhaps a more important objection to favouring prison labour as a source of restitution is that this possibility may strengthen the role of the prison in the system of sanctions. The courts may feel that this option meets several needs, and that its use should be expanded. Moreover, since the rate of pay for prison work is low, the courts may also feel that lengthier sentences should be set in order to provide the offender with time to work off his debt.

8.3.2. Views and concerns of the victim in sentencing

It was noted in section 8.2.5. that the courts in many countries may waive the sentence on the condition that the offender provide restitution to the victim. This is a clear indication of how the views and concerns of the victim may be taken into consideration during sentencing.

There is also another close link between restitution and sentencing, one that less directly reflects victim views and concerns. This is the possibility that apparently exists in all countries of considering the payment of restitution as a mitigating factor. The criminal laws of many countries (2) specifically state that the court, in setting sentence, must consider whether or not the offender has provided compensation for the loss or made good the damage done.

Court consideration of restitution is also a possibility, of course, even where it is not specifically noted as a criterion in sentencing. For example, chap. 6, sec. 3 of the

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(1) See, e.g., Nader and Combs-Schilling.

(2) Sec. 34, points 14 and 15 of the Austrian Penal Code; sec. 84 of the Danish Penal Code; sec. 46(2) of the Penal Code of the Federal Republic of Germany; sec. 25 of the Penal Code of the German Democratic Republic (cf. also sec. 62); sec. 332 of the Hungarian Penal Code; art. 62, point 6 of the Italian Penal Code; sec. 59 of the Norwegian Penal Code; and art. 38(1) point 1 of the RSFSR Penal Code. Cf. also sec. 1(1) of the Powers of the Criminal Courts Act 1973 of England and Wales, which may be applied in the rare cases where a deferment of the sentence is considered appropriate.

Finnish Penal Code requires the court to take into consideration as a mitigating factor the voluntary attempt of the offender to prevent or erase the consequences of his act. Payment of compensation can be considered such an attempt. (1)

To note a jurisdiction in addition to the core countries, the Turkish Penal Code is specific as to the effect of compensation. Art. 523 states that the penalty for certain offences against property is to be reduced by one to two thirds if full compensation is made before the institution of proceedings and by one sixth to one third if the proceedings have begun but the case has not yet come before the court.

Despite the general agreement on the principle of considering restitution as a mitigating circumstance, there is less unanimity on the time at which restitution must be made in order for it to be considered as a mitigating factor.

The Turkish provision just cited illustrates two different approaches. According to the first, restitution may be a mitigating factor only if the offender had provided restitution before the criminal process had begun. According to the second, restitution should be encouraged as part of the criminal process: it may be pointed out to the offender that payment of restitution may mitigate the sentence. (2)

The first approach is dealt with in different ways in the various European jurisdictions. In most countries voluntary restitution and averting the harmful consequences of the crime before the offence came to the attention of the authorities is a mitigating factor, or it may relieve the offender entirely of penal responsibility. There are, however, considerable limits on this.

A distinction should be made between two grounds on which such mitigation or absolving from punishment may enter the question. First, the offender may withdraw from the offence; secondly, after the criminal attempt has been completed, he may intervene to prevent or lessen its harmful consequences. To take the simple example of theft, in the first case a burglar may decide not to take away an object

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(1) See also Lappalainen, pp. 46-47: if the payment of compensation together with the sanction would lead to an "unreasonable" result, the punishment is to be mitigated on the basis of chap. 6, sec. 4 of the Finnish Penal Code.

Compare also art. 50(2) of the Polish Penal Code (consideration of the behaviour of the offender after the offence); chap. 33, sec. 4(2) of the Swedish Penal Code (mitigation is possible for special reasons). In respect of Scotland, see Renton and Brown, p. 436, and Nicholson, pp. 208-209, 220-221.

(2) This possibility was dealt with immediately above, in section 8.3.1.

he finds on the premises; in the second case, he returns an object he has already taken away.

Generally speaking, in the case of withdrawal from an offence, the offender cannot be punished for the completed offence; in addition, he is generally not punished even where an attempt of this same offence is punishable. However, it is generally a condition here that the offence was abandoned voluntarily and not because, for example, the offender feared immediate apprehension. If the attempt in itself incorporates a different completed offence, the offender may be punished for this. In the above example, the burglar may be punished, for example, for the offence of violation of domicile, if the essential elements of such an offence have been fulfilled. (1)

In common law, withdrawal from an offence has not achieved the same recognition it has on the Continent. (2)

The second grounds mentioned for mitigation or absolving from punishment was the voluntary intervention by the offender in order to prevent or lessen the consequences of the offence. The general trend among the core countries here is that the offender is to be punished, but with a mitigated punishment. Art. 56(4) of the Italian Penal Code is specific as to the extent of this reduction: the offender shall be subject to the punishment prescribed for the attempted offence, reduced by one third to one half. (3)

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(1) Sec. 16 of the Austrian Penal Code; sec. 22 of the Danish Penal Code; sec. 24 of the Penal Code of the Federal Republic of Germany; chap. 4, sec. 2 of the Finnish Penal Code; sec. 21(5) of the Penal Code of the German Democratic Republic (see also, e.g., sec. 185, 187 and 189); sec. 17(3) of the Hungarian Penal Code; art. 56 of the Italian Penal Code; art. 45(1) of the Penal Code of the Netherlands; sec. 50 of the Norwegian Penal Code; art. 13 of the Polish Penal Code; chap. 23 sec. 3 of the Swedish Penal Code and art. 16 of the RSFSR Penal Code.

(2) In respect of England and Wales, Smith and Hogan note (p. 269) that "(t)he principle argument in favour of a withdrawal defence is that it might induce the attempter to desist - but this seems unlikely." Gordon notes that there is no law on this in Scotland, although he himself supports the concept. However, he continues (1978, pp. 182-183): "The question is ... unlikely to rise in Scots law if it adopts a last act theory since such a theory avoids the difficulty by postponing the stage of attempt until it is impossible for the accused effectively to abandon his object."

(3) See Bricola and Zagrebelsky, parte generale, vol. II, pp. 542-546; Manzini, vol. II, p. 517. In respect of the law in the other countries, see the citations in footnotes 1 and 2 above; the provision in the RSFSR, however, is art. 15(4) of the Penal Code.

In addition to general provisions on the effect of withdrawal or intervention on sentencing, separate provisions exist in some legislation on the significance of "active repentance" (tätige Reue). These provisions provide that, in respect of specified offences, the offender may be absolved of punishment if he voluntarily averts the harmful consequences of his offence. In most cases, these provisions apply only to certain serious offences that rarely have individual victims. The most common such offence is treason. However, in two core countries, Austria and Hungary, provisions exist on the effect of active repentance for certain property offences. (1)

The Austrian provision lists a very wide range of property offences (including theft, malversation, misappropriation, fraud, and the receiving of stolen goods) where the punishability of the act is terminated by active repentance. One condition here is that the offender voluntarily admits his guilt before the act is known to the authorities. A further condition is that either the offender pays full compensation or agrees to pay this compensation within a specific period. According to sec. 167(4), if the offender cannot compensate the loss, he nevertheless will not be punished as long as he seriously endeavoured to pay, and a third person pays full compensation on behalf of the offender or an accomplice. (2)

The Hungarian provision applies to much the same property offences as the Austrian provision. However, the Hungarian provision assumes that the punishment for the offence will only be mitigated, although "in a case deserving special consideration it may even be omitted". In this, it bears a close resemblance to the provisions on mitigation of punishment noted above. A second difference arises in those cases where the offender is unable to pay; the benefit of active repentance may be granted to a person who "does the best that can be expected from him in order to repair the damage."

In addition to the waiving of measures or sentence mitigation on the grounds of restitution, there is a third and extremely controversial way of taking the views and concerns of the victim into consideration in sentencing. This is to allow the victim to be heard in some manner on the issue of the penalty.

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(1) Sec. 167 of the Austrian Penal Code; sec. 332 of the Hungarian Penal Code. See also chap. 14, sec. 11 of the Swedish Penal Code, which permits active repentance in the case of forgery; and chap. 17, sec. 7, and chap. 34, sec. 21 of the Finnish Penal Code, which deal, respectively, with perjury and certain offences involving endangerment through negligence.

(2) See Müller-Dietz; Haberl, pp. 48-50; Kienapfel, pp. 313-325. Note that in the case of sec. 167(4) it is not necessary that the offender admits his guilt; it is sufficient that the offender voluntarily pays, or agrees to pay, full compensation within a certain period.

A distinction shall be made here between participation of the victim in the trial itself and allowing the victim to be heard at a separate sentencing hearing. In section 7.3., it was noted that several countries allow the victim to present penal claims in court. It is clear that the presentation of such penal claims is at the same time an expression of the victim's views and concerns regarding the penalty. (1)

On the basis of the data collected for this survey it appears that none of the core countries have arrangements for a separate sentencing hearing where the victim would have a chance to be heard. There also do not appear to be any official proposals for providing the victim with such a right. The only indirect link between the "views and concerns of the victim" and the penalty would appear to be provided by the social history reports that, in some countries and in some cases, are prepared to assist the court in the determination of the sentence. In the Federal Republic of Germany, some information on the injury and damage done to the victim is at times included in these reports. (2)

The direct involvement of the victim in sentencing is apparently repugnant to the criminal policy of the various countries for a variety of reasons. The primary one is that it would include a very unpredictable and subjective factor which would run counter to sentencing models based on equality and proportionality.

In the countries favouring individualized sentences the subjectiveness of the victim's views would introduce an element that is foreign to the theory that the sanction should rest on a careful assessment of the character of the offender and on a prediction of his dangerousness.

There is also the question of the victim's willingness to participate in such a punitive decision. Leaving aside the real danger that involvement of the victim in the sentencing decision might subject him to pressure by the defendant or threats of retaliation, the little empirical evidence avail-

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(1) For example, requesting that the court punish the offender for libel is a request that the court apply the statutory scale of punishment for this offence. Emphasis of the serious nature of the offence can be seen as an attempt to have the court use the upper end of the scale or the heaviest of alternative punishments provided for in the scale. No empirical data is available on the extent to which victims call for specific forms of punishment (e.g., an apology, or two months' imprisonment).

(2) United Nations Report, para. 78. They thus bear certain similarities to the "victim impact statements" in use in the United States. See e.g. Paul Hudson, pp. 51-53.

able indicates that the victim does not want a decision-making role. (1)

8.4. Concluding remarks

Two issues have been dealt with in this section, restitution and sentencing. It was noted that restitution was originally a central factor in organized social control. The earliest legal mechanisms that were related to crime were often designed to ensure restitution. Punishment, as something distinct from restitution, did not come into wide-spread use until considerably later.

For a long time restitution had a very low profile in the criminal justice system. Some commentators believe that it had been divorced from criminal justice almost entirely. The preceding survey indicates that although this may describe the situation in some other parts of the world restitution in one form or another has remained a significant factor in decision-making in criminal justice in Europe at least in theory.

Restitution and criminal justice are tied together in a variety of ways. One of the most important way - and one that is in wide-spread use throughout Europe, with only a few exceptions - is that claims for restitution can be made in criminal proceedings, or the court may decide on a compensation order at the conclusion of the criminal proceedings. It was also noted that restitution is also very commonly considered as a mitigating or even totally absolving factor when the court decides on the sentence.

After a lengthy period of low profile restitution is re-entering discussions on criminal justice. First, it is finding increased favour in a few countries as a sanction in itself. Restitution as a sanction has in effect been reborn. Second, restitution is one of the key elements in projects on mediation and reconciliation that have been initiated in some Western European countries. The pattern here somewhat resembles the experiences of some Socialist countries with social courts.

It may be difficult to assess the potential for direct restitution as the sole sanction for offences in Europe. It will apparently be limited to offences that have certain characteristics: the offences involve damage or loss for which restitution can be made; they are directed primarily at individual victims who are willing to accept restitution; and the offences are so petty that no other sanctions are required. This last factor is particularly important in those offences that are being considered for mediation and

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(1) However, it may be noted that the proposals for increased victim involvement (which have been made particularly in the United States) do not suggest that they be required to participate in such decision-making, only that they be given such a right. See, e.g., NOVA, pp. 10-12.

conciliation, as the prerequisite generally is that the public prosecutor foregoes prosecution.

Although these limits rule out many offences they still contain within their scope a large number of offences, both absolutely and proportionately. The arguments for restitution as the only sanction, or for mediation and conciliation proceedings leading to restitution and other private settlements, are telling enough to suggest that the use of these may well expand.

The use of restitution as a sanction for more serious offences, which would generally involve the combining of restitution with imprisonment, would seem an alternative less likely for general acceptance. There are serious criminal policy arguments against it. It may lead to increased inequity or at least a sense of inequity. It may even lead to an increase in the severity of the system of sanctions.

In those countries in which inmate earnings are used in part to pay for restitution, it would seem that the rationale is that the offender would be in prison anyway. The restitution itself does not appear to determine the length of the sentence. Given the low rate of pay for prison industries, it would not seem as if this mode of payment would ever be of appreciable significance to more than a minority of victims.

9. STATE COMPENSATION FOR VICTIMS OF CRIME

9.1. General remarks

The concept of State compensation for crime victims has received wide support in Europe, as well as in several countries elsewhere. (1) It was approved by a majority of the participants at the Eleventh Congress of the International Association of Penal Law in 1974; (2) it has been the subject of intensive and productive work by the Council of Europe, (3) and most recently it has been highlighted by the United Nations Declaration. The provisions of the Declaration in question read as follows:

> "12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
>
> (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
>
> (b) The family, particularly dependants of persons who have died or become physically or mentally incapacitated as a result of the victimization.
>
> 13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm."

In Milan and in the earlier preparatory work on the Declaration there was apparently no disagreement over whether or not State compensation for crime victims should be recommended. The main points of discussion in this regard were over how far State compensation should extend and the problems that many countries would have in funding any compensation programme.

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(1) See esp. Lamborn 1976, passim. A survey of State compensation schemes in the English-speaking world is provided in Burns 1980, passim.

(2) Resolution A(I) of the Eleventh Congress. Revue internationale de droit pénal, vol. 44 (1973), no. 1 and 2, p. 401.

(3) See section 3.3.

Several arguments have been advanced both for and against State responsibility for crime damages. Among the arguments in favour of such schemes are the legal tort theory, the social contract theory, the social insurance theory, and the utilitarian theory.

According to the legal tort theory, the State has a legal obligation to compensate victims for any losses resulting from an offence. The argument generally proceeds as follows. The State lays down the rules of behaviour, but at the same time prohibits private revenge. The State also introduces criminal justice measures and should be liable if these measures prove ineffective against crime. What is more, the activity or inactivity of the State creates criminals or at least the conditions for crime, and the operation of the State law enforcement machinery may make it very difficult for the victim to obtain restitution for losses. An example of this last point is that the State may react to crime by placing the offender in prison, which decreases the victim's possibilities of obtaining compensation. The tort theory therefore holds that the State has a duty to take reasonable care to protect its citizens. The very fact that the offence is committed indicates that the State has failed in this; the tort is the breach of duty. (1)

A more extreme form of this theory argues that the State has reserved for itself the right to use force in suppressing crime and punishing offenders. Citizens are generally not allowed to carry arms and private vengeance is prohibited. If the criminal justice agencies (and the police in particular) do not fulfill their functions, whether through incompetence, negligence or simple inability, it becomes the State's responsibility to make reparation to the victim. (2)

There are a number of obvious counterarguments. (3) The State has at no time guaranteed a life free from crime, although policy generally calls for the minimization of crime and its costs. It would be manifestly impossible for the State to prevent all types of offences; some responsibility remains with the individual and the community. In addition, fully effective measures would be unacceptable in a free society.

There is also a practical counterargument. On the basis of the legal tort theory the State should be responsible for all crime damages and not just the damages from violent crimes to which most State compensation schemes are presently limited. Moreover, with the exception of acts of God, all damages are in a sense foreseeable, and the same legal tort theory can be developed to argue for the protection of

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(1) Council of Europe 1978, p. 17. The Council rejected this theory; pp. 18-19. See also President's Task Force, p. 39.

(2) Karmen, pp. 211-212; Schultz 1975, p. 131.

(3) Miers, pp. 75-76; Burns 1980, pp. 99-116; Weintraud, pp. 21-22; Henderson, pp. 1017-1019.

the citizens against all misfortunes. Thus, acceptance of the legal tort theory would prove to be an impossible burden on the public treasury.

The legal tort theory was based on the assumption of a legal duty. The social contract theory, in turn, rests on the assumption of what is, in effect, a moral duty. This theory is based on the humanitarian rationale according to which all citizens should be assisted in case of need; this is one of the obligations of a welfare state. (1) One could refer to the sympathy of the public for the innocent victim. The fact that all schemes in Europe are indeed directed at innocent victims (a position to which more reference will be made below) is an indication of the strength of this argumentation in practice. The "just expectations" of the public would explain why victims of violent crime are singled out for such special treatment; moreover, in many welfare states, other victims of misfortune are already covered to some extent. (2)

The social contract theory contains elements similar to those in the legal tort theory. In establishing a society the citizens assign the central power certain rights but also certain responsibilities. One of these responsibilities is to prevent crime. Failure to prevent crime shows that the State has failed, and it should make amends - as a moral duty, however, and not as a legal duty. State compensation is in effect a symbolic act of compassion and charity. (3)

According to the insurance theory, programmes of State compensation assist in loss distribution and in sharing the risk of crime. The State is regarded as a large enterprise. In the activity of this enterprise, it is fairly certain that certain negative phenomena (e.g., crime) will harm some members of the State, but the risk is less predictable for any individual citizen. (4)

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(1) Weintraud, pp. 24-29. The social contract theory is reflected in the writings of one of the first authors to suggest State compensation, Jeremy Bentham; see Bentham, p. 39. It may be noted, however, that Bentham limited his scheme so that it would provide "satisfaction from the public treasure" only after an offender had been convicted and found destitute. This was in order to avoid "a secret connivance between the party pretending to be hurt, and the pretended author of the offence."

(2) Arguments along these lines can be found in the preparation of the English scheme, which was the first general scheme to be adopted in Europe. Shapland et al, p. 119.

(3) It is another matter that the adoption of the schemes may provide certain crime victims with the right to compensation.

(4) Karmen, p. 211.

The analogy with insurance to this extent is a good one. In its details, however, it falters. It has been pointed out (1) that as with the legal tort theory, this theory does not explain why victims of violent offences should be singled out as the recipients of such benefits. Life as a member of an organized community involves a number of other risks, ranging from labour and traffic accidents to property offences, from unemployment and other economic setbacks to acts of terrorism and war. Furthermore, the analogy with insurance is not perfect in that the "premiums" (the taxes used to finance most State compensation programmes) are not calculated at all on the basis of risk of victimization to violent crime.

Legislators may not necessarily act on the basis of philosophical arguments about duty, risk and charity. If, however, practical arguments are added, the arguments taken together may become convincing. The practical arguments may concern the effect of State compensation schemes on two different target groups: the victims and the public at large.

The utilitarian theory argues that satisfaction with State compensation benefits the criminal justice system and thus helps in fulfilling some of the basic tasks of society. If the victim knows that he will be compensated by the State for his injury he will cooperate with the law enforcement authorities. Since reporting the offence to the police is generally a condition for eligibility for the benefits, it can be argued that more victims will be willing to report offences. Knowledge that any losses will be covered may even encourage altruistic behaviour on the part of bystanders, who will therefore intervene to prevent offences. It may be noted that many State compensation schemes specifically include within their coverage those who "assist law enforcement officials in their duty."

