

September 2020

BREAKING DOWN BARRIERS

ACCESS TO JUSTICE IN EUROPE FOR
VICTIMS OF INTERNATIONAL CRIMES

fidh



REDRESS

Ending torture, seeking justice for survivors



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More than 100 000 people have been detained in Syria since March 2011, many of them disappeared by Bashar al-Assad's regime. Among them was Mansour Omari, a journalist and human rights defender who had documented cases of enforced disappearance and other human rights violations during the Syrian Uprising. In 2012, Mansour was arbitrarily detained by Syrian intelligence in a secret military prison in Damascus. Together with four of his fellow detainees, Mansour recorded the names and contact details of 82 of their cellmates on pieces of fabric using ink made from their blood and rust.

When Mansour was released after a year in detention, he left the prison with the pieces of fabric sewn into the cuffs and collar of his shirt. Using the information recorded on the cloth, he began contacting the families to inform them of the whereabouts of their loved ones. Mansour was able to escape from Syria to Lebanon and was later resettled by UNHCR in Europe, where he has built a life in exile. However, other detainees have died in detention and the fate of many remains unknown. Mansour hopes that this record of his fellow detainees may contribute to efforts to hold the Syrian regime accountable for their crimes.

"I thought of trying to find some way to document all the names without the possibility they would be forgotten. When we were writing them, to me it was a matter of just recording names and contacts to allow us to inform their families later. But when I was released and took the list with me, my relationship with it began to evolve. It's not just words or letters anymore—in my mind, those are pieces of their souls."

In 2019, the pieces of fabric were presented to the Swedish War Crimes Unit as evidence in support of a criminal complaint filed against 25 high-ranking Syrian intelligence officials by Mansour and eight other torture survivors. As Mansour explains, "the list of names on the cloth is alive and is still revealing the crimes of the Assad regime". To learn more about Mansour's journey and the exhibition *Syria: Please Don't Forget Us*, visit www.ushmm.org where you can also find information about the documentary film *82 Names: Syria, Please Don't Forget Us* (2018).

Cover photograph © United States Holocaust Memorial Museum 2018

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	5
ACRONYMS	8
I. INTRODUCTION	11
II. BACKGROUND.....	12
The Rise in Extra-Territorial Proceedings Concerning Serious International Crimes	12
Increasing Regional and International Coordination in the Fight against Impunity	13
Recognising Victims as the Key to Any Viable Investigation or Prosecution of Serious International Crimes	14
III. VICTIMS' RIGHTS UNDER THE DIRECTIVE AND HUMAN RIGHTS LAW	16
Victims' Rights under Human Rights Law	16
The EU Victims' Rights Directive	17
Jurisdiction Over Serious International Crimes	21
COUNTRY CHAPTERS.....	22
Role of Victims in Criminal Proceedings	24
IV. BELGIUM.....	25
Framework for Investigation and Prosecution of International Crimes	26
Overview of Recent International Crimes Cases in Belgium	29
Framework for Victims' Rights	31
Conclusion	42
V. FRANCE	45
Framework for Investigation and Prosecution of International Crimes	46
Overview of Recent International Crimes Cases in France	48
Framework for Victims' Rights	50
Conclusion	59
VI. GERMANY	61
Framework for Investigation and Prosecution of International Crimes	62
Overview of Recent International Crimes Cases in Germany	65
Framework for Victims' Rights	66
Conclusion	76

TABLE OF CONTENTS

VII. THE NETHERLANDS	77
Framework for Investigation and Prosecution of International Crimes	78
Overview of Recent International Crimes Cases in The Netherlands	80
Framework for Victims' Rights	82
Conclusion	90
VIII. SWEDEN	91
Framework for Investigation and Prosecution of International Crimes	92
Overview of Recent International Crimes Cases in Sweden.....	94
Framework for Victims' Rights	96
Conclusion	103
IX. COMMON CHALLENGES, EMERGING BEST PRACTICES AND RECOMMENDATIONS...	105
Applicability of the Victims' Rights Directive with respect to Victims of Serious International Crimes	106
Right to Review of Decisions Not to Prosecute	110
Role of the Victim in Criminal Proceedings	111
Access to Information to Enable the Exercise of Victims' Rights	112
Providing Updates on Proceedings and Facilitating Effective Participation	116
Support Services.....	119
Protection Measures	120
Right to Compensation	126
Recommendations to the European Union	128
ANNEX – LIST OF INTERVIEWS.....	131



Gisozi Genocide Memorial
Site, Rwanda © AFP/Eric
Lafforgue 2010

EXECUTIVE SUMMARY

IN THE past decade, six million individuals have sought asylum in the EU, many of them victims of serious international crimes (that is, war crimes, crimes against humanity, genocide, torture and enforced disappearance).

However, among those fleeing mass atrocity and persecution are a small but significant number of perpetrators of international crimes, hoping to escape justice. In addition, EU Member States are increasingly faced with cases of their own nationals' complicity in such crimes (including in the course of their business activities or as so-called foreign fighters). In light of this situation, Member States have established jurisdiction over serious international crimes and have created **specialised units** to identify, investigate and prosecute potential perpetrators.

The EU has also made the **fight against impunity** for international crimes one of its priorities. In recent years, the mandates of both Eurojust and Europol have been extended to improve