Somewhat along these lines are arguments to the effect that payment of compensation helps to liberate victims from feelings of injustice and rejection by society. (2) Becoming the victim of a crime may be a disorienting experience and the victim may feel that society as a whole is to blame. Providing him with State compensation, according to this reasoning, assures him that he is valued as a member of society.

State compensation may also have an effect on the criminal policy climate of society as a whole. A great deal of money is spent on the detection of offences, trial and punishment. As many offenders are destitute, many victims continue to suffer. "Justice must be seen to be done", and therefore the State should take up the slack. Such schemes maintain faith in the basic "fairness" of the system. However, this symbolism may also be empty. What is important from this

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(1) See e.g. Burns 1980, pp. 129-130.

(2) Council of Europe 1978, p. 17.

point of view is that the public believes that such a scheme has been adopted; it is of lesser importance that few individuals may in fact be compensated. (1)

In the arguments for the schemes in Scandinavia, such pragmatic points appeared to have been significant. The first scheme in Sweden, in 1948, covered only damage caused by escapees from institutions. The scheme was proposed on the grounds that it was considered unreasonable that those who lived in the neighbourhood of an institution (e.g. a prison) were at greater risk than others. There was therefore the danger that any suggestions for the establishment of a new institution would be opposed if persons living near the proposed location felt that they were being placed in danger. Also, as the Swedish Government was planning more open forms of corrections, public outrage at damage caused by escapees might lead to difficulties. (2) Similar argumentation was presented in Finland, when a corresponding scheme was adopted.

More recently in Norway the establishment of the general scheme of State compensation in 1976 was defended not only on the grounds that offenders are rarely able to pay for damage, leaving the victims in financial need, but also on the pragmatic grounds that public support for a humane criminal policy could be more easily reached if the State compensated the victim of crime. (3)

The use of State compensation schemes as a symbolic measure (which some have considered only a placebo to direct the attention of the public from the failures of the State's criminal policy) has been decried by some commentators. (4) However, such symbolic politics might be seen in a less cynical light if, as was the case in the countries noted, the purpose is to assist in the promotion of the goals of criminal policy.

The arguments against State compensation schemes can be based either on philosophical issues or on practical considerations. Conservative political philosophy may object to compensation on the grounds that it undermines the values of rugged individualism, self-reliance and personal responsibility. In this connection, it might, for example, lead to the possibility of lessened vigilance and care by the victim, which would in turn result in increased crime. (5) Another philosophical protest is the view that restitution should primarily be the duty of the offender. This conservative attitude generally suggests as a preferable alternative private enterprise; above all, insurance.

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(1) Burns 1980, p. 121-126.

(2) Ersättning för brottsskador, pp. 66-67.

(3) Schønning, p. 10.

(4) See, e.g., Chappel; Harland 1978; Burns 1980; R. Elias.

(5) Council of Europe 1978, p. 18.

The practical difficulties include above all the financial cost of the schemes, not only through the provision of the awards but also through the costs of the administration. Other arguments include the risk of fraud, the administrative difficulties and difficulties in drawing borderlines, and the possible effect on the attitude of the offender: he may feel that since the State will indemnify the victim, he may commit his offence at small cost to the victim. State compensation schemes would thus provide yet another basis for neutralization techniques.

The question of fraud is involved in possible attempts to collect compensation from multiple sources, such as from both insurance and the State; State schemes are generally secondary to other sources. Fraud is also involved in possible attempts to collect awards for non-existent injury or loss, or for injuries or losses that in fact were not caused by an offence.

As for the difficulties in drawing borderlines between eligible and ineligible victims, the primary question appears not to be what sort of offences are to be covered, but instead whether or not the behaviour of the victim in connection with the crime is to be taken into consideration. The various schemes have taken very different approaches to this problem, as will be noted below.

9.2. The development of the schemes

The concept of State compensation for crime victims can be found in the Hammurabi codes (1775 BC) and various other ancient sources. It has been proposed during the 1800s by e.g. Bentham, Lombroso, Ferri and Garofalo, and at the turn of the century by Tallack. Schemes with certain rudimentary elements of State compensation were adopted in fact in England in 1285, in Ireland in 1697, in Tuscany in 1786, in Mexico in 1871, and in France in 1934. (1)

Despite these numerous early examples, the forerunner of general State schemes for compensation of victims of crime is generally held to be that adopted in New Zealand in 1963. The schemes spread rapidly through the Anglo-Saxon world

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(1) On the general development of State compensation, see, e.g., Silvig, esp. pp. 213-214.

The Statute of Winchester (1285) provided that the victim of a robbery, burning or theft, or the survivors of a victim of murder, could collect compensation from one or more of the local inhabitants unless the hundred raised the hue and cry and captured the offender with 40 days. For (Northern) Ireland, several pieces of legislation given since 1697 are outlined in Greer and Mitchell 1976, pp. 1-3 and Greer and Mitchell 1982, pp. 1-10.

States) and on to Continental Europe and elsewhere. (1)

The European countries can be divided into three groups on the issue of State compensation for victims of crime. First are those countries in which no general State compensation scheme exists and the general system of social insurance can be considered insufficient protection. This is the case at the moment in Cyprus, Greece, Iceland, Italy, Malta, Portugal, Spain and Turkey. A compensation scheme, however, is under consideration in most of these countries, in part due to the work of the Council of Europe. (2)

Second are the countries in which the State has made arrangements for State compensation to some victims of crime. The credit for being the European forerunner in this regard is often given to England, which was indeed the first European country to introduce a general State compensation scheme (on the basis of Command Papers in 1961 and 1964). However, in 1948 Sweden incorporated into the State budget funds for the compensation of personal injury and property damage inflicted by persons who escaped from a government-operated institution. Thus, for example theft, burglary and damage to property committed by a person absconding from a prison, an institution for alcoholics or a youth home could be compensated by the State. Although the system is discretionary (ex gratia), in practice full payment has been made to all applicants not covered by insurance. (3)

At present, the following European countries have adopted a State compensation scheme for victims of crime (the statute in parantheses is the one presently in force): (4)

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(1) On developments outside Europe, see, e.g., Meade et al; Lamborn 1976; Schmidt; NOVA.

(2) United Nations Report, para. 87. It will be appreciated that these countries differ in their social insurance systems, or lack thereof. Regarding Iceland's developed social insurance, see e.g. Council of Europe 1978, pp. 42-43, and Björnsson, pp. 21-26. In Italy, a 1974 Act provided that thirty percent of prisoners' earnings be placed in a central fund for the benefit of victims (Cassa per il soccorso e l'assistenza alle vitteme del delitto). Council of Europe 1978, p. 18. Lombart (p. 130) notes specifically that Italy, Spain and Switzerland are considering adopting a state compensation scheme. The present situation in Switzerland is dealt with in Eser and Huber, p. 727. On 22 June 1984, the Swiss Federal Constitution was amended to include a stipulation (art. 64(3)) that "The Confederation and the cantons sall ensure that aid is provided to victims of attempts on life or physical integrity. Such aid shall include equitable compensation where, as a result of the offence, the victim experiences hardship."

(3) Ersättning för brottsskador, pp. 13-14 and 66 ff.

(4) See also Šeparović, pp. 164-168; Villmow, pp. 78-81; United Nations Report para. 87-100.

United Kingdom (England, Scotland, Wales), 1964 (Criminal Injuries to Persons (Compensation) scheme (not, however, a statutory instrument; revised in 1979)
Northern Ireland, 1968 (Criminal Injuries (Compensation) (Northern Ireland) Order 1977)
Sweden, 1971 (Brottsskadelag)
Austria, 1972 (Verbrechensopferentschädigungsgesetz)
Finland, 1973 (laki rikosvahinkojen korvaamisesta valtion varoista)
Ireland, 1974 (Scheme of Compensation for Personal Injuries Criminally Inflicted)
Norway, 1975 (förskrifter om erstatning fra staten for personskade voldt ved straffbar handling)
the Netherlands, 1975 (Wet voorlopige regeling schadefonds geweldsmisdrijven)
Denmark, 1976 (lov om erstatning fra staten til ofre for forbrydelser)
the Federal Republic of Germany, 1976 (Gesetz über die Entschädigung für Opfer von Gewaltstraftaten; NB. the Neubekantmachung, Bundesgesetzblatt 1985 I, p. 1)
France, 1977 (loi no. 77.5 du janvier 1977 et Décret no. 77-194 du 3 mars 1977; the text was incorporated into the Code of Criminal Procedure as art. 706-3 - 706-15)
Luxembourg, 1984 (loi du 12 mars 1984, relative à l'indemnisation de certaines victimes de dommages corporels résultant d'une infraction et à law répression de l'insolvabilité frauduleuse)

In addition, Belgium has adopted a state compensation system with the Act of 1 August 1985. However, as of this writing the system has not been put into operation. (1)

Third are the Socialist countries, which have developed comprehensive public health service and social insurance systems intended for all citizens regardless of the source of the need.

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(1) See Eliaerts, pp. 2-3. Adoption of the Act enables Belgium to sign the European Convention; see section 9.5. below. It will cover victims who have sustained serious bodily injury or serious damage to health as a result of a deliberate crime of violence. The award may cover loss of earnings, temporary or permanent disability, medical and hospital expenses, and loss of maintenance. Awards will be discretionary, and require inter alia that the victim constitutes himself as a partie civile. The award can be reduced or refused with reference to the victim's financial situation, his conduct relative to the injury, and his relations with the offender. Aliens may receive compensation on the reciprocity principle. Decisions will be made by a Commission composed of magistrates, lawyers and civil servants. The decision of the Commission will not be subject to appeal.

On the situation in Belgium before this scheme, see Dalcq.

Even such systems, however, may lack the fuller coverage for crime victims provided by separate State compensation schemes. (1) At the moment, Hungary and Poland are considering the adoption of State compensation to some extent. An emergency fund already exists in Poland, called the Post-Penitentiary Aid Fund. According to the 1969 Penal Executive Code, the purpose of this fund is to provide assistance to former prisoners and their families. Five per cent of the reimbursement (wages) paid to prisoners is paid into the fund. A small share of this is turned over to the Polish Committee of Social Assistance in order to help victims of various offences.

In February 1986, a second Polish fund initiated its activity: the Foundation for Compensating Victims of Crime. By the end of August 1986, the Foundation had over 100 million zloties (circa 650 000 USD). However, as of this time no awards had been made. The scope of the Foundation is roughly similar to the state compensation schemes elsewhere: financial assistance may be granted if the victim has suffered a bodily injury or impairment of health followed by a substantially reduced capacity to work; or a dependent has lost his guardian or the person responsible for his maintenance, and this has led to a difficult financial situation; or the victim has lost such a substantial portion of his property that he is unable to satisfy his basic needs or those of his family. Decisions are made by the eleven member Board of the Foundation. (2)

In seeking to explain why only certain countries have thus far opted for a separate State compensation scheme, it will be noted that these tend to be the European States that have both a strong social welfare orientation and a strong victim movement. Further factors that have been suggested to explain the adoption of such schemes include the perception of a general risk of victimization, and a readiness of the State to innovate. (3)

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(1) In the collection of data for this study, it was noted that at least in the German Democratic Republic, Poland, the RSFSR and Yugoslavia these comprehensive systems do not necessarily cover all citizens. They are generally available to those who make social security payments, family members of a breadwinner who makes such payments, and children and retired persons. They are also available to those who are officially registered as unemployed, in the army or in an institution. Thus, for example, vagrants are not covered, and yet they have a high risk of becoming victims of crime. -In the German Democratic Republic, a special fund exists within the framework of the state insurance system for all cases involving special difficulties to a citizen.

(2) Jankowska, pp. 1-2.

(3) Lombart, p. 131.

9.3. Questions of coverage

9.3.1. The scope of offences

All of the general schemes of state compensation to victims of crime cover at least injuries resulting from violent offences against the person. However, there are marked differences in the definition of violent offences.

Some schemes are limited to deliberate acts of criminal violence. Sec. 1(2) of the Austrian law carries the additional limit that the premeditated illegal act must be punishable by imprisonment for at least six months. In the Netherlands, France and Luxembourg, the laws essentially cover serious injury caused by deliberate criminal violence (art. 3, 706-3 and 1 of the respective laws).

More expansive schemes include injuries suffered in the prevention of crime or in the assistance of the police (sec. 1 and 4 of the Irish law, para. 5 of the United Kingdom scheme, art. 2(2) of the Northern Irish law), even where the injury was not the result of a violent act willfully inflicted on the victim by the offender. (1) Sec. 1 of the law in the Federal Republic of Germany limits this scheme to deliberate acts of criminal violence and lawful defence against a deliberate, unlawful assault.

An even wider scope is taken by those countries that permit compensation of any injury resulting from a criminal act (sec. 1(1) of the Danish law, sec. 5 of the Finnish law, sec. 1(1) of the Norwegian law, sec. 2 of the Swedish law). As long as the act itself is a violation of criminal law its victim will be eligible for benefits; the act itself need not be one of deliberate violence. (2)

All of the schemes exclude traffic accidents from their scope; these are dealt with by separate legislation. (3)

The inclusion of property offences in the scope of State compensation is so far a rarity. In France, the so-called "liberté et securité" law of 1981 opened the French scheme to victims of fraud or theft in discretionary cases. Both Finland and Sweden have enlarged the scope of their scheme to permit compensation for (any) property offences, although on a very restrictive and discretionary basis.

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(1) These "Good Samaritans" are dealt with in Geis 1976, pp. 248-252; Miers, pp. 90-91.

(2) The Danish law, however, is limited to offences against the penal code as such, and not against other legislation.

(3) Lombart, p. 135. However, the law in the Federal Republic of Germany also covers accidents on the way to the police station; see sec. 1(3).

Among the arguments presented for this exclusion of property offences are the fact that property insurance is fairly common and easily obtained; property is usually recovered (an argument that is not fully borne out in practice), there is higher public sympathy for the victim of violent crime, compensation for property loss implies a considerably greater risk of fraudulent or exaggerated claims, compensating property damage would be intolerably expensive, and the impression that physical injury is more severe than property loss. (1)

It was also noted earlier in this section that Sweden, at a relatively early stage, adopted a scheme for the compensation of property damage in one specific case: where the offender was an institutionalized person (sec. 3(1)). Denmark (sec. 3) and Finland (sec. 8) have also adopted a corresponding provision. The provision will thus apply to offences committed by e.g. prison or mental hospital inmates who have absconded from the institution or are on furlough. It is a sign of advanced Nordic cooperation in criminal legislation that the three countries award compensation for damages caused by a person institutionalized in another Nordic country.

The special case of "personal appurtenances" (e.g., eyeglasses, dentures, prosthetic devices or clothes) damaged in connection with a violent offence is covered separately in some of the State compensation schemes (e.g., sec. 5(3) of the Finnish law; sec. 2 of the Norwegian law; sec. 2 of the Swedish law).

9.3.2. Loss and harm covered

The types of expenses for which compensation can be obtained are, in all cases, medical expenses, as long as the link between the offence and the treatment can be substantiated and the care and treatment is regarded as necessary.

In cases of death, modest funeral expenses can be recovered in Austria (sec. 2, point 8), the Federal Republic of Germany (cf. sec. 36 of the Bundesversorgungsgesetz (BVG)), Finland (sec. 6), France, the Netherlands (sec. 2(2) of the Royal Decision of 3 September 1975), Northern Ireland (art. 3(1)(c)(ii), Norway (sec. 2), Sweden (Tort Act chap. 5, sec. 2) and the United Kingdom (sec. 12). In these same countries and in Luxembourg, maintenance can be paid to dependants; this is also possible in Ireland, Northern Ireland and the United Kingdom as a lump sum payment. Loss of earnings is compensable in Austria, the Federal Republic of Germany, Finland, France, Luxembourg, the Netherlands, Northern Ireland, Norway, Sweden and the United Kingdom. Pain and suffering are compensable according to the schemes in

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(1) Encker; Hasson and Sebba, pp. 112-113; Burns and Ross, p. 74; Anttila 1973, pp. 178-179. These difficulties notwithstanding, NOU p. 86 proposed that also the Norwegian scheme be expanded to cover certain property loss in discretionary cases.

Denmark, Finland, France, Ireland, Luxembourg, the Netherlands, Northern Ireland, Norway, Sweden and the United Kingdom; this is not covered in the Federal Republic or Austria.

Many schemes establish maximum and minimum limits on the coverage. The primary purpose of a minimum limit is to restrict the number of petty claims. These petty claims, which can generally be covered by the victims themselves, might otherwise overburden the administration of the scheme. (1) The minima, where they exist, are generally expressed in monetary terms. These minima (converted to USD as of 31 August 1986, and with references to the respective legislation) are:

- Finland: 200 FIM (ca. 40 USD) (sec. 4)
- Ireland: £ 50 (ca. 70 USD) (sec. 9)
- the Netherlands: 250 HFL (ca. 110 USD) (art. 3 of the Royal Decision of 3 September 1975)
- Norway 1000 NOK (ca. 140 USD) (sec. 6(1))
- the United Kingdom and Northern Ireland £ 400 (ca. 600 USD) (para. 6 and art. 6(5), respectively) (2).

The Swedish minimum is tied to the minimum used in national insurance (sec. 3 of the Crime Damage Decree). Also the scheme in the Federal Republic of Germany is tied to the national insurance scheme: the earning capacity of the claimant must be reduced by at least 25 per cent, or the injury must last at least six months before compensation will be allowed. (3) Denmark has not yet established a minimum, although the law stipulates that this may be done.

Austria, France and Luxembourg do not use monetary minimums. However, in France and Luxembourg compensation will be granted only if the harm suffered is death, permanent incapacity, or total incapacity for at least one month (art. 706-3(1) and 1, respectively). It was noted above that in Austria, the scheme applies only to offences punishable by imprisonment for at least six months. Also this will indirectly limit the number of petty claims. Also, no compensation will be paid under the Austrian scheme for loss of earnings unless this loss will continue prospectively for at least six months or the victim has suffered a serious bodily

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(1) Burns 1980, pp. 302-395 notes that in fact relatively few awards are sought, and the minimum is established below the actual administrative cost. With reference to the fact that even a small sum might be important for a poor victim, he recommends that the minimum requirement be waived. The President's Task Force noted (p. 41-42) that blanket minimums place the elderly and low-income victims at a disadvantage.

(2) The minimum in the United Kingdom may be waived for funeral expenses. Also, in the special case of family violence, the minimum in the United Kingdom is £ 500 (ca. 700 USD).

(3) Sec. 30-31 of the Bundesversorgungsgesetz; see Dünkel 1985b, p. 31.

injury in the meaning of sec. 84(1) of the Penal Code of Austria (sec. 1(4) of the Austrian Act).

Furthermore, the schemes in Luxembourg and Sweden consider the financial need of the claimant. The French scheme considers the effect of the offence on the "life conditions" of the claimant.

The primary purpose of maxima is to avoid draining the existing funds, always a strong administrative consideration. Not all countries have a maximum. The existing financial maxima (converted to USD as of 31 August 1986) are:

- Finland: 100 000 FIM (ca. 20 000 USD) for injury and 50000 FIM (ca. 10 000 USD) for property damage (sec. 7)
- France: 400 000 f (ca. 60 000 USD) (art. 706-9).
- the Netherlands: 25 000 HFL (ca. 11 000 USD) (art. 2 of the Royal Decision of 3 September 1975)
- Norway: 150 000 NOK (ca. 21 000 USD) (sec. 6(1)).

In Sweden, the maximum is tied to the amount of social insurance (sec. 11). In Northern Ireland and the United Kingdom, the only maximum is on the size of the loss of earnings over a certain period. No maxima are noted in Austria, Denmark, Ireland or the Federal Republic of Germany (although in both Austria and the Federal Republic of Germany the link to the social insurance system may indirectly establish maxima); in Luxembourg, the maximum is to be established by decree (art. 11).

For 1984 some data is available on the average size of the awards. This was 2500 f in France (ca. 350 USD), 3 700 HFL in the Netherlands (ca. 1500 USD), and £ 1 790 in England (ca. 1500 USD).

9.3.3. Secondary nature of schemes

All of the schemes state that compensation will be paid only to the extent that it cannot be obtained from other sources. These other sources primarily refer to the offender, but insurance payments and social insurance payments are also to be deducted. The schemes generally state that before compensation may be paid deductions are to be made for any damages that have been or will be paid. (1)

This, however, generally does not mean that the victim must first attempt to collect from the offender (or other sources). For example, in the Federal Republic of Germany, the compensation is paid in full by the State, and any claims that the victim may have against the offender are trans-

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(1) Sec. 7 of the Danish law, sec. 3 of the Finnish law; art. 706-3(1), point 3 of the French law; sec. 5, 15 and 16 of the Irish law; art. 1, point 3 of the Luxembourg law; art. 5(3) of the Northern Irish law; sec. 6(1) of the Norwegian law; sec. 6-7 of the Swedish law; paras. 19-21 of the United Kingdom scheme.

ferred by law to the State (sec. 5 of the scheme, together with sec. 812 of the Bundesversorgungsgesetz).

9.3.4. Residence or citizenship of victim

Some State compensation schemes cover all victims of offences that occurred in the territory of the State in question, regardless of their citizenship (sec. 1 of the Irish scheme, art. 3(1) and 3(2) of the law in the Netherlands, sec. 3(1) of the Northern Irish scheme). However, in the event that the victim was not a citizen of the country in question, other schemes require a fixed point of contact. For example in Finland, if both the offender and the victim were in Finland only temporarily at the time of the offence, the benefit will be granted only if there are special reasons (sec. 2, point 2 of the Finnish law).

Austria, the Federal Republic of Germany and France have a more limited scope of application. Sec. 1(2) of the Austrian law establishes the nationality principle as the rule: only Austrian citizens are covered. In the Federal Republic of Germany sec. 1(1) establishes the territorial principle as the rule, but sec. 1(4) notes that foreign nationals may be compensated on the basis of reciprocity. (1)

The Nordic countries supplement the territoriality principle with a qualified nationality principle. All citizens and even non-citizens with a permanent residence in the Nordic country to which the claim is presented may collect the benefits regardless of where the offence took place (sec. 1(1) and 1(3) of the Danish law, sec. 2 and 2a of the Finnish law, sec. 3 of the Norwegian law, sec. 1 of the Swedish law). In Finland and Sweden this is limited to personal injuries only, and the Danish and Norwegian laws provide that the citizenship principle will be applied only if there are special reasons.

Also the French and Luxembourg schemes cover not only citizens but also permanent residents ("toute personne résidant régulièrement et habituellement"; art. 1(1) of the Luxembourg law) of these respective countries.

9.3.5. Conduct of victim

All of the schemes pay attention to the behaviour of the victim in connection with the offence. In the first State scheme for the payment of compensation, that of New Zealand, the compensation tribunal considered any behaviour that directly or indirectly contributed to the victim's injury or

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(1) See Tsitsoura 1983, p. 52. The application of the nationality principle in the Federal Republic of Germany has been criticized (see e.g. Weintraud, p. 102). A particular problem is posed by the considerable number of migrant workers in that country. The principle was discussed to a considerable extent in the drafting of the Council of Europe agreement.

death. (1) The later schemes adopted somewhat similar constructions.

In some respects, the phrasing of the respective provisions differs to a significant extent. The provisions that are most liberal in an assessment of the conduct of the victim are apparently to be found in the Swedish law, which refers to conduct of the victim in which he "deliberately or through serious negligence ("grov vårdlöshet"; this may also be translated as recklessness) contributed to the injury (sec. 6(1) of the Swedish Tort Act), combined with a more general provision according to which the tribunal may also consider, if there are special reasons, whether the behaviour of the victim in connection with the crime or in another similar manner deliberately or negligently increased the risk of damage (sec. 9(2) of the Swedish law on State compensation). Should the victim have died as a consequence of the offence, only deliberate conduct on his part will have legal relevance. (2)

The provisions in the other Nordic countries are also relatively liberal in this regard. Sec. 11 of the Finnish law states that the benefit may be adjusted "within reason" if the victim had contributed to the damage or another factor not related to the offence had also been involved in causing the damage; in fatal cases, no reduction is to be made. Sec. 6(2) of the Norwegian law and sec. 8 of the Danish law both refer to conduct through which the victim had contibuted to the damage or to other circumstances in which it would not be reasonable to grant compensation. (3) The Norwegian and Danish laws in this respect resemble sec. 2(1) of the law of the Federal Republic of Germany. However, the scheme in the Federal Republic rules out compensation entirely if in the light of, e.g., the victim's own conduct it would appear inequitable to grant the award; there is no provision

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(1) Schafer 1973, pp. 119-120.

(2) Anttila notes (1985, p. 177) that in Sweden compensation for injury may be denied or reduced if there are special reasons for this, with reference to the fact that the victim, through his behaviour in connection with the offence or otherwise deliberately or through carelessness increased the risk of injury. The Swedish committee report that led to a reform of the law (Ersättning för brottsskador, pp. 182-183; see also pp. 145 ff.) noted that "there may be reason to reduce the compensation ... if the applicant ... had provoked the incident or in some other manner had placed himself in a situation that can typically be seen to involve a risk that he shall be victim of an offence. In the case of property damage, the compensation may be reduced if the applicant neglected to take out the normal insurance coverage" (sec. 8(1) and 8(2).

(3) The Danish law book (Karnov) comments that this provision "covers both the guilt of the victim and acceptance of risk".

for the middle-road course of reducing the award. (1)

The Austrian law can be considered relatively liberal. Sec. 8, which is considerably more detailed than the Nordic provisions, draws attention to the participation of the victim in the offence, for example to direct participation, provocation and recklessness. The law notes that an award may be refused if the victim for no valid reason has negligently exposed himself to crime or deliberately and without any legally recognised grounds incited the offender to commit the criminal assault.

The law in the Netherlands also allows reduction or denial of State compensation if the offence was partly the fault of the victim (art. 5).

The French and the Luxembourg laws may be considered somewhat more stringent in this respect. Art. 706-3 and 1(2), respectively, refer to the behaviour of the victim in connection with the offence and his relationship with the offender. Thus the tribunal may refer not only to actual acts or omissions on the part of the victim at the time of the offence, but also to a factor (his relationship with the offender) which in itself is not necessarily connected with the offence in question.

The most restrictive schemes are to be found in the common law countries. Sec. 13 of the Irish scheme refers to the responsibility of the victim for the damage "because of provocation or otherwise". To this extent, the Irish scheme is in line with the other schemes referred to above, in the Nordic countries, the Netherlands, Austria and the Federal Republic of Germany. However, sec. 14 of the Irish scheme goes even further than the French provision: it refers to the conduct, character or way of life of the victim that would make an award inappropriate. What is more, if the victim and the offender were living together as members of the same household, the award may be refused or reduced (sec. 10).

The Irish model is quite clearly taken from the scheme adopted earlier in Northern Ireland and the United Kingdom. Art. 5(2) of the Northern Irish scheme refers to all such relevant circumstances and to any provocative or negligent behaviour that contributed, directly or indirectly, to the criminal injury. Art. 3(2)(b) excludes from coverage victims who were living with the offender as wife or husband or as a member of the same household. Finally, art. 6(3) of the Northern Irish scheme excludes from benefits victims who at any time whatsover had been a member of an unlawful association or who had been engaged at any time whatsoever in the commission, preparation or instigation of acts of terrorism.

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(1) Kirchhoff (pp. 27-28, 32) notes that the legislation in the Federal Republic of Germany may be interpreted quite restrictively. See also Dünkel 1985b, p. 32.

In the United Kingdom, para. 6 of the scheme draws attention to the conduct of the victim, including conduct before and after the events, and his character and way of life. Para. 7 draws special attention to, e.g., provocation in sexual offences or offences arising out of a sexual relationship. Para. 8 excludes from benefits those who, at the time of the award, are living together with the offender "as man and wife or member of the family". (1) The United Kingdom scheme does not include the same explicit reference as does the Northern Irish law to membership in an unlawful association or participation in terrorist activities, but these can be seen to fall within the scope of para. 6. (2)

The difference between the schemes in the United Kingdom and Ireland and those of the rest of Europe are heightened by the fact that the former schemes are based on the "ex gratia" principle, while the latter are based primarily on the principle that the award is one of right. (3) Thus, the decision-maker in the United Kingdom has a greater degree of discretion.

The behaviour or position of the victim, as considered by some or all of the schemes, may be classified as follows: (the applicable schemes are noted in parantheses) (4)

- the victim is an active participant in criminal behaviour (e.g. gang fighting, provocation, instigation) (all of the schemes);
- the victim circumstantially participated in criminal behaviour (e.g. prostitution, drug use, recidivism) (all of the schemes, although in particular in this connection there are various degrees, ranging from the liberal Nordic schemes, through to the strict schemes in the common law countries);

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(1) The English scheme thus provides that compensation is payable even if the victim and offender had been living together at the time of the offence if, before the award is granted, they have stopped living together. A further condition is that prosecution has been undertaken.

(2) See Wright, p. 24.

(3) The distinction between ex gratia payments and payments as a matter of right is not an absolute one. The Norwegian scheme provides that awards shall be granted "as considered reasonable", i.e. at the discretion of the tribunal. In practice, the premise is that victims will be compensated in full. It may also be noted that the Government of England has introduced, in 1986, a bill that would make the award one of right. Finally, the Dutch law stipulates that no award shall be made if the personal means of the victim are sufficient (art. 4(1)).

(4) The classification is based on Miers, whose analysis was based on a review of the work of the Ontario Criminal Injuries Compensation Board. Miers, pp. 181-191.

- the victim actively participated in "perceived reprehensible" behaviour (e.g. drunkenness or illegal sexual activity) (same as above); and
- the relationship between the victim and the offender, or the character and way of life of the victim places the advisability of an award in question (primarily the common law countries).

In all of these cases, the problem in fact revolves around who is a "deserving victim" or "ideal victim". (1)

The possibility of refusing to grant awards to victims living in the same household as the offender (as in the United Kingdom, Ireland and Northern Ireland) has been justified through reference to certain problems that arise in these cases. There is the possibility of fraud, although it may be assumed that the risk of fraud is low in the case of personal injury, especially considering that the offender is known. Perhaps more fundamental problems are connected with the practical and legal difficulties in establishing the facts and in allocating blame, as well as the problem of ensuring that the offender himself does not benefit from the award. (2)

The limitation may certainly be criticized, however. This is especially so if the laws do not provide the tribunal with any discretion at all. Studies of domestic violence have revealed that this is a major problem in many if not all European countries. The justice of allowing the problems mentioned above to outweigh the need of many victims for assistance can well be doubted.

The reference to the active participation of the victim in criminal behaviour can be found, directly or indirectly, in all of the schemes, as noted above. Earlier in this study (section 4) reference was made to the following forms of participation: facilitation, invitation, precipitation, consent, instigation and simulation. In this connection, we should also add full complicity, in that the reference here can be understood to cover those injured in the course of their own offence. An example would be a robber who is shot by mistake by an accomplice and robbers injured by someone acting in self-defence.

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(1) Geis 1976, pp. 244-245; Miers, pp. 85 ff.; Shapland 1984, p. 139 and Shapland et al, p. 172; Christie 1986, passim.

(2) Miers, p. 65. The risk of the offender profiting from the award is certainly not an appreciable one if compensation is only paid for proven medical expenses, as noted. However, the Finnish scheme contains a special limitation in respect of damaged property, where this risk may be greater: according to sec. 9 of the law, if the victim and the offender lived in the same household at the time of the offence, compensation shall be paid for such damage only if there are special reasons for doing so.

In the payment of compensation for injury and damage through the civil process, the concept of contributory negligence has a central role. It is not considered equitable for the tortfeasor to be made liable for the entire amount of damage if the victim was also at fault. As was noted in section 4, this concept has been carried over into cases in which the damage or injury was the result of an offence; if the criminal court finds that the victim was partially responsible for what occurred, the restitution from the offender may be reduced, or the offender may be relieved entirely of financial liability.

In all of the schemes the decision-making tribunal has been left with discretion in this regard. There are two primary reasons for permitting such discretion: it is difficult to draft detailed regulations on the effect of the various forms of participation, and even in the case of serious negligence or recklessness on the part of the victim, the results may be so serious that humanitarian and social reasons would appear to justify an award.

There are, however, more than just social and administrative reasons underlying the restrictive attitude of the schemes towards victim carelessness or recklessness. On criminal policy grounds the schemes appear to be designed to encourage preventive action and discourage attitudes and behaviour that may be conducive to crime.

This trend may be most evident in the Finnish and Swedish schemes, which also grant discretionary awards for damage arising from property offences. The Finnish Government Bill leading to a recent reform explicitly noted (1) that the law is intended to emphasize that a nonchalant attitude toward normal precautions is not to be accepted. The Swedish Committee report (2) observes that the provisions on compensation must be designed so that citizens do not become negligent in the protection of their property. The Swedish law goes even further than the Finnish law in explicitly noting that compensation may be reduced or withheld entirely if the victim neglected to take out normal insurance. (3)

Participation in criminal activity other than the event leading to the claim in question may be grounds for refusal of an award in the United Kingdom, Ireland and Northern

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(1) Finnish Government Bill 49/83, p. 6; cf. p. 13. According to the original Finnish Government Bill leading to the scheme, no. 1973:98 (p. 4), "neglect of the normal precautions cannot be considered contribution; it is not to be considered a factor forming part of the act causing the damage itself, but instead a factor influencing the extent of the damage". See also Anttila 1985. On the original scheme and its background, see Koskinen, passim.

(2) Ersättning för brottsskador, p. 147.

(3) Sec. 8(1) and 8(2); Ersättning för brottsskador, pp. 148 ff.

Ireland. The Northern Ireland scheme refers to membership "at any time whatsoever" in an unlawful association, or to participation "at any time whatsoever" in terrorist activities; the schemes in the United Kingdom and Ireland refer more indirectly to "conduct, character and way of life".

Here the rationale is apparently no longer to encourage preventive activity, as was the case in the event of victim participation in the event itself. The limitation would appear to be based more on "ordre public" considerations: it would not be considered to be in the public interest to compensate members of organized crime groups or terrorists for injury, even if there is no direct connection between their criminal activity and the injury in question.

The provision in the schemes of the United Kingdom and Ireland referring to the "conduct of the victim, his character and way of life" include the possibility that participation in "ordinary" criminality may also lead to a reduction or refusal of the award. Awards have been refused in practice if the way of life of the applicant is markedly criminal, but random forays into crime have apparently not always led to reductions or refusals.

The situation is more problematic in cases in which the victim has actively participated in "perceived reprehensible" behaviour (e.g. drunkenness or illegal sexual activity). It is here that the stereotype on which the schemes are often based comes best into focus. The image of the victim is often one of an innocent party, brutally subjected to a deliberate, sudden and unprovoked assault by the offender.

As all of the schemes apply primarily to violent crime against the person, it may be in order to refer to the comments in section 4.2. on victim vulnerability. With the exception of robberies, perhaps only a minority of violent offences (assaults, homicides) take place between complete strangers, with no preliminary interaction. Most violent offences involve young working-class men being assaulted in public places or places of entertainment. (1) Being a heavy drinker, being drunk at the time of the incident, or frequenting pubs may indeed be considered symptoms of an "inappropriate" way of life, leading to a refusal of the award. If so, then the scope of the schemes is considerably limited.

It would therefore appear that along with the increasing degree to which the State is assuming responsibility for compensating crime damages, more demands are being placed on the victim himself. (2) The schemes are clearly to the

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(1) Shapland et al, p. 172. It may be added that an appreciable number of cases occur within a household; these have been left outside of the scope of the schemes of the two countries mentioned here, the United Kingdom and Ireland.

(2) Anttila 1985, p. 177. See also Fooner, passim.

benefit of the ideal, innocent victim, but they will not benefit those victims who, in the opinion of the decision-making tribunal, were to an appreciable degree responsible for their victimization. In some countries, moreover, the restrictions operate to the disadvantage of those whose lifestyle is regarded with severe disfavour.

9.3.6. Cooperation with the authorities

Just as the schemes require that the victims fulfill certain standards of conduct, they also require a certain degree of cooperation with the criminal justice system and, in some cases, with other authorities. The primary purpose of these requirements is to facilitate the clarification of the matter and, in the best of cases, the apprehension of the offender so that he can be held liable. The requirements are also enforced to facilitate the assessment of the actual extent of the damage or injury, thus preventing fraud and increasing administrative efficiency.

The requirement that the police be informed of the offence is often phrased in terms of a set period. The Northern Ireland scheme requires a report to the police within 48 hours or "within such period as the Secretary of State considers reasonable" (art. 3(2)(d)(i)). Denmark and Norway require a report to the police "without delay", unless there are special reasons for not doing so (sec. 10(1) of the Danish law, cf. sec. 5 of the Norwegian law). The United Kingdom scheme requires a report without undue delay (para. 6). In Finland, the period is 10 days, unless there are special reasons or the police have already been informed of the offence (sec. 12). In France, Ireland, Luxembourg and Sweden no time limit is set on the report to the police.

In Austria and the Federal Republic of Germany the victim is required to assist in the elucidating of the facts of the matter. Failure to do so may lead to a refusal to grant an award.

In Denmark and Finland, the applicant must sue the offender for damages if the case comes to criminal court (sec. 10(1) and 12(2) of the respective laws). Because of the peculiarity of the Finnish system that any victim may prosecute, sec. 12(1) of the Finnish law notes that the victim need not press charges.

In the Netherlands, there is no obligation on the victim to report the offence to the authorities.

The application for compensation must generally also be made within a set period. This ranges from 3 months (Ireland; sec. 21) through 6 months (the Netherlands; art. 7) and one year (France; art. 706-5 and Luxembourg: art. 3(1)) to three years (the United Kingdom, para. 4). In connection with the consideration of the application, the schemes for Ireland, Northern Ireland and the United Kingdom require that the victim cooperate in providing the necessary assistance in respect of, e.g., medical evidence (sec. 11, art. 3(2)(c) and sec. 6) of the respective laws).

There are no time limits in Austria, the Federal Republic of Germany and Norway for presentation of the claim.

9.4. Organizational questions

The source of funding for schemes of State compensation can be the State budget and the pooling of fines, penalties and even voluntary contributions. (1)

In Europe the source of funds for all of the general schemes, with the exception of the Polish fund, is general government revenue. Upon payment of the compensation, the State receives a right of recourse from the offender. The Polish fund, as noted, is composed of part of the earnings of prisoners.

All of the European schemes involve a tribunal, board or other agency that decides on whether or not the compensation is to be paid. Separate boards have been established for the State compensation schemes in Denmark, Ireland, the Netherlands, Sweden and the United Kingdom. Existing administrative boards are used in Austria (the Landesinvalidamt or the "Land" Disability Office), the Federal Republic of Germany (the Versorgungsamt or the War Pensions Administration) and Finland (the State Accident Office).

The French scheme also uses a separately constituted board comprised of two professional judges and one citizen interested in victim assistance issues. In Northern Ireland, the decision is made by the Secretary of State. In Luxembourg, the matter is decided by the Ministry of Justice, on the basis of the consideration of a board consisting of a judge, an official of the Ministry and a representative of the Bar Association. In Norway the decision is made by the county governor (fylkesman) with the possibility of appeal to the State compensation board.

The decision of the board in the Federal Republic of Germany may be appealed to the Gerichten der Sozialgerichtsbarkeit (social insurance court), that of the Finnish court to the Insurance Court, and that of the Dutch commission to the Gerichtshof (court of appeal) in the Hague. There is no appeal from the decision of the boards in Austria, Denmark, France, Ireland, Sweden or the United Kingdom (except to the court on issues of law), or from the decision of the Secretary of State in Northern Ireland. In France and the United Kingdom, however, an appeal may be made on the grounds of incorrect application of the law.

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(1) See President's Task Force p. 40; Compensating Victims of Crime, p. 136. Some states in the United States pool a small part of the salaries earned by offenders in work release or in prison, while other states include in the fund a defendant's profits from the sale of books or films based on his criminal activity. Extensive use is also made in many states of "penalty assessments" of small amounts from all offenders. See NOVA, esp. pp. 7-8.

9.5. The Council of Europe model

In June 1983, the Committee of Ministers of the Council of Europe adopted the European Convention on the Compensation of Victims of Violent Crime. The Convention was opened for signature on 24 November, 1983. (1) The Convention is based on a minimum standard of coverage and is thus limited to victims of serious, intentional and violent offences, who as a result of the offence have sustained serious bodily injury or impairment of health, and in the case of death, their dependents. The Convention has so far been ratified by the Netherlands and Luxembourg, and it has been signed by eight other Member States of the Council of Europe. (2)

The Convention is not intended to replace restitution from the offender by state compensation. The Council of Europe has explicitly and repeatedly suggested that Governments develop means of facilitating restitution by the offender, for example by having such restitution imposed as the main punishment for an offence. Furthermore, the Convention provisions are subsidiary in certain cases to general social insurance, private insurance and other sources.

The drafting of the Convention renewed the discussion of the justification of such schemes. It was noted (3) that the grounds on which State intervention is justified are that the offence demonstrates that the measures of crime policy have failed in this instance and private vindication must be eliminated. Also, when state policy takes note of the victim's interests the social conflict created by the offence is appeased and the social reintegration of the offender is facilitated. Furthermore, state compensation is an expression of social solidarity towards the victim. This last justification is noted in the preamble to the European Convention.

As noted, the Convention works on the "minimum principle" basis. The contracting states are, of course, free to provide wider rights and more generous compensation. The States must themselves put the Convention's provisions into force through the introduction or modification of legislation.

The scope of the Convention is limited to victims who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence and, in the case of death, their dependents (article 2). The offences are thus those that are directed at life, physical integrity and health. "Dependants" is to be interpreted by national law and may thus include cohabiting persons.

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(1) See Muller-Rappard 1984, passim.

(2) As of 1 August 1986 the Convention has been signed by Denmark, the Federal Republic of Germany, France, Greece, Norway, Sweden, Turkey and the United Kingdom.

(3) Tsitsoura 1984, p. 134.

In the original Resolution that led to the Convention, the extension of the Convention to foreign nationals was proposed on the principle of reciprocity. Article 3 of the Convention extends the scope of State compensation to those who are permanent residants of the country in question. This is particularly important in view of the status of migrant workers.

Compensation may be reduced or refused on account of the applicant's financial situation (art. 7). Furthermore, the decision-maker may refer to the conduct of the victim or applicant before, during and after the offence (art. 8(1). Examples of possible behaviour of the victim after the offence that may be considered relevant are his serious aggressive behaviour, a neglect to stem the seriousness of the damages or injury, or a refusal to cooperate with the authorities. (1)

A special feature of the Convention (bearing considerable similarity to the Northern Ireland scheme) is that involvement in organized crime or membership of an organization that engages in crimes of violence, even if this has no connection with the offence at issue, may lead to a refusal of compensation (art. 8 (2)). This provision was included only after lengthy debate. (2)

Art. 8(3) contains an ordre public provision which would bar an award that would be contrary to a sense of justice or public policy.

The compensation may be granted (art. 4) at least for loss of earnings (past and future), medical and hospitalization expenses, funeral expenses, and loss of maintenance.

Although they are not specifically mentioned, for example, pain and suffering, loss of expectation of life and other additional expenses may be covered, in accordance with the concept of minimum principles. Upper and lower limits to compensation may be established.

The Convention will enter into force on the first day of the month following the expiration of a period of three months after the date three member States have ratified the Convention. At the time of this writing (December 1986), only the Netherlands and Luxembourg have ratified the Convention.

The minimum principles of the Council of Europe Convention are relatively modest. It can be said that they were formulated on the basis of a "least common denominator" approach; all of the national schemes existing at the time the Convention was adopted by the Committee of Ministers were already in accordance with these minimum principles. However, even if the Convention has not had a visible effect on the basic

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(1) Tsitsoura 1984, p. 139.

(2) Ibid.

outlines of the schemes in those countries where it already existed, it has clearly fostered the development of statutory schemes in other countries. The fact that Turkey and Greece have signed (although not yet ratified) the Convention indicates that they are considering the adoption of such schemes. Furthermore, as noted, Belgium has already passed the legislation needed for ratification of the Convention, and Switzerland has amended its Federal Constitution to encourage the adoption of legislative measures.

9.6. Specialized schemes

In addition to the general State schemes for compensating victims of crime, various States have enacted special schemes related either to certain types of damage or injury (for example, that caused by terrorist activity) or to certain types of victims (in particular, law enforcement officers or other State officials). (2)

An early model was the 1886 Riot Damage Act for England and Wales, on the basis of which the police paid for property damaged, stolen or destroyed in the course of a riot. In Northern Ireland the Criminal Injuries to Property (Compensation) Act (NI) 1971 provided for compensation to the owner of agricultural property maliciously damaged and to the owner of other property damaged by an unlawful gathering of people or by an illegal organization; the 1977 Order essentially repeated this.

Terrorism is an increasing political problem in many countries. The incidents often cause large public unrest and fears, which the State must do its best to allay; similarly, there is generally wide-spread sympathy for those who are considered the innocent victims of such attacks.

Both factors have led to the preparation either of special compensation schemes or of ad hoc arrangements in the aftermath of particularly serious incidents. Such schemes exist in Denmark, England and Wales, France, Ireland, Italy, Northern Ireland and Spain; ad hoc arrangements have been carried out, for example, in Cyprus. (2)

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(1) State compensation is also involved where the State provides restitution of injury or loss caused by the agents of the State itself. In particular, judicial error is a recognized basis for claims for compensation in many countries (see art. 5(5) of the European Human Rights Convention). However, as such payments are generally not based on a criminal offence but on an erroneous act of state, they will not be considered here.

(2) United Nations Report, para. 134. For Ireland, this is the Malicious Injuries Act 1981; for Northern Ireland, the Criminal Damage (Compensation) (NI) Order 1977; for Spain, the Decree Law 3/1979 of 28 January 1979 and Law 11/1980 of 1 December 1980. The French scheme is the most recent; it was adopted by law 86-1020 of 9 September 1986.

Several of these schemes regarding terrorism depart from the general schemes in that property loss can also be compensated. This is the case in England and Northern Ireland. The English and Northern Irish schemes also provide for the opportunity of small interim awards pending a final medical assessment.

The development of several of the specialized schemes shows the influence of considerations of employee welfare, as the core of coverage of these schemes is formed by State officials responsible for the maintenance of law and order. The growing problem of terrorism and other violence in many European countries has led to an obvious risk for, e.g., police officials as well as prosecutors and judges who deal with such cases. This development was clearest in Italy, where the coverage was originally limited to such officials; only later was it expanded to all victims of terrorist incidents who were killed or suffered at least 80 per cent disability. Currently, the Turkish scheme is limited to officials responsible for maintaining peace and security.

A State scheme directed at damages arising from a single criminal offence exists in Poland, which by the act of 18 July 1974 established an Alimony Fund (expanded in 1982). Those who are beneficiaries of alimony may collect a maximum of 2000 zloties monthly in the event that the person with the maintenance obligation neglects to pay.

The schemes dealt with above, by definition, are limited to injury or loss resulting from an act in violation of criminal law. There are also related schemes, such as those covering motor traffic accidents and industrial accidents. Both are relatively widespread in Europe; victims may collect regardless of whether the injuring incident was a crime or, for example, an accident. In connection with more advanced employee welfare schemes, for example policemen can collect the benefits regardless of whether or not the injury is due to a criminal act.

To round out this survey of State compensation for crime victims, special reference should be made to the willingness of the State to assist in the event of particularly severe or widespread victimization that is otherwise not covered by State schemes. A notable example is the payment of compensation by the Spanish government to those who suffered from the use of poisoned cooking oil in the Redondela oil affair. However, the most notable example is undoubtedly the Bundesgesetz zur Entschädigung für Opfer nationalsozialistischer Verfolgung, adopted by the Federal Republic of Germany on 18 September 1953 for the reparation of victims of the National Socialist regime. (1)

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(1) See the article by Schwarz.

9.7. Criminal policy considerations

One of the primary purposes of State compensation schemes, noted above, is to influence the attitudes of crime victims. It is generally assumed that payment by the State to the victim will not only lead to the victim having a more favourable attitude towards the criminal justice system ("system satisfaction") but also to greater cooperation on his part with the aims of the system.

Studies carried out in such countries as England, the Netherlands, the Federal Republic of Germany and the United States, (2) however, have led some commentators to suggest that the schemes may lead to an increase in disfavourable attitudes towards the criminal justice system, the State or the schemes themselves. The study results can be generalized by saying that the schemes may have negative results both practically and philosophically. The practical inconveniences include a wide-spread ignorance of the schemes, (2) a failure to make awards even in part, (3) the bureaucracy, the inconvenience and expense in collecting the awards, and the possible perception by the claimants of poor treatment and delay involved in the administration of many schemes. (4) Also, quite often the payment is not made until several months after the offence; the financial need itself is generally the greatest immediately after the offence, and disappears with the passage of time. (5)

The "philosophical" stumbling block is that the victim begins with the assumption that it is "just" for the offender to repay the damages that he has caused. To receive payment from the State does not feel right; some may even regard this as unwanted charity. As was noted at a recent congress, "Victims apparently demand certain services of the criminal justice system itself which cannot be substituted by a monetary hand-out, however welcome the money may be." (6)

The studies have indicated that in fact the compensation schemes have not increased crime reporting or increased the willingness of the victims to raise and prosecute charges to any great degree. Indeed, the research results suggest that

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(1) See, e.g., Villmow, p. 80 and the literature cited.

(2) See, e.g., Dünkel 1985b, pp. 32-33. Steinmetz (p. 325) notes that one survey showed that only 0,5 per cent of the Dutch population was aware of the scheme.

(3) This is due to the restrictions noted above in section 6.3.

(4) van Dijk 1984.

(5) See, e.g., Shapland 1984, pp. 140 ff.

(6) van Dijk 1986b, p. 115.

claimants for State compensation may end up with even more negative attitudes. (1)

Many victims are thus critical of the schemes. The public at large, however, appears to support the idea of state compensation. Under such circumstances, one can understand why some observors have argued that the schemes are produced for symbolic reasons alone. It has even been suggested that as long as the public believes that the victims are being taken care of, there will be a relaxing of the public pressure for the State to "do something about crime". Displaying concern for the victims may deflect criticism of law enforcement itself - even if the actual victims do not benefit. (2)

Such criticism, however, is directed not at the basis of the schemes but at their scope and at the way they are administered and publicized. The criticism should not be considered so fundamental that it should lead to elimination of the existing schemes, or delay of plans to establish new or more expanded schemes. The awards themselves are probably welcome to those who receive it, although they may dislike the bureaucracy involved.

In respect of the scope of the schemes, the United Nations Declaration is very limited in its call. It only recommends that States "endeavour to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes" as well as the family, under certain circumstances. This is essentially also the scope provided by the Council of Europe Convention. Within the European framework, such injury is generally covered by national insurance. There remain, however, cases that are not covered by any form of compensation. The modest requirement of the Declaration and the Convention should be turned into a reality in all European States. At the same time, consideration should be given to the problem of protecting also the "non-ideal victims" referred to above in section 9.3.5.

In respect of the administration of the schemes, the difficulties noted are primarily due to the insensitivity of the persons who come into contact with the victim, or to the bureaucratic delay and red-tape that are an overly common feature of administration. Many victims simply are not aware of the existence of the schemes, and the authorities with whom they come into contact may themselves be ignorant of the details, or may not see fit to remind the victims of the possibility of State compensation. (3) Implementation of paragraph 16 of the Declaration - calling for training to sensitize the "personnel concerned" to the needs of the victims - would be of some assistance in allaying the frustration.

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(1) R. Elias, pp. 218-219.

(2) See Chappell, passim, for an analysis of some of the early difficulties with the Australian scheme.

(3) R. Elias, p. 221.

More fundamental philosophical criticism of the schemes - e.g. the alleged disintegrating effect that the schemes have on bedrock values of self-reliance, as well as the view that restitution is fundamentally the responsibility of the offender - can be countered by emphasizing that the State compensation schemes are not intended as the primary source of compensation. Restitution from the offender remains the primary source. State compensation also comes second to insurance schemes or other sources of coverage. As long as it plays such a secondary role, it should be seen as a beneficial and not disintegrating form of State activity.

10. CONCLUSIONS

10.1. General remarks

Over a period spanning roughly two decades, there has been a significant growth of interest throughout Europe and the world in improving the position of the victim. The rapidity of this development can be seen above all in the number of scholarly articles, experimental projects and meetings devoted to the subject. Up to the beginning of the 1960s articles on the victims of crime were scarce and victims could be found on the agenda of only a few meetings. From the 1960s on the situation changed considerably: journals devoted more and more space to the subject, national and international associations for victimological research and victim assistance sprouted, and local, national and international meetings crowded the calendar of the interested researcher and practitioner. The work of the Council of Europe over the past decade, culminating in the European Convention on the Compensation of Victims of Violent Crime, and Recommendation No. R(85)11 on the position of the victim in the framework of criminal law and procedure, and the work of the United Nations, culminating in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, are the most authoritative international manifestations of this interest. At the same time, the two instruments can be considered statements of the criminal policy of the member States of both international organizations.

The swell of interest in improving the position of the victim has so far been most marked among practitioners and empirically minded sociologists. Although many lawyers have become involved in helping victims, the subject has not caught the attention of legal scholars with anything like the fervour with which it has been embraced by certain other disciplines.

It is against this background that one can best appreciate an apparent contradiction that has become evident in the course of the present study. Victimological research is replete with statements along the lines of "the victim is the forgotten party in the criminal justice system". This study has indicated, seemingly quite to the contrary, that the criminal justice systems of Europe, from the entry to the exit of the case, contain a large number of legal mechanisms that have been designed specifically with the victim in mind.

The apparent contradiction can be laid to rest in part by noting that many of the mechanisms, especially the State compensation schemes, are recent attempts by the criminal justice system to respond to the growing concern about vic-

tims.

Examples of such new schemes will be noted once again in this concluding section. At the same time, several examples will be noted of how the victim has long had a clear role in the criminal justice system. It is doubtful whether he has ever truly been forgotten.

The study has proceeded along lines that parallel the flow of a hypothetical case through the criminal justice system in the European countries. Following general remarks on terminology, history and the role of the United Nations and the Council of Europe in international criminal policy, various mechanisms of prevention were noted and the existing alternative measures were studied. The case was then tracked from its entry into the criminal justice system to its exit. The last section dealt with the possibility of State compensation for crime damages.

It was noted in section 1 that Europe contains a large number of criminal justice systems. Some indications of the considerable differences between the systems have already been given in connection with each segment of the flow of the case through the criminal process. Despite the fact that the main analysis was limited to fifteen so-called "core countries" as representatives of the various families of systems, the reader could be forgiven the impression that all that remains from the study are kaleidoscopic images, snatches of the passage of the case through the system in one country after another. In this section a more over-all impression of the operation of major models of criminal justice in the European countries will be provided.

The section will also seek to marshall together an answer to the five questions raised in section 1.2.3.

10.2. How can the prevention of crime by individual citizens be encouraged through the criminal justice system?

For many victims throughout Europe crime is a sudden, totally unexpected occurrence. They return home to find that someone had broken in while they were gone; they are injured in a labour or traffic accident that is later found to have been an offence; they purchase goods that are dangerously defective or poisoned. These victims may well be meticulously conscientious in their behaviour. They cannot be said to have contributed in any blameworthy way to their victimization. It is extremely difficult to assess how representative these victims are, out of all the victims of the various offences. Most educated guesses place them in the majority. All such guesses must of necessity be subjective and culture-bound.

There remains, however, an appreciable number of cases in which the State has decided that the behaviour or lifestyle of the (potential) victim is a cause for concern. The victim has crossed some kind of a threshhold, beyond which also he is regarded as blameworthy. In section 4 of the study, the different forms of participation were categorized as follows: simulation, instigation, consent, precipitation,

invitation and facilitation. The various measures that can and have been implemented in Europe to diminish the role of the victim in his own victimization have been classified as persuasion, the withholding of benefits, reducing the amount of restitution and compensation, reducing the charges or the penalty, releasing the alleged offender from criminal liability, and punishing the alleged victim.

The interest with which the criminal justice systems of Europe consider the forms of victim participation and the various measures to diminish it varies from offence to offence and over time. The victimological literature provides the impression that the Socialist countries stress the preventive role of victimological research. The role of the (potential) victim in connection with crime prevention, however, is also studied widely in other European countries, notably in the Federal Republic of Germany, the Netherlands and the United Kingdom. The current interest in situational crime prevention, in particular in Sweden and the United Kingdom, can also be seen to have some victimological flavouring.

The criminal justice systems of the countries in the study use the above measures in allocating responsibility for the offence between the offender and the victim. It was noted that the greater the involvement of the victim in the offence, the lesser the reproach that is directed at the offender and the greater the negative consequences for the victim. There did not appear to be any difference between the countries in the readiness to use the means noted in section 4.4, other then the tendency in the Socialist countries, as already noted, to be more willing to emphasize the preventive responsibility of citizens.

It was noted in section 4.6 that the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted a formulation of the goals of criminal policy where reference is made to the need to minimize the cost and sufferings arising from crime and crime control, and to distribute these costs and sufferings equitably. One party who shares in this allocation is the (potential) victim.

It is eminently practical that also the potential victim assumes some responsibility for the prevention of crime. The State and the community cannot police all areas, nor can the threat of punishment alone deter all offenders. It would seem to be sensible to state blandly that potential victims should not, for example, invite, provoke or instigate crime. The difficulty lies in deciding on how such inviting, provoking or instigating behaviour should be considered in criminal law. On the basis of this survey, it would appear that all of the core countries have adopted a similar approach: the greater the culpability of the victim, the less right he has to benefits and compensation. Furthermore, greater culpability on the part of the victim may lessen the culpability of the offender - even to the extent that the offender is not punished at all, while the victim is found guilty of an offence.

10.3. What factors determine who is defined as a victim of crime by the criminal justice system?

The most important theoretical difference among the countries in respect of the entry of the victim into the criminal justice system lies in the prosecutorial principle. While the socialist countries operate with a strict legality principle, the material concept of an offence may lead to discretion in practice. Also in other respects, the theoretical distinction between the countries with the legality principle and those with a discretionary principle in prosecution appears to be more one of degree than an absolute difference.

Two general remarks were made about entry into the criminal justice system. One is that the victim and those with whom he comes into contact have a critical role to play in determining whether or not the case will enter the criminal justice system (or indeed any other system). Relatively few cases involving individual victims are detected by the agents of the criminal justice system; the system is to a large degree dependent on the willingness of victims and bystanders to bring offences to the attention of the authorities. If the victim does not want the matter dealt with, it will be difficult (although in most cases not impossible) to proceed.

The second comment relates to the critical role of the police. Although it is true that much depends on the victim's attitude towards the criminal justice system, it is also true that this attitude is shaped to a significant degree by the police reaction to the victim. Most offences involving individual victims are reported to the police and therefore generally a policeman is the first figure of authority to contact the victim. Legal mechanisms - for example, making the reporting of certain offences mandatory or expanding or contracting the scope of complainant offences - may well have less influence on the role of the victim then will the way in which he interacts with the first point of contact and the early support and assistance that he receives.

In the Socialist countries the police and other authorities are obliged by law to render assistance to the victims of crimes. This expressly includes the obligation to inform them of their rights and role. In some Western countries piece-meal efforts have been made to assist certain special categories of victims or to institute guidelines.

10.4. What are the rights and responsibilities of the victim of crime in the criminal justice system?

Few important differences were observed among the various systems of Europe in respect of entry into the criminal justice system. The situation is quite different, however, with respect to what steps the case takes on it way through the criminal process.

With respect to the victim's needs for information, the legislated rights of the victims in the socialist countries have already been noted. These rights, of course, apply throughout the process. In the other countries the right to information is much more limited and is based primarily on limited provisions: some victims may obtain some information on some rights and some decisions.

The study concluded that the need for information can to a considerable extent be met by the issuing and implementing of guidelines. The arrangement for proper assistance throughout the process, however, proved to be more problematic. The institution of the State-appointed contact person in certain cases in Denmark, Norway and Sweden is one alternative, albeit an expensive one. Adoption of a similar institution in the other countries, with discretion over the criteria for granting the right to such a person, might be considered.

In respect of the procedural position of the victim, and in particular the possibility of having his views and concerns presented and considered in the process, a tripartite analysis was used. The victim may present penal demands in the socialist countries and in Finland, and in respect of certain petty cases in most of Continental Europe. Throughout Continental Europe he generally also has the right to present civil claims in the criminal process. In the common law countries the victim's position is primarily limited to that of witness.

In three countries (Austria, the Federal Republic of Germany and the Netherlands) the victim's right to present civil claims has considerably atrophied in practice. In the other countries where the partie civile or adhesion procedure is provided for by law it would appear that it is also used in practice.

In general, once the case has entered the criminal justice system, the initiative in respect of further measures lies with the authorities, and rarely with the victim. It is an authority, for example, who considers (and of course decides upon) the waiving of further measures, the use of conditional measures, or on restitution and punishment. The victim's role is a much more limited one.

Although the study noted that the presentation of the views and concerns of the victim is important and that one of the important issues for many victims is restitution from the offender, the study did not suggest that the partie civile or adhesion procedure should be adopted in those countries in which this has previously not been possible - that is, in the common law countries.

The development of the common law has been marked by the growth of a large gap between torts and offences and diverging proceedings in respect of these two in court. In addition, the common law countries in other respects do not provide the victim with a independent role in procedure. Research carried out in England would indicate that even the victims themselves would not appear to call for such a role.

On the other hand, the common law countries have developed other means for taking the views and concerns of the victims into consideration. The recently expanded use of the compensation order in the United Kingdom is clear evidence of this trend.

The study suggested the greater use of guidelines on assistance to victims. Such guidelines might increase the degree to which the views and concerns of the victims will be taken into consideration by the decision-makers, in a manner consonant with the legal system in question. It was noted that one of the key matters here is ensuring that the authorities with whom the victims come into contact are sensitized to the needs of victims.

10.5. What possibilities does the victim of crime have to obtain compensation through the criminal justice system?

The discussion of the exit of the victim from the criminal justice system dealt with restitution and sentencing. It was noted that in all of the European criminal justice systems studied some reference is made in the final disposition to restitution. In many countries this may be direct, in that the court orders the offender to provide restitution, either on the basis of a civil claim or, as in some common law countries, sua sponte. In all of the countries covered in the study, various mechanisms exist for tieing together the issues of restitution and sentencing. Thus, for example, in some countries the offender's willingness to provide restitution or the fact that he has already done so may be taken into consideration in the determination of the sentence.

There is now increasing discussion in many European countries about the role of restitution as a sanction. It is finding more and more favour both as a separate penal sanction and as one element of the final adjudication.

It was noted that there are difficulties in assessing the potential for restitution as a sanction in Europe. Of necessity, the scope of such sanctions would be limited to offences that have certain characteristics. However, in absolute figures the number of cases in which restitution would be a possible sanction appears to be quite large. The most serious reservations were noted in connection with the possibility that restitution as a sanction might be used as the sole sanction for relatively serious offences; this would endanger the principles of equality and predictability.

Restitution from the offender is not the only possibility of obtaining compensation in the criminal justice system. The majority of the countries of Europe offer at least a limited possibility of obtaining compensation from State funds.

In respect of this possibility, the discussion divided the countries of Europe into three groups. In the Socialist criminal justice systems there are no general State compensation schemes for the victims of crime, but the needs of victims for material (and social) assistance are largely met

through the general social insurance schemes. In a second group (e.g., Cyprus, Greece, Iceland, Italy, Malta, Portugal, Spain and Turkey), there are no compensation schemes. In the third group (Austria, Denmark, the Federal Republic of Germany, Finland, France, Ireland, Luxembourg, the Netherlands, Northern Ireland, Norway, Sweden and the United Kingdom) State compensation schemes exist at least for the victims of violent offences of offences against the person; as of this writing, Belgium and Switzerland are on their way to joining this group.

Hungary and Poland have evidenced some interest in developing their own schemes. In other respects it would appear that the Socialist countries will develop their systems along the present lines: assistance is to be provided to all victims of unfortunate occurrences, regardless of the source - crime or other.

In the second group significant interest has been evidenced in many countries for the establishment of State schemes. The fact that a number of these countries are members of the Council of Europe, and some (Greece and Turkey) are even signatories to the European Convention on the Compensation of Victims of Violent Crimes presages that more such State schemes will be adopted in the future.

In the third group, as noted, the State has assumed a special responsibility for compensating crime victims. The assistance is a significant step forward for an appreciable number of crime victims. However, the discussion noted that there are also some theoretical and practical problems involved. One is the apparently odd experience that the schemes do not necessarily contribute to the victim's satisfaction with the criminal process. A second factor is that the schemes tend to counterbalance the new forms of state assistance against the responsibility of the victim. Along with the willingness of the State to pay compensation for a large number of incidents the State is emphasizing that the victim also has a role in the prevention of crime.

10.6. The core countries: a review

It was noted in section 1 that the criminal justice systems of Europe can be categorized in accordance with several criteria. The most common distinction is between Romano-Germanic, socialist and common law systems.

The socialist countries considered in this study are the German Democratic Republic, Hungary, Poland and the Union of Soviet Socialist Republics. This study did not note any significant differences among the socialist countries in respect of the role of the victim in criminal law and criminal proceedings, although a considerable number of superficial differences exist.

These countries have generally emphasized the importance of victimological research directed at prevention. All four countries have at least experimented with social courts, and two (the German Democratic Republic and the Union of Soviet Socialist Republics) continue to use them to an appreciable

degree. The participation of the victim in the process is encouraged and various mechanisms exist through which he can have his concerns and views presented to the decision-makers. In particular, the law requires that the victim be informed of his rights and role in the process; no corresponding legislation was noted elsewhere in Europe.

Although no State compensation schemes for crime damages exist as a separate scheme in the socialist countries (with the partial exception of Poland), the social insurance coverage appears to be highly developed, in particular in respect of personal injury and disability. However, it was noted that this "safety-net" does not protect all victims of crime. In particular, unemployed vagrants - who have an appreciably high risk of victimization - may find that they have no protection at all.

The common law countries were represented here by England and Wales, and Scotland.

In these countries, the role of the victim in practice is largely limited to that of witness for the prosecution. The victims can generally not present their views and concerns (for example, claims for compensation) directly to the criminal court, although indirect presentation can be made by the prosecution. The court itself can take, for example, compensation into consideration in deciding on the sanction.

Both countries (as well as the other European common law countries of Ireland and Northern Ireland, but not Malta) have State compensation schemes. These schemes, however, appear to be among the most restrictive in Europe. It is these that in particular reflect the assumption that only the ideal innocent victim should benefit from the possibility of State compensation.

The Romano-Germanic grouping appears to contain more that its share of internal differences. These countries were represented here by Austria, Denmark, the Federal Republic of Germany, Finland, France, Italy, the Netherlands, Norway and Sweden.

The clearest difference is related to the actual role of the victim in the proceedings. In the partie civile countries (France and Italy) the victim appears to have an appreciable role. In some of the Adhesionverfahren countries (the Federal Republic of Germany and the Netherlands, in particular) his role appears to be quite limited, while in other countries with a Germanic tradition (in particular Finland, but also the other Scandinavian countries) his role is somewhat comparable to that of the partie civile.

In several respects, the situation in both the Federal Republic of Germany and the Netherlands is the most interesting. Both countries can be called veritable hotbeds of victimological interest as well as of victim movements. Several mechanisms exist in theory to ensure victim participation in the process and through this the presentation of his views and concerns. Reports of the use of these mechanisms in practice, however, indicate that they have remained very much a dead letter; they are either so burdened with

technical restrictions or they can be used only at the sufferance of the court, that only a proportionately minute number of victims actually use these mechanisms.

In all the Romano-German countries (with the two above exceptions in practice) the victim's main role in the criminal process is that of a civil claimant and witness for the prosecution. Through the presentation of civil claims in the criminal process he has an opportunity to make his views and concerns known to the tribunal. He also has some limited possibilities of serving as a prosecutor; in practice, however, this is limited to a few private prosecutions in petty matters or (in Finland and Sweden) to supporting the prosecutor.

Austria, Denmark, Finland, the Federal Republic of Germany, France, Luxembourg, the Netherlands, Norway and Sweden all have State compensation schemes for criminal injuries. In all other Romano-Germanic countries in Europe (represented in this study only by Italy) such schemes are lacking. Furthermore, with the exception of Belgium and Switzerland, the countries also appear to be largely lacking in a widespread social insurance system.

10.7. Abolitionism, mediation and the community approach: conflict or cooperation with the criminal justice system?

The stress throughout the present study has been on the role of the victims of crime within the criminal justice system and on the correspondence between the provisions of the recently adopted United Nations Declaration and Council of Europe Recommendation on one hand and the operation of the various criminal justice systems in Europe on the other.

However, it was also noted that the United Nations Declaration clearly indicates that both formal and informal mechanisms outside of the criminal justice system can be called upon to deal with victimization. The criminal justice system may be an inappropriate response to crime or the criminal justice system may be too restricted in its response.

It was noted that, to a large extent, crimes are not dealt with by the criminal justice system at all. This is primarily due to the fact that the victims or bystanders do not inform the law enforcement officials about the incident. In some Socialist countries the pettier events may also be dealt with by social courts.

There is now a growing interest in many countries of Europe in seeking alternatives to criminal justice processes in dealing with a significant proportion of incidents. Several strands are involved in this development. In part, it can be attributed to an interest in what has been called "diversion", the seeking of a more appropriate resolution of an incident. Part of the development is due to the increase in interest in a minimalist or even abolitionist approach to criminal justice.

The minimalist approach is based on the view that conflicts are dynamic and maintain the development of society. Because of this, they contain a potential for change and progress, from the point of view both of society and of the individual. From the point of view of society it would be a worthwhile conservation of resources to allow individuals to resolve their own conflicts; moreover, in many respects the individuals immediately concerned are in the best position to assess which conflict resolution would be the best for their circumstances, both in the short and in the long run. From the point of view of the individual, moreover, direct involvement in the solving of conflicts is a learning experience; it is participatory democracy at the grass-roots level.

The minimalists therefore seek to restore (criminal) conflicts to the status of private matters between the victim and the offender; one could refer to a privatization of conflicts. The minimalists seek to restrict any vestiges of State involvement, in particular when this takes place against the will of the parties immediately concerned. The victim is assumed to be in the best position to know the circumstances in which the crime occurred, and can thus best assess its seriousness to him as a member of society. If he does not consider a reaction necessary, why should society?

In the cases in which the criminal justice systems already appear willing to forego their right to co-opt the conflict, such privatization would seem to be almost solely a positive matter. The fact that the State does not wish to become involved certainly does not mean that the victim (and the offender) has no interest in the outcome. In particular where the two parties exist within a mutually binding social network, the matter should still be resolved in one way or another.

The cases that have just been referred to are the petty cases, where the State adopts the view that "the law is not concerned with trifles". In respect of more serious offences the willingness of the State and of the community to allow conflicts to become privatized is considerably less. In fact, the community may have an opinion that completely contradicts that of the victim. Two offences that studies have indicated to have a very low rate of reporting - rape and domestic violence - are also two for which there is considerable interest in retaining the matter within the criminal justice system.

Even when the criminal justice system does not become involved in the conflict, its presence in the background may colour the discussions. One way in which this may become evident is that the victim and the offender are very much aware that the threat of official punishment hangs over the offender, and the victim uses this as a lever in mediation. If the offender is not aware of court practice in cases such as his (as is often the case in particular with young offenders), he may in fact agree to a resolution of the outcome that, from his point of view, is less advantageous than a court order. Moreover, as primarily the pettier cases go

to mediation the "widening of the net" phenomenon may occur: the result of a privatization of criminal justice may be that more and more people are subjected to community control.

Such considerations on the possible development of the role of criminal justice should be noted at the same time as the increased attention to prevention. As was noted above in section 10.2., State schemes for compensation of crime victims, the interest in situational crime prevention, and the victimological interest in the participation of the victim in crime may lead to a situation in which the responsibility for preventing and dealing with crime falls more and more on the individual.

For many individuals this would be a happy development. As long as they are conscientious in attempting to prevent crime, they constantly take precautions, they take out the necessary insurance coverage and they have the necessary social power to participate fully in either formal or informal proceedings that may arise if and when (despite all their precautions) an offence occurs, the improvements in the position of the victim will be strong assurance that their damages and losses will be made good. The State will look after those who look after themselves.

At the same time, however, these positive developments may have negative corollaries. Not all individuals are able to afford insurance or target-hardening paraphernalia. Not all individuals are so level-headed and aware that they can avoid most risky situations in society. Not all victims have sufficient social power to ensure that they can in fact attain their rights.

This is certainly a problem for the criminal justice system and other formal systems of justice. These systems are said to have been developed so that they protect the weak: legal assistance can be provided in many cases to the indigent, legal safeguards are designed to ensure that even the down-and-outs can have an opportunity to present their version of the events to an impartial decision-maker.

The twin emphasis on situational crime prevention and mediation in many Northern European countries and elsewhere may cause even greater problems to those mechanisms that are designed to resolve conflicts outside the scope of the formal systems for the administration of justice. One problem is that those who already have problems in preventing crime directed against themselves - the poor and the uneducated who often live in high-crime areas and whose lifestyle has several victimogenic features - may find their burden increasing. The other problem is that the shift towards mediation in the interests of a stronger position for the victim may at the same time weaken the position of the defendant. If the victim is well-to-do, articulate and has a position of social power in the community while the offender is young, uneducated and perhaps even disliked by the community, the problems with informal dispute resolution begin to become manifest.

The question should therefore not be one of conflict between mediation and the criminal justice system, between formal and informal processing of criminal matters. Instead, there should be more integration of the two. The criminal justice system has a central role in voicing the authoritative reproach of society at violations of norms of central importance. Serious offences are not solely matters that affect the parties immediately concerned; the way in which they are resolved is of special interest to the community as a whole.

The criminal justice system, however, can easily be regarded by the victim (and the offender) as a faceless bureaucracy pursuing its own interests in disregard of the victim's needs.

Such an impression may even have been strengthened by the victim movements. These movements have significantly added to the attention directed at the victim; the instruments passed by the United Nations and the Council of Europe are only two illustrations among many. Although there seems to be general agreement that the position of the victim should be improved, there is much less agreement on what this means in practice. Mention was made in section 2.7. of the competing ideologies in the victim movement: the care, the rehabilitative, the retributive, the abolitionist or minimalist and the preventive ideologies. Of these, the rehabilitative, the retributive and the preventive ideologies have the closest links to the criminal process. All three can be argued to use the victim as a medium in achieving non-victim related goals.

The rehabilitative ideology, as was noted, is geared towards the reintegration of the offender into the community. It would encourage victim participation in mediation and conciliation schemes. The retributive ideology desires punishment in proportion to the harm inflicted. It would encourage a higher victim profile in the criminal process in the sense that he emphasizes the harm done; however, restitution in itself may have to yield to punitive measures in the interests of proportionality. At the same time, the focus on "harm done" signifies a new emphasis of offences leading to a concrete outcome, and less emphasis on so-called endangerment offences.

The preventive ideology, which section 2.7. suggested as the fifth ideology in the victim movement, raises clear specters of "victim-blaming" among some. It can, indeed, be used for this purpose: the victim is asked what he did to "trigger off" the crime so that he (or other potential victims) will not have to run a similar risk of victimization in the future.

Here we can refer to the review in section 4.4. of the measures that all of the core countries (and presumably all countries in Europe) have adopted in order to decrease victim participation in offences, that is, in order to prevent crime. Almost all of the measures noted are of long-standing; in this sense, the preventive ideology predates the victim movement. The victim has not been forgotten by the courts or by the criminal justice system in

general. They are very much aware of his potential role in crime and crime prevention, and want him to be more responsible.

As has already been noted in section 10.2., when these measures are seen together with the recent State compensation schemes, with their emphasis on victim conduct, it can be argued that the preventive ideology is gaining strength in Europe. These compensation systems are a mixed blessing for the victims. Although some victims receive an award (perhaps a late award, or perhaps after a lot of red tape, but an award nonetheless) they are being used as mediums for increasing public awareness of the virtues of crime prevention.

One method for decreasing the misuse and diverting of schemes intended to aid the victim is to increase the empathy and sensitization of decision-makers to the needs of the victim. Through greater stress on allowing the victim an opportunity to present his views and concerns, the State would allow the victim to participate in the re-ordering ritual, to be assured that society condemns the offence and supports the victim.

This is not (solely) a matter that can be dealt with through the development of legislative measures. The United Nations Declaration and the Council of Europe Recommendation are broad enough to admit of various options in assisting the victim. What is more important is that the practitioners and decision-makers are made more aware of the importance of assisting the victims - and of what assistance the victim actually needs.

At the same time, the trend towards privatization of petty conflicts should be encouraged. What may be too trivial for the State to deal with may be a major matter for the victim and for those with whom he comes into contact. If these matters can be resolved within the community, the community as a whole will be strengthened.

10.8. What is the significance of the United Nations Declaration and Council of Europe Recommendation No. R(85)11?

There are considerable differences in the various aspects of the role of the victim among the criminal justice systems in Europe. Several theoretical differences have been noted, above all in the formal procedural status of the victim. What may be more important in practice, however, lies in the responsiveness of the State to the victim, in the willingness of the representatives of State authority to assist the victim. Here, the differences may lie not so much among the systems, as within each system - some policemen, prosecutors, judges and other persona may be more willing to assist the victim than others.

The United Nations Declaration and the Council of Europe Recommendation establish certain basic standards that can be applied when assessing how the criminal justice system deals with the victims of crime.

Neither instrument, however, is self-implementing. These are not binding documents, and no victim of crime in any of the member States of the two international organizations in question can successfully refer to the provisions of these instruments when attempting to secure what he may consider his rights as a victim to assistance and vindication. These rights must first be provided by the countries in question.

For this reason, much of the significance of the United Nations Declaration and the Council of Europe Recommendation will depend on any success achieved in developing means within each country to assess the operation of the criminal justice system in the light of these basic standards.

The implementation measures fall, broadly, into five sectors: the drafting of new laws, the more effective application of existing law, training, research and the exchange of information.

First, there are some areas that clearly call for new laws. An eminent example is in respect of State compensation schemes in those countries where these do not already exist. However, new laws may also be needed in other areas, for example in connection with the right of the victim/complainant to legal advice and to information.

This survey has shown, however, that many countries already have legislation that meets the standards set by the two international instruments. In many cases the problem is that the legislation has become almost a dead letter. Examples here include the use of adhesion proceedings in Austria, the Federal Republic of Germany and the Netherlands. Other examples include the use of court orders on the payment of restitution. Thus, means should be found for studying and resolving the difficulties with which the application of such legal provisions have met in practice.

Another area lies in training. Both the Declaration and the Recommendation emphasize the need for greater sensitivity to the needs of the victims. This can be achieved by disseminating these instruments and incorporating them into the training programmes of criminal justice practitioners and of others who come into contact with the victim. Mere dissemination, however, is not enough. It has been noted in many connections in this study that guidelines are needed that tailor the general provisions of the Declaration and the Recommendation to the specific legal, social and cultural circumstances of the jurisdiction in question, and to the specific demands of the decision-makers in question. Moreover, some means must be found for implementing these guidelines, for example by holding practitioners accountable in some way for any violations.

As for research, there has certainly been an abundance of victimological studies over the past two or three decades, but only recently have major research projects been undertaken which are directly interested in methods of improving the interaction between the victim and the criminal justice system. Such research is necessary - especially if it evaluates the effect of changes in the system. As has been noted, many innovations have a tendency to being misused.

More information is needed on the extent to which there is a variance between the intended and the actual effects of reforms.

Research is also needed on the actual needs of victims. The four victim movement ideologies referred to in this study largely operate on the assumption that the victim has certain needs, and attempts to answer these needs - without actually ascertaining that such needs exist. As a consequence, the services and assistance provided to victims may be ill designed, and various needs may be overlooked.

The final area of implementation noted was the international exchange of information and experience. The countries in Europe and elsewhere may learn much from one another, by studying the effectiveness of various measures that are or have been applied in practice. Mere copying of schemes, however, would not be good policy. Criminal policy is rarely a suitable commodity for export. Consideration should be paid to the actual needs and expectations of victims in specific cultural and legal surroundings.

This would indicate that the interest in the implementation of the two instruments should not be directed primarily at ensuring that "new and innovative" legal mechanisms are adopted in the various systems. Instead, attention should be paid to what different possibilities exist, both within and outside of the criminal justice system, to render to the victim the assistance that he needs within the basic scope of the existing mechanisms. In this way, the dangers of unexpected (and undesired) consequences from unsuitable grafts modelled on other legal systems can be avoided.

One method of implementing the Declaration and the Recommendation would therefore be to strengthen the exchange of information on the various ways in which the provisions of these instruments are being applied in the different countries, and in particular on guidelines that have been prepared and enforced to ensure that these ways are responsive to victim concerns.

The above list provides ample scope for national and international work in implementing not only the Declaration but also the Recommendation of the Council of Europe. The work of the United Nations and the Council of Europe, however, would appear to be limited to the suggestion of various alternatives to the various Governments. Fundamentally, criminal justice is an internal issue on which the sovereign States reserve their freedom of action. Although the experience of victimization knows no national boundaries and although international cooperation can go a long way in alerting both the decision-makers and the public to dangers and possible solutions, the final decision will still have to be made by individual citizens and individual agents of the criminal justice systems or victim-assistance organizations, working within the framework of national legislation and policy.

ANNEX 1

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

A/RES/40/34

DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER

The General Assembly,

Recalling that the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended that the United Nations should continue its present work on the development of guidelines and standards regarding abuse of economic and political power,

Cognizant that millions of people throughout the world suffer harm as a result of crime and the abuse of power and that the rights of these victims have not been adequately recognized,

Recognizing that the victims of crime and the victims of abuse of power, and also frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders,

1. Affirms the necessity of adopting national and international measures in order to secure the universal and effective recognition of, and respect for, the rights of victims of crime and of abuse of power;

2. Stresses the need to promote progress by all States in their efforts to that end, without prejudice to the rights of suspects or offenders;

3. Adopts the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, annexed to the present resolution, which is designed to assist Governments in the international community in their efforts to secure justice and assistance for victims of crime and victims of abuse of power;

4. Calls upon Member States to take the necessary steps to give effect to the provisions contained in the Declaration and, in order to curtail victimization as referred to hereinafter, endeavour;

a) To implement social, health, including mental health, educational, economic and specific crime prevention policies to reduce victimization and encourage assistance to victims in distress;

b) To promote community efforts and public participation in crime prevention;

c) To review periodically their existing legislation and practices in order to ensure responsiveness to changing circumstances, and to enact and enforce legislation proscribing acts that violate internationally recog-

nized norms relating to human rights, corporate conduct, and other abuses of power;

d) To establish and strengthen the means of detecting, prosecuting and sentencing those guilty of crime;

e) To promote disclosure of relevant information to expose official and corporate conduct to public scrutiny, and other ways of increasing responsiveness to public concerns;

f) To promote the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, medical, social service and military personnel, as well as the staff of economic enterprises;

g) To prohibit practices and procedures conducive to abuse, such as secret places of detention and incommunicado detention; and

h) To cooperate with other States, through mutual judicial and administrative assistance, in such matters as the detection and pursuit of offenders, their extradition and the seizure of their assets, to be used for restitution to the victims;

5. Recommends that, at the international and regional levels, all appropriate measures should be taken:

a) To promote training activities designed to foster adherence to United Nations standards and norms and to curtail possible abuses;

b) To sponsor collaborative action-research on ways in which victimization can be reduced and victims aided, and to promote information exchanges on the most effective means of so doing;

c) To render direct aid to requesting Governments designed to help them curtail victimization and alleviate the plight of victims;

d) To develop ways and means of providing recourse for victims where national channels may be insufficient;

6. Requests the Secretary-General to invite Member States to report periodically to the General Assembly on the implementation of the Declaration, as well as on measures taken by them to this effect;

7. Also requests the Secretary-General to make use of the opportunities which all relevant bodies and organizations within the United Nations system offer, to assist Member States, whenever necessary, in improving ways and means of protecting victims both at the national level and through international co-operation;

8. Further requests the Secretary-General to promote the objectives of the Declaration, in particular by ensuring its widest possible dissemination;

9. Urges the specialized agencies and other entities and bodies of the United Nations system, other relevant intergovernmental and non-governmental organizations and the public to co-operate in the implementation of the provisions of the Declaration.

Part A. Victims of crime

1. "Victims" means 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.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable 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.

4. Victims should be treated with compassion and respect for their dignity. 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.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and reta-

liation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

7. Informal mechanisms for the resolution of disputes, including mediation, arbitration, and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victim should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

15. Victims should be informed of the availability of health and social services and other relevant assistance, and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

Section B. Victims of abuse of power

18. "Victims" means 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 do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

20. States should consider negotiating multilateral international treaties relating to victims as defined in paragraph 18.

21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.

ANNEX 2

THE DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER: COMMENTARY

General remarks

The following commentary is based primarily on the available documentation, to which reference will be made where appropriate. As the author had the opportunity to participate in the discussions on the drafting of the Declaration in Ottawa in 1984, at the Milan Congress itself, and at other formal and informal meetings in advance of the Congress, reference will also be made to the arguments and counter-arguments that are reflected only indirectly in the documentation.

The Preamble

The General Assembly resolution adopting the Declaration contained a preamble outlining the background to the issue of victims, including the recommendation of the Sixth United Nations Congress that guidelines and standards regarding abuse of economic and political power be developed, as well as the general observation that crime and the abuse of power causes harm and hardship to millions of people around the world.

The preamble, along with part B (on victims of abuse of power) includes the only reference in the entire resolution to the need for prevention measures, surely the most effective means of assistance to victims. However, the deletion of a reference to crime prevention in the Declaration itself can be understood when it is noted that several other General Assembly resolutions deal directly with crime prevention, and that the present Declaration attempts to deal with the problems arising when crime and abuse of power have already occurred.

The preamble further recommends training to foster adherence to United Nations standards and norms; collaborative action-research on, as well as direct aid to requesting Governments in, prevention and victim assistance; and the development of recourse for victims where national channels may be insufficient.

Part A. Victims of crime

Paragraph 1. The definition of the victim

"1. "Victims" means 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."

The first part of the Declaration (part A) deals with victims of crime.

The first paragraph, which provides the basic definition of the concept of "victim", is the most important one in determining the scope of the Declaration. It was also the one most heavily debated in the process of the preparation and acceptance of the Declaration.

The phrase "persons who, individually or collectively, have suffered harm" was adopted in preference to the rather lengthy paragraph II(2) of the Ottawa draft, which covered persons victimized "as an individual or as a member of a group or collectivity" and which defined "persons" as including, where appropriate "legal entities and other organizations or associations or society as a whole". The effect of this change was to leave the determination of standing to the law of the jurisdiction in question.

"Individually" is a reference at least to natural persons. In most jurisidictions (including all the countries covered by the present study) it also covers legal persons, those collective bodies recognized as such by the law of the jurisdiction. The general nature of the phrase is intentional; it was changed largely due to the objection of the delegation from the Union of Soviet Socialist Republics that explicit mention in the same paragraph of both legal entities and mental injury would cause needless confusion by introducing a very new concept - mental injury suffered by a legal entity.

The scope of "collectively" is less clear. The United Nations documentation for the Seventh United Nations Congress would appear to use the term to apply to those victimized through the abuse of power. (1) Since the abuse of power issue is dealt with in the second part of the Declaration, which contains a definition paragraph of its own, this possibility would appear to be ruled out.

A second possibility would be that the offence has been directed at the individual victim because of his membership in a certain group or collectivity. The reference here would therefore be to what Bassiouni refers to as "collective victims", "groups or groupings of individuals linked by special bonds, considerations, factors or circumstances which, by these very reasons, make them the target or object of victimization". (2)

If this is the case the paragraph would appear to contain an unnecessary distinction between persons victimized as individuals and those victimized as members of a collectivity. In both cases a person has been victimized. The principle difference would be in the motive of the offender, a distinction which in other respects is irrelevant for the purposes of the Declaration. This second possible interpretation would therefore not add anything of substance to the

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(1) See e.g. the Report of the Eighth Session of the Committee on Crime Prevention and Control, E/1984/16 and E/AC.57/1984/18, paragraphs 81 and 88.

(2) See Bassiouni 1985a, pp. 242-244.

Declaration although it might be merited as a symbolic emphasis of the need to pay attention to collective victims in this sense.

A third possible interpretation of "collectively" is that the offence is directed at a whole and that the victim suffers as a member of such a whole. This interpretation is supported by an earlier wording of the Declaration; the Ottawa draft referred to "other organizations or associations or society as a whole". Examples of such victimization would be defamation of an organization, embezzlement from an association, tax fraud and pollution. These last two can be considered to be directed at a community or society as a whole.

To the extent that the organizations and associations do not have a legal personality (and cannot therefore be dealt with under the law as "individual victims") such an interpretation will lead to one of the problems concerning the procedural position of the victim, that of the assignment of standing. The problem here is the determination of what degree of harm a person must suffer to be considered a victim under the Declaration and thus the bearer of the rights that the Declaration seeks to secure for him.

In this connection it may be noted that this paragraph does not qualify the term "harm" by, for example, "direct", "serious" or "significant". The potential scope would therefore cover all cases where any harm at all is suffered. The ultimate specification of the scope is left to the consideration of the jurisdiction in question.

A very broad interpretation would include under "emotional suffering" such indirect harm as the fear that, for example, elderly people may have upon hearing of crimes being committed in their neighbourhood. Attempts were made in the drafting process to limit in some way the definition of harm; the principal reason for this was the link to the paragraphs on State compensation.

Some experts believed that too expansive a definition, when read together with paragraph 12 on State compensation, would oblige the States to undertake the impossible task of compensating all manner of trivial injuries and harm. The solution to this was to leave the definition in paragraph 1 open but limit the corresponding scope in paragraph 12.

The terms "physical or mental injury", "emotional suffering" and "economic loss" are common ones in European law. The Declaration is designed to cover, for example, both violent offences against the person and property offences. Emotional suffering can be involved not only in the case of a completed offence but also in the case of an attempted offence (such as attempted burglary or rape) that did not lead to actual physical injury or material damage. Emotional suffering can also be suffered by the immediate family or dependants of the victim (who are referred to in paragraph 2).

The term "substantial impairment of their fundamental rights" is fairly unusual in criminal law. It is designed

as a catch-all phrase to cover harm that, although it does not directly harm the victim personally, prevents him from participating as a full member of society. It somewhat resembles the reference in paragraph II(1)(c) of the Ottawa draft to conduct "constituting a violation of internationally recognized human rights norms protecting life, liberty and personal security." (1)

"Acts and omissions" is used to underline that the criminal conduct under consideration is not limited solely to positive manifestations of behaviour. Continental law largely recognizes crimes of omission. The inclusion of this reference may have been due to certain ambiguity in the common law concept of crime.

"Acts and omissions" includes failures to act, when action is called for by the legal system. An example would be neglect of rescue when this is defined as criminal. The phrase also clearly covers crimes of negligence.

"(I)n violation of criminal laws" is the key phrase in this definition from the point of view of the discussions of the drafts. It limits the scope of this part of the Declaration to acts and omissions recognized as criminal by the jurisdiction in question. (2)

The phrase "criminal laws operative within Member States" was adopted to abort two difficulties. One pointed out by the delegations from the United States and the Union of Soviet Socialist Republics, was the debatability of the existence of an international criminal law. The second was the necessity to consider the special case of, for example, federal states. It therefore also includes federal, state and local criminal laws.

The inclusion of the reference to "laws proscribing criminal abuse of power" can be regarded as redundant, as it merely notes that one type of criminal conduct covered by the Declaration involves abuse of power. It may be noted that no definition is supplied of this category.

It may be noted that the Declaration in no way defines the victimizing party. The only condition in this respect is that the act or omission be criminal. The victimizer may thus be a natural or legal person or even the State.

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(1) Regarding these concepts, see Lamborn 1985b, passim.

(2) Earlier drafts referred to "violations of criminal law"; the change was due to the realization that in international usage "violations" is used for breaches of human rights norms while in American usage a "violation" is a minor criminal infraction. Both usages would have been misleading.

Paragraph 2. Special categories of victims

"2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

This paragraph, first of all, emphasizes that a person may be considered a victim even if the offender is not brought to justice. In part this is to avoid the complications involved in referring to "alleged victims".

This has several implications. First, a person alleging that he has been victimized should be accorded the appropriate assistance of, for example, the police. His allegations should not be dismissed out of hand unless they are clearly groundless; the dangers of what is known as secondary victimization should be kept in mind. Also, with reference to paragraph 12 on State compensation, the possibility should be considered of providing compensation to the victim on an interim basis. (1)

Second, a person may be considered a victim under the terms of the Declaration even if the perpetrator can not be brought before the court. This is the case, for example, if the victimizer is not criminally responsible (e.g., he is insane or a child) or has some form of immunity. It is also the case if the offender cannot be prosecuted or convicted in fact because he is an agent of the State or, for example, a powerful corporation.

Third, a person may be considered a victim even if the offender can not be identified or apprehended. This is particularly important in the case of State compensation (paragraph 12).

Fourth, the Declaration applies to informal dispute resolution as well as to formal adjudication. Should such informal settlements be attempted between the victim and the offender this should have no effect on the possibility of the victim receiving, for example, the services noted in paragraph 14.

Paragraph 2 states further that the familial relationship between the offender and the victim should not be a consideration in defining a person as a victim.

The apparent purpose of this phrase is to draw attention to the special problems often faced by victims of domestic violence. The phrase, however, may lead to some problems in application. It should be noted that the laws of several

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(1) This had been called for "in appropriate cases" in paragraph V(3) of the Ottawa draft.

European countries have created privileged offences on the basis of the familial relationship between the offender and the victim. Examples of such offences are theft from a family member or embezzlement from an estate. (1) An example that has roused considerable debate from the victimological point of view is spousal rape. Such acts may be treated more leniently than similar acts outside a familial relationship; in the case of spousal rape there may be no criminal liability at all. There is thus no offence and, with reference to paragraph 1, there is no victim.

Furthermore, most if not all European criminal laws include offences where a familial relationship is an essential element or an aggravating factor. The obvious example here is incest.

Third, in connection with the adoption of State compensation schemes, special restrictions have been made by some countries on the basis of familial relationship. The simple fact that the offender and the victim were members of the same household, may bar the victim from eligibility for State compensation for crime damages (see section 9.3).

Fourth, familial relationship is often significant in procedural law, for example, in connection with the duty to testify against an accused.

The phrasing here is that a person may be considered a victim regardless of the familial relationship between the prepetrator and the victim. The use of the weak "may", which did not appear in the drafts until the discussions in Milan, (2) raises some question as to the intention of the drafters. The phrase can be understood as an encouragement to Member States to ensure that no victim is unnecessarily placed in a worse position on the ground that he or she is related to the offender. At the same time, it is clear that reasons of policy may lead Member States to decide that in certain respects the familial relationship is to be taken into account in the criminal or procedural law.

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(1) See e.g. art 345 of the Maltese Penal Code, art. 524 of the Turkish Penal Code and chapter 30 of the Finnish Penal Code.

(2) According to general principle no. 12 of the Ottawa draft, the rights of victims and the duties of States shall not necessarily depend on findings of criminal responsibility and guilt by the perpetrator, or on the identification or apprehension of the alleged offender. A proposal by the United States of America dated 2 September 1985 (A/CONF.121/C.2/L.10) was the first to note that a person was to be considered a "victim" under the Declaration "...regardless of the relationship between the perpetrator and the victim..." (paragraph 2). It would seem to be a strong assumption that the insertion of this phrase was linked to the draft resolution proposed by the same delegation on domestic violence (A/CONF121/C.2/L.12).

The paragraph continues by noting that "where appropriate" the immediate family and dependants of the victim are also to be considered victims. The primary purpose is to catch the situation where the victim has died as a result of the offence and his dependants are left without maintenance. They should thus, in accordance with the Declaration, be granted, for example, access to justice and various services and they should be entitled to restitution.

On this question the various European countries differ considerably on the details of the law. For example, some countries have considered it appropriate to provide State compensation to dependants; others have not (cf. paragraph 12).

The last part of the paragraph (which includes - again "where appropriate" - "persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" under the definition of victim) is a reference to "Good Samaritans" and law enforcement officers.

One point on which the definition of "victim" in paragraph 2 is silent is the culpability of the victim. The person suffering harm through criminalized acts or omissions may well be the offender himself, or an accomplice. The person may also be responsible in part for the offence, for example, through precipitation or instigation. Both possibilities were brought up during the drafting and a suggestion was made in an informal working group at the Seventh United Nations Congress that the Declaration should include a specific reference to offenders and culpable victims. (1) However, in view of the difficulties in drafting such a restriction, it was felt that the question is one that is better left to the law of the jurisdiction in question.

In this study, it has been argued that the Declaration and much recent legislation in some European countries are based on a stereotype of an "ideal victim". The Declaration and the laws in question appear to assume that the victim did not facilitate the offence, nor was he involved in any other way in its commission. (2)

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(1) Some unofficial drafts prepared between the Ottawa expert meeting and the Seventh United Nations Congress included a general principle to this effect. For example, a draft circulated by Roger Clark on 20 April 1985 suggested the following wording: "The benefits and rights provided to victims in this declaration may be reduced or withheld if the person was victimized as a direct result of his or her criminal acts of a serious nature." Similar points were made in the informal discussions at Milan by the Finnish delegation.

(2) See in particular section 10.3, infra.

Paragraph 3. Prohibition against discrimination

"3. The provisions contained herein shall be applicable 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."

Such an anti-discrimination paragraph is common in United Nations declarations. The above phrasing is similar to that found in, for example, article 2(1) of the Universal Declaration of Human Rights, article 2(2) of the International Covenant on Economic, Social and Cultural Rights, and article 2(1) of the International Covenant on Civil and Political Rights. (1) It is in keeping with the International Convention on the Elimination of All Forms of Racial Discrimination. (2)

The criminal justice system, however, may contain certain features that complicate adherence to such a "self-evidently" proper paragraph. Non-discrimination requirements are generally designed to prevent discrimination against individuals and groups having an underdog status in society. Including such non-discrimination clauses in instruments providing for aid and assistance, on the other hand, may also work to the advantage of other members of society.

The delegation from the Netherlands, for example, pointed out at the Seventh United Nations Congress that the prohibition of discrimination on the basis of property is problematic in deciding on State compensation. The legislation of some countries (3) stipulates that State compensation will be provided to crime victims on the basis of need. A wealthy person is in a better position to pay for medical expenses and may therefore be denied compensation. This would appear to be contrary to paragraph 3 of the Declaration.

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(1) The Universal Declaration of Human Rights was adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. The two covenants were adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966.

(2) General Assembly resolution 2106 A (XX), adopted on 21 December 1965.

(3) This is the case with, for example, the laws on State compensation for crime victims in the Netherlands (art. 4(1)). The corresponding schemes of the United Kingdom and Norway are based on the ex gratia principle, where such "discrimination" is possible in theory although apparently no such distinctions are made in normal practice. See section 9.3.2.

Paragraph 4. Access to justice and fair treatment

"4. Victims should be treated with compassion and respect for their dignity. 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."

This paragraph can be regarded as a general introduction to the many important issues dealt with in paragraphs 5 through 7. It makes two important points. First, victims are entitled to be treated with compassion and respect. Second, it is not enough that the law provides theoretical mechanisms for justice and redress; there must also be the possibility in fact of securing justice and redress.

The principle of access to justice has already been stated in art. 8 of the Universal Declaration of Human Rights and art. 2(3) of the International Covenant on Civil and Political Rights. (1)

The issue of compassion and respect is indeed an important one. For many individual victims such offences as rape, burglary or assault may lead to anquish and self-recrimination. They may needlessly blame themselves for what happened.

By treating such victims with compassion and respect they are assured that they have indeed suffered an injustice recognized by the community as such.

Furthermore, some victims may be so shaken by the offence that they are not able to function as full members of the community. The showing of compassion and respect, something that can be done at minor cost, may well be enough in itself to help the victim to recovery. Compassion, however, should be balanced against respect; many victims may dislike an attitude that implies that, as victims, they are helpless persons in need of charity and assistance.

Paragraph 5. Availability of judicial and administrative mechanisms

"5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms."

Paragraph 5 sets out in greater detail what paragraph 4 merely refers to with regard to "access to the mechanisms of justice". It is noteworthy that the mechanisms for redress need not be made available within the criminal justice system. Alternatives might be made available through civil or administrative proceedings or through informal means.

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(1) See footnote 1, previous page. See also art. 6, 7, 10 and 12 of the Universal Declaration and art. 14(1) and 26 of the Covenant.

Both paragraphs 4 and 5 refer to redress. This term is a broad one. It covers compensation for wrong or loss. However, the word is derived from the French "redrecier", "to make straight". The term may therefore also involve elements of retribution or vindication. It was noted in section 5 that research indicates that victims do not have any marked punitive tendency, and are often satisfied with compensation as well as a condemnation of the offence. The satisfaction of these needs can be attended to also outside of the criminal justice system.

The provision calls upon States not only to establish mechanisms where necessary but also to strengthen existing mechanisms. For example civil proceedings have been faulted in many connections for being complex and time-consuming. The provision in question would therefore suggest that the State should undertake the simplification and expediting of civil procedure, in particular with respect to the enforcement of claims. From the point of view of the victim, however, it may be more expeditious to have his civil claim appended to criminal proceedings, as is indeed possible in many European countries. (1)

Paragraph 5 refers to procedures that are fair. This fairness should also be assessed from the point of view of the alleged offender. Point 2 of the preamble to the Declaration stresses that progress by States in recognizing and respecting the rights of victims should not cause prejudice to the rights of suspects or offenders. (2)

The last sentence refers to informing the victim of his rights, an issue dealt with also in part in subparagraph 6(a). The difference between the two is that the information called for in this paragraph refers primarily to the alternatives open to the victim, such as civil or criminal proceedings, as well as State compensation and other services. Subparagraph 6(a), on the other hand, deals with both the rights and the duties of the victim in proceedings.

Paragraph 6. Responsiveness of judicial and administrative processes

"6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affect-

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(1) See section 8.3.

(2) The Ottawa draft had contained a substantive paragraph to this effect (art. VII(11)).

ed, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims."

This paragraph on fair treatment in judicial and administrative processes covers a considerable number of problems that victims have faced: lack of information, the feeling of having one's views ignored in the proceedings, possible intimidation, and the slowness of the process. The scope is not limited to criminal proceedings; it includes both "judicial and administrative processes". Informal mechanisms are dealt with separately in paragraph 7.

Subparagraph (a) deals with the issue of information, which several studies have indicated to be one of the greatest needs of victims. (1) For many victims dealing with the criminal justice system (and other legal processes), this is a bewildering experience, and they often have difficulty in knowing what is being done and what is required of them.

The necessary information should be made available by the police at the outset. This can be done through such simple means as brochures outlining the criminal process as well as alternative proceedings.

Once the case is passed on to the prosecutor and the court, however, the police generally can not continue to supply the information called for by this subparagraph. The information could be provided by, for example, the prosecutor or a clerk of the court.

Subparagraph 6(a) refers only to "informing" victims, without stating whether this information should be supplied actively and sua sponte by the various persons concerned or passively, in reply to questions by the victim. The phrase "especially ... where they have requested such information" would appear to favour the former alternative.

Subparagraph 6(b) involved serious difficulties in the drafting stage. There was considerable disagreement over the extent to which the views of the victim were to be presented and considered during the proceedings. The original draft from the 1984 Ottawa meeting stated that the State should allow the victim to initiate and pursue criminal

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(1) See for example Shapland et al, pp. 78 and 85; Kelly, p. 16.

proceedings where appropriate (art VII(7)), and furthermore that the State should provide for an active role for victims at all critical stages of judicial proceedings for example by allowing the victim to be present and heard (art. VII(8)(a)).

Anglo-American lawyers at the Ottawa meeting had noted that this point would cause difficulty for them. In England, for example, the victim is emphatically not given a role in the decision on punishment. The difficulties came to a head in Milan when the United States delegation put forward its own draft declaration. Point 13(f) in this draft stated explicitly that the participation of victims of crime in criminal justice and administrative processes should be facilitated by consulting with victims of crime and considering their views in making decisions on case disposition.

The final wording was thus a compromise between these two diametrically opposed points of view. The United Kingdom sought to make doubly sure that there was no misinterpretation in this regard by dictating into the report the following observation: "In the view of this delegation, the rights of victim should not extend in any way to sentencing, case disposal or course of trial."

Subparagraph 6(b) is considerably modified in a number of ways. First, there is no reference to any active role for the victim. Such a role would be difficult to accept in many countries at, for example, sentencing or at a possible parole hearing. Second, the subparagraph is written to make it possible to adopt various options in the presentation of the views of the victim ("to be presented and considered") instead of obliging the tribunal in question to accept that the victim be physically present or represented in some way ("allowing the victim to be present and heard"). Third, the subparagraph refers only to appropriate stages and not to all critical stages, as called for by the Ottawa draft. Fourth, the paragraph notes that this responsiveness should be "consistent with the relevant national criminal justice system."

Subparagraph 6(c) calls for proper assistance throughout the legal process. The assistance called for covers at least legal questions. However, the assistance might also be emotional, as recognized by the States that seek to ensure that victims of certain offences can rely on a "contact person" throughout criminal proceedings.

The measures called for by subparagraph 6(d) have various purposes in mind. Minimizing inconvenience is primarily a matter of placing as few demands as possible on the victim, for example, by minimizing the number of times he is summoned to court to be prepared to testify, as well as the amount of time he is to wait at court to present his testimony. Establishing and strengthening expeditious (alternative) mechanisms, as called for by paragraph 5, is part and parcel of this minimization.

The subparagraph then refers to protection of privacy where necessary. Such protection is intended vis-a-vis the public, in order to prevent, for example, unwanted publication

of the details of the victimization. In view of the reference in the preamble to avoiding prejudice to the rights of suspects or offenders it should not be read in a way that permits the making of anonymous accusations. It does not therefore negate the right of the accused to confront his accuser, although it may allow the victim, for example, to conceal his address from the suspect.

Finally, the subparagraph calls upon States to ensure the safety of victims, their families and witnesses on their behalf from intimidation and retaliation. The possible mechanisms for this include criminalization of victim or witness harassment, provision of special police protection, and allowing the accused to contact the victim only through legal counsel.

Subparagraph 6(e) is a general call for avoiding unnecessary delay, both in proceedings and in the enforcement of awards.

Paragraph 7. Informal dispute resolution

"7. Informal mechanisms for the resolution of disputes, including mediation, arbitration, and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims."

Paragraph 5 of the Declaration calls on the State to strengthen both formal and informal mechanisms. Paragraph 7 amplifies this by referring to mediation, arbitration, and customary or indigenous practices.

The paragraph does not state that these informal mechanisms are an alternative to criminal justice or other processes. It merely refers to resolving disputes and facilitating conciliation. It remains open to the criminal laws of the jurisdiction in question to proceed with the prosecution of the alleged offence regardless of possible dispute resolution and conciliation between the offender and the victim. The drafting of the Ottawa version had been worded in a way that placed somewhat more emphasis on peaceful resolution of the matter as an alternative to criminal justice. (1)

The terms "mediation", "arbitration" and "conciliation" have at times been used almost interchangeably. "Arbitration" should be reserved for cases where the parties to a dispute agree to abide by the decision of a third party. It is a common term in commercial affairs, but rarely used in a criminal justice setting. The term was not used in the original Ottawa draft. It was added in the working paper prepared by the Secretariat for the Seventh United Nations

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(1) For example, art. VII(5) of the Ottawa draft noted that the State should facilitate peaceful, non-adjudicatory resolution of conflicts, while art. VII(6) called upon criminal justice authorities to inform victims of the option in seeking reparation of dealing with the matter through community means where available.

Congress. (1) It is unclear if this addition was made with reference to any specific examples of arbitration in criminal cases.

"Mediation" refers to a process where a third party assists the parties in the resolution of the dispute.

"Conciliation", finally, can be used for a process where the two parties themselves are actively engaged in the resolution of the dispute while the role of any third parties is primarily passive. In paragraph 7, however, conciliation is apparently used in a more general sense, that of a restoration of peaceful relations between the two parties.

At first sight, "customary justice" and "indigenous practices" would appear to refer to practices prevailing before the development of the criminal justice system. However, the reference should not be understood in such a limited sense. In practice, many disputes are being dealt with on a day-to-day basis through "customary justice and indigenous practices" within the framework of social relationships, for example within the family or at one's place of work. Furthermore, the institution of social courts in some socialist countries can be seen as a modern form of customary justice.

Paragraph 8. Restitution from the offender or responsible third parties

"8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights."

"Restitution" is used here in the sense of compensation from the offender (or a responsible third party) to the victim and not in the narrow sense of the return of illegally obtained property. In earlier drafts, the term "reparation" was used instead.

The responsibility of the perpetrator for "making good" is part of the legal tradition of all societies, and should be one of the basic elements of any attempts to aid the victim in his recovery.

The responsibility of third parties for the behaviour of the offender is to be determined by the jurisdiction in question. It may be understood as referring to the responsibility of guardians for their wards, or of employers for their agents. However, according to an informal conference room

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(1) A/CONF.121/6, p. 60, art. B(8).

paper submitted to the Seventh Congress, (1)

> "it is intended ... to take account of those cases where there is tort liability imposed on someone other than the offender, for example in the case where those responsible for a criminal's incarceration fail to exercise proper care and the criminal escapes and commits further crimes."

The Ottawa draft (art. IV(2)) was more specific in itemizing the types of losses for which restitution may be due. This list included loss of life, impairment of health, physical and mental pain and suffering, loss of liberty, loss of income, earning capacity and support, loss of or damage to property or deprivation of the use of movable and immovable property and other valuable assets (including intellectual property and artistic works), special damages (i.e. the expenses reasonably incurred by the victim as a result of the victimization; for example, medical, legal, transportation, funeral and burial expenses), and damage or injury to intangibles, such as loss of reputation.

The first form of restitution referred to in this paragraph is the return of property, which is the narrow sense of "restitution". The return of property would be the obvious form of restitution in cases of theft and similar offences.

The return of property is mentioned in the Declaration only in this connection. However, it might be noted that property stolen from the victim and seized from the accused may be held by the police as evidence for the duration of the trial, thus depriving the victim of its use for the time being. An early draft prepared by Irvin Waller had called for return of property upon recovery, or equitable compensation for loss of its use. (2) It may be argued that the requirement of minimizing inconvenience to the victim (art. 6(d)) can be read in a way that subsumes this point.

The problems that arise when the property is in the possession of a bona fide third party are not considered by the Declaration, although they had been dealt with at length in the Ottawa draft in the case of certain serious forms of abuse of power. (3) This has been left by the final version to the legislation of the jurisdiction in question.

The second mode of restitution is "payment for the harm or loss suffered". In distinction from the continuation of the

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(1) Commentary A/CONF.121/IPM/4/ADD.1, pp. 5-6. The example would be of doubtful validity in European countries; it is more understandable in the light of legal developments in the United States. See e.g. Karmen 1984, pp. 193-196.

(2) Draft dated 4 March 1983; point G3c.

(3) Art. IV(4) stated that such third parties shall be liable to return property "notwithstanding that they were bona fide purchasers for value without knowledge of the victim's interests".

paragraph ("reimbursement of expenses..."), this would cover for example loss of life, pain and suffering, impairment of health, loss of income, loss of earning capacity and support, and loss of liberty.

The paragraph next deals with "reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights." The expenses incurred as a result of the victimization would include medical, legal, transportation, funeral and burial expenses. The restoration of rights would include, for example, the restoration of a professional or business licence.

The reference to "fair restitution" is again subject to varying interpretation in different jurisdictions. These two words embody the essence of a separate paragraph in the Ottawa draft, IV(3): "In deciding on reparation, especially in criminal cases, the means and circumstances of the offender and the interests of justice should be considered." This paragraph had caused some discussion in Ottawa when it was suggested by the author. At the time, some Anglo-American lawyers objected that their civil law systems required full restitution regardless of the circumstances of the offender. The reference was dropped during the discussions at the Seventh United Nations Congress as unnecessary. (1)

Paragraph 9. Restitution as a sanction

"9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions."

This paragraph on restitution as a sanction was not to be found in the Ottawa draft. It was added by the Secretariat in the working paper prepared for the Congress. (2)

As noted in section 2.1., restitution has in some countries and to some extent been divorced from criminal proceedings. This paragraph clearly suggests that restitution might be reintroduced, or used more widely, in criminal proceedings.

What is unclear from the wording is whether or not the intention was for restitution to be made an independent sanction in criminal cases. Although the paragraph first calls for restitution as an option, it then states that this option should be "in addition to other criminal sanctions." It should be noted that even if the intention were indeed

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(1) The point was pressed at the Seventh Congress by the Norwegian delegation, which noted that it understood the words "where appropriate" in this paragraph to include, inter alia, due regard to the needs and circumstances of the offender. See the Report of the Seventh Congress, A/CONF.121/22, p. 159.

(2) A/CONF.121/6.

that restitution be an independent sanction the paragraph calls upon the States only to consider such an option. (1)

At the present few European countries provide for the possibility of restitution as the only sanction in criminal cases (see section 8). On the other hand, the criminal courts in several other European countries have the possibility of ordering the offender to pay restitution in addition to the main criminal sanction. (2)

Paragraph 10. Restitution for environmental offences

"10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community."

Environmental offences are one category of offences where the damage done, and thus also the scope of restitution, is very diffuse. The problem of determining what harm is so directly a result of the offence that it should be covered by restitution is a difficult one. This paragraph attempts to guide the development of law ("should include, as far as possible...") so that the scope of restitution is extended to include a wide range of expenses.

The terminology used here, in departure from that used in most other parts of the Declaration, is fairly unusual in law ("restoration of the environment", "reconstruction of the infrastructure" and "replacement of community facilities").

"Restoration of the environment" can be seen primarily as a reference to the natural environment. "Restoration" would include at least the removal of foreign substances (e.g., polluting substances) deposited in the environment by the offence and the reintroduction of plants and animals destroyed by the offence.

"Environment" need not refer only to the natural environment. The technological environment is part of the "infrastructure" that should be reconstructed as part of the restitution. Clearly, if the offence has led to the destruction of buildings or other material objects the offend

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(1) See section 8.3.1.

(2) The delegation from Norway observed at the Seventh United Nations Congress that it interpreted the words "in addition to other criminal sanctions" to mean that other criminal sanctions were available to the court and not that restitution should or must be used in addition to other criminal sanctions. Restitution might thus also be used as a true alternative to other criminal sanctions. Report of the Seventh Congress, A/CONF.121/22, p. 159.

er should be liable for their reconstruction.

The requirement for the "replacement of community facilities" involves the restoration of power, water and other services enjoyed by the victims before the offence.

An environmental offence may be so serious that the community cannot continue to exist in the same place. The air or water may be so polluted as to cause a danger to health, or this may seriously hamper the livelihood of a community dependant on its natural surroundings. In such cases, paragraph 10 suggests that the restitution includes the expenses of relocation.

Paragraph 11. Responsibility of the State for its officials or agents

"11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victim should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims."

Paragraph 2(3)(a) of the International Covenant on Civil and Political Rights (1) calls upon State Parties to the Covenant to undertake to ensure that violations of the Covenant are dealt with effectively notwithstanding that the violation has been committed by persons acting in an official capacity.

The question of the burden of proof is not dealt with in the present paragraph. It would appear that, as is normally the case in legal proceedings, the burden of proof is on the prosecution or the plaintiff to demonstrate that the officials or other agents in question had been acting in an official or quasi-official capacity. This may involve considerable difficulties in practice. It may be noted that art. IV(6) of the Ottawa draft had placed the burden of proof on the State in the case of certain forms of serious abuse of power. (2)

The case of State succession is dealt with in the second sentence of the paragraph, which places the responsibility for restitution on any successor State or government. In addition to the political problems of the new government

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(1) General Assembly resolution 2200 A (XXI).

(2) The paragraph in question stated that "Unless otherwise proven, employees or agents of the State shall ... be presumed to be acting in the usual course of their duties and within the scope of their actual or ostensible authority." However, it should be noted that the Ottawa draft placed responsibility on the State only for certain abuses of power, and not for all criminal acts or omissions.

acknowledging responsibility for acts committed by a predecessor government, there are the legal problems that arise should the predecessor government have declared a blanket amnesty for all acts committed on its behalf by its agents.

The reference here to national criminal laws, and not to "criminal laws operative within Member States", would appear to be an error of drafting, due in part to haste during the work at the Seventh United Nations Congress. It may be noted that at least in some federations, this reference would in effect restrict the concept to the most serious offences, which are generally dealt with on the federal level.

Paragraph 12. State compensation

"12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization."

This paragraph deals only with schemes of State compensation for crime damage. The reference to "other sources" covers not only third parties responsible for the behaviour of the offender (as noted in paragraph 8) but also insurance schemes and general social security or insurance programmes, to which an oblique reference was made in paragraph V(1) of the Ottawa draft.

Many social security and insurance schemes are also available to victims of crime. For example, where a State provides free or low-cost medical care, the cause of the injuries is generally not a decisive factor in determining who benefits from the scheme. However, some of the needs of victims of crime, such as for compensation for loss of earnings, are often not covered by these social schemes in full.

In distinction to the general paragraph defining harm (paragraph 1), this paragraph places three limitations on its coverage. It refers to significant bodily injury or impairment and to serious crimes. The limitation is intended to avoid the considerable costs of compensating victims of all offences, as well as the administrative difficulties involved in such wide coverage.

The reference to bodily injury or impairment limits the scope to offences against the person. Economic loss or "substantial impairment of fundamental rights" is not covered, even if these are caused by a violent offence against the person. Also, the paragraph does not call for compensation for emotional suffering, unless this is so severe as to be considered an impairment of mental health.

The reference to serious crimes, in turn, limits the scope to only certain offences against the person. Seriousness, of course, can be considered both in concrete and in abstract terms. A petty assault may, through an unforeseeable chain of events, lead to significant bodily injury. Taking the reference to significant bodily injury and impairment together with the reference to serious criminality would appear to suggest that the evaluation should be of the concrete act without regard to the legal category of the offence.

Trivial bodily injuries or impairments are not covered. Generally, State compensation schemes have a minimum loss requirement; losses under a specified sum will not be compensated. Some schemes also include the provision that the loss should be of relative seriousness to the victim; hospital expenses may seem enormous to some, while only a minor sum to others. The reference to "significant" can be interpreted to refer to both such absolute and relative amounts.

The paragraph does not define the harm for which financial compensation from the State should be made available. State compensation today generally provides financial awards for physical and mental injury, loss of income, rehabilitation, and funeral expenses. It generally does not cover pain and suffering and rarely if ever "the provision of services" (with the exception of medical services and rehabilitation) or "the restoration of rights" referred to in paragraph 8, even if the expenses incurred result from a serious crime of violence causing significant bodily injury or impairment.

The exhortation to establish State compensation schemes provides the States with considerable discretion. The phrase "should endeavour" was used in recognition of the fact that, for many States, such compensation schemes remain financially impracticable.

Paragraph 13. Compensation funds

"13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm."

The Ottawa draft called for the strengthening of international funds and gave as an example the United Nations Voluntary Fund for the Victims of Torture (art. V(4)). This phrasing was regarded as problematic at the Seventh United Nations Congress, if it were to be construed to imply that Member States have an obligation to contribute to such a fund. (1) Furthermore, it was noted that funds might exist

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(1) The delegation from the Union of Soviet Socialist Republics noted that the creation of such funds could

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also on the national and local level. It was therefore considered preferable to speak primarily of national funds, and merely state that other funds may be established where appropriate.

The Federal Republic of Germany is a notable example of a State which has established a special mechanism to assist the victims of crime, in this case the victims of National Socialist persecution. The establishment and administration of this mechanism, known as "Wiedergutmachung", has necessitated the solving of a considerable number of difficult legal and administrative problems. (1)

Paragraph 14. Social assistance

"14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means."

Paragraph 22 of the Universal Declaration of Human Rights states that everyone, as a member of society, has the right to social security. Paragraph 25 further states that everyone has the right to security in the event of lack of livelihood in circumstances beyond his control. (2)

Modern welfare societies provide a broad range of services to all citizens, regardless of the source of the need. The victim of crime may require public health and social services such as medical care and counselling, which are often provided by the State or the community. There has also been a considerable increase in voluntary services for special categories of victims, such as the victims of rape and domestic violence.

The use of the word "should" in a Declaration directed at Member States implies that the State should undertake a variety of measures, as appropriate. To state that the victims "should" receive assistance from voluntary and indigenous means cannot be regarded as a call for the State to ensure that such means are made available by volunteers or the indigenous community. Instead, it should be read as a call to the State to strengthen such means and encourage their development.

Voluntary, community based and indigenous means are generally flexible to the extent that they can often provide a more

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not be regarded as an international obligation imposed upon the State and that instead such funds should be based entirely on voluntary contributions. Report of the Seventh Congress, A/CONF.121/22, p. 159.

(1) See the report by Schwarz.

(2) General Assembly resolution 217 A (III).

comprehensive response to the needs of a victim than state services. These means may be able to provide a degree of compassion, care and individualized attention that government means at times cannot. However, the goals of these means may be in conflict with State policy. For example, feminist oriented shelters for the victims of domestic violence may be at odds with the government social policy of encouraging the integrity of the family unit.

Paragraph 15. Informing victims of health and social services

"15. Victims should be informed of the availability of health and social services and other relevant assistance, and be readily afforded access to them."

Paragraph 5 provides that victims should be informed of their rights in seeking redress through judicial and administrative mechanisms. To the extent that health and social services are part of the State administration this paragraph would also cover the exhortation provided by paragraph 15. However, in many countries such services are made available by community-based or voluntary-based sources and a separate provision on the matter is called for.

The agency that is in the best position to provide this information is the police. Furthermore, the need for such services is often most acute immediately after the offence, at the time when the police become involved.

This paragraph requires that victims be afforded ready access to this relevant assistance. As noted above in connection with paragraph 14, the Declaration is directed at Member States. To the extent that the services covered by paragraph 15 are granted by sources other than the State, the intention is presumably that the State strengthen the activity of such sources where possible.

Paragraph 16. Training

"16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid."

The purpose of this provision is self-evident. It has been suggested that the day-to-day routine of those working in the criminal justice system or in health and welfare services gradually lessens their awareness of the needs of victims. This may be due in part to the development of emotional detachment needed to avoid professional burnout, or, for example, to the fact that the personnel in question have priorities transcending the immediate emotional or other needs of victims. (1)

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(1) See e.g. Karmen, pp. 138-140 regarding the police.

Paragraph 17. Identification of special needs

"17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above."

Paragraph 3, the anti-discrimination clause, called for application of the provisions of the Declaration without distinction of any kind. Among the examples given of such prohibited distinctions are race, colour, age and sex.

Paragraph 17 calls for the favouring of those with special needs. Research has indicated that there are a variety of factors (such as low education, low-income housing, unemployment, alcohol and drug abuse) that are strongly correlated with victimization, even multiple victimization. Certain other factors (such as age and sex) may also create special needs. Special mention should be made here of victims of domestic abuse and sexual offences. The victims of such offences may have special problems in gaining access to justice or services, problems that might only be overcome by an "out-reach" service.

Section B. Victims of abuse of power

Paragraph 18. Definition of "victims of abuse of power"

"18. "Victims" means 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 do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights."

Section B of the Declaration, entitled "Victims of abuse of power" and incorporating paragraphs 18 - 21 is the result of the compromise reached during the Seventh United Nations Congress: although the Declaration as a whole deals with both victims of crime and victims of abuse of power, the main focus (in section A) is on the victims of crime.

The definition of "victims of abuse of power" is word for word the same as that of victims of crime, with the exception of the ending (beginning with "...that do not yet constitute ...").

The paragraph refers to acts or omissions that do not yet constitute violations of national criminal laws. This phrasing again reveals the haste of drafting at the Seventh United Nations Congress. The phrase "national criminal laws" is used instead of the phrase "criminal laws operative within Member States". It is submitted that the two phrases are intended to have the same material content.

The reference to acts or omissions that do not yet constitute violations of national criminal laws can be read in two ways. The first is that it merely notes that, although such violations in the abstract should be criminalized by the

State in question, the State has not yet done so. Nevertheless, such persons are "victims", and the State should consider proscription and remedies. The second reading would appear to raise the possibility that the concrete acts in question may be proscribed ex post facto.

To the extent that the proscription involves criminalization, the first reading would clearly be in accordance with the prohibition of retroactive criminal legislation (nulla poene sine lege). However, it should be emphasized that paragraph 18 deals with violations of internationally recognized norms relating to human rights. Paragraph 11(2) of the Universal Declaration of Human Rights (1) states that no one shall be held guilty of any penal offence on account of any act or omission that did not constitute a penal offence under national or international law at the time when it was committed.

A comparison of paragraph 18 with the definition in the Ottawa draft shows three deletions. One is a reference to crimes under international law (paragraph II(1)(b) of the Ottawa draft) and the second is a very general and lengthy attempt to incorporate within the scope of the Declaration victims of abuse by persons "beyond the reach of the law" (paragraph II(1)(d)(i)) (but see paragraph 21, below). The third was the attempt in the Ottawa draft to extend the concept of abuse of power beyond international criminal law and violations of human rights norms (paragraph II(1)(d)(ii)).

At a preparatory meeting organized by the Helsinki Institute it was noted that the latter formulation was unwieldy and nebulous in legal connections, while the concept "violation of internationally recognized human rights" is suitable and workable also in legal connections. (2) The separate reference to violations of international law was deleted, apparently on the basis of the view that it is subsumed by "violation of internationally recognized human rights", at least in respect of serious abuses of power. At the Congress, serious doubts were also raised about the existence of international criminal law.

An "internationally recognized norm" is one contained in instruments such as treaties, resolutions, guidelines, standards, principles or rules adopted within the United Nations framework or, exceptionally, in other international or regional instruments, such as those adopted within the frame-

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(1) General Assembly resolution 217 A (III). Furthermore, article 15(2) of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI)) states that nothing in said article 15 shall prejudice the trial and punishment of any person for an act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

(2) HEUNI 6, p. 11.

work of the Council of Europe, the Organization of African Unity, or the Organization of American States. (1)

Specific reference had been made in earlier drafts to the Universal Declaration of Human Rights. Other important United Nations instruments in this regard are the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

Examples of violations of the internationally recognized norms referred to are slavery, apartheid, piracy, genocide, torture and extrajudicial executions.

Paragraph 19. Criminalization of abuse of power

"19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support."

Throughout the Declaration, with the exception of paragraphs 19 and 20, the word "should" is used, as an exhortation to Member States to undertake various measures. In these two paragraphs, however, a less demanding phrase is used: "should consider".

The use of "should consider" leaves the interpretation of what abuses should be criminalized to the interpretation of the State in question. According to Lamborn (2)

> "States could in good faith comply with their moral responsibilities under the proposed Declaration and yet reach somewhat differing results, there being no exhortation to define any particular conduct as criminal. States would be urged only to examine their laws and fill in gaps perceived in light of the provisions of the Universal Declaration and the findings of other States and the General Assembly."

Even so, this paragraph is an important one from the point of view of the potential victim of abuse of power. As long as the abuse of power in question does not involve a criminal act or omission, the access to justice and services covered in paragraphs 1-17 of the Declaration remain closed to the victim (unless the State has programmes extending to persons other than crime victims). It is only through the criminalization of the abuse that these channels are open.

The paragraph calls upon the States to consider the incorporation of norms "proscribing ... and providing remedies

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(1) Informal conference room paper entitled "Commentary A/CONF. 121/IPM/4/ADD.1", p. 3.

(2) Lamborn 1985b, p. 16.

...". This can be understood as an exhortation to consider the criminalization or other proscription of the abuses of power in question, and through this (in accordance with paragraphs 1-17) providing remedies. However, the specification of various remedies would appear to indicate that the States should consider the providing of these remedies even if (and indeed, especially if) the abuse is not criminalized.

The paragraph refers to "national law norms" and not, as did paragraph 1, "laws operative within Member States". This would again appear to be a result of hasty drafting; the incorporation in question might well take place in the laws of the member states of federations, for example.

Paragraph 20. Treaties on abuse of power

"20. States should consider negotiating multilateral international treaties relating to victims as defined in paragraph 18."

Many victimizations involving the abuse of power have international ramifications. They may be committed by persons in one nation against victims in a second nation; such victimization is often economic in nature.

Victimization may also take place on a nation-wide scale. The State in question may be powerless or reluctant to intervene in such victimization. The State may, indeed, be the victimizing party. The negotiation of (and accession to) multilateral international treaties may encourage the State in question to step in to assist the victims of such abuses.

Paragraph 21. State responsiveness to new forms of abuse of power

"21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts."

This paragraph has three main elements. First, it exhorts ("should ... review", and not "should consider reviewing") States to ensure that their legislation and practice takes due consideration of new forms of abuse, and possible new categories of victims and victim needs. Second, it covers the category of "serious abuses of political or economic power". This coverage is to the extent that such serious abuses are not criminal (paragraph 1) or violations of internationally recognized human rights norms (paragraph 18). Third, it raises for the first time in the body of the Declaration the issue of prevention.

In the working paper on abuse of power, prepared for the Sixth United Nations Congress, a twofold process was outlined for the review and possible revisions of legislation. This involved a partial decriminalization of less serious offences and a clearer focus on serious acts resulting in significant harm to the community. (1)

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(1) A/CONF.87/16, para. 56.

ANNEX 3

RECOMMENDATION No. R(85)11 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE POSITION OF THE VICTIM IN THE FRAMEWORK OF CRIMINAL LAW AND PROCEDURE

Adopted by the Committee of Ministers on 28 June 1985

The Committee of Ministers, in accordance with Article 15.b of the Statute of the Council of Europe,

Considering that the objectives of the criminal justice system have traditionally been expressed in terms which primarily concern the relationship between the state and the offender;

Considering that consequently the operation of this system has sometimes tended to add to rather than to diminish the problems of the victim;

Considering that it must be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim;

Considering that it is also important to enhance the confidence of the victim in criminal justice and to encourage his co-operation, especially in his capacity as a witness;

Considering that, to these ends, it is necessary to have more regard in the criminal justice system to the physical, psychological, material and social harm suffered by the victim, and to consider what steps are desirable to satisfy his needs in these respects;

Considering that measures to ths end need not necessarily conflict with other objectives of criminal law and procedure, such as the reinforcement of social norms and the rehabilitation of offenders, but may in fact assist in their achievement and in an eventual reconciliation between the victim and the offender;

Considering that the needs and interests of the victim should be taken into account to a greater degree, throughout all stages of the criminal justice process;

Having regard to the European Convention on the compensation of victims of violent crimes,

I. Recommends that the governments of member states review their legislation and practice according to the following guidelines:

A. At the police level

1. Police officers should be trained to deal with victims in a sympathetic, constructive and reassuring manner;

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

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

4. In any report to the prosecuting authorities the police should give as clear and complete a statement as possible on the injuries and losses suffered by the victim;

B. In respect of prosecution

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

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

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

C. Questioning of the victim

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

D. Court proceedings

9. The victim should be informed of:
- the date and place of a hearing concerning an offence which caused him suffering;
- his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice;
- how he can find out the outcome of the case;

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

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

12. All relevant information concerning the injuries and losses suffered by the victim should be made available to the court that it may, when deciding upon the form and the quantum of the sentence, take into account:
- the victim's need for compensation;
- any compensation or restitution made by the offender or any genuine effort to that end.

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

E. At the enforcement stage

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

F. Protection of privacy

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

G. Special protection of the victim

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

II. Recommends the governments of member states:

1. to examine the possible advantages of mediation and conciliation schemes;

2. to promote and encourage research on the efficacy of provisions affecting victims.

ANNEX 4

A schematical comparison of the provisions of Part A of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and Recommendation No. R(85) 11 of the Council of Europe

Note: in general, the Council of Europe guidelines noted below are phrased more specifically than the Declaration guidelines. Thus, none of the corresponding provisions overlap entirely.

Declaration paragraph	Recommendation guideline	Section in present study
1 - 3 (definition)	(no counterpart)	(1.4.2.)
4 (general treatment and entitlements)	(preamble)	(passim)
	8 (in re questioning)	
5 (mechanisms and informing victims of rights)	2 (information by police)	7.2.
	7 (right of review of prosecutorial decision)	7.3.3.
	14 (enforcement)	7.6
6a (informing victims of proceedings and disposition)	3 (in re investigations)	7.2.
	6 (in re prosecutorial decision)	7.2.
	9 (in re trial)	7.2.
6b (views and concerns of victim)	(no immediate counterpart. However, note 4, on police statement in re injuries and losses; and 12, in re providing the court with such information)	7.3.
6c (proper assistance)	(no counterpart)	7.4.
6d (privacy, safety)	15 (privacy)	7.5.
	16 (safety)	7.5.
6e (in re delay)	(no counterpart)	7.6.
7 (informal mechanisms)	II(1)	5.2.
8 (restitution)	(no counterpart, but see 5, 12 and 13 on restitution)	8.2.
9 (restitution as a sanction)	10 and 11 (court-ordered restitution)	8.2.

Declaration paragraph	Recommendation guideline	Section in present study
10 (restitution for environmental offences)	(no counterpart)	8.2.
11 (State responsibility for restitution)	(no counterpart)	8.2.
12 (State compensation)	(separate recommendation)	9.
13 (victim funds)	(no counterpart)	(9.6.)
14 (assistance)	(no counterpart*)	5.6.
15 (informing victims of forms of assistance)	(no counterpart*)	5.6.
16 (training)	1 (police training*)	5.6.
17 (victims with special needs)	(no counterpart*)	5.6.

* the issue of social services for victims is currently being dealt with by a Select Committee of experts in the Council of Europe

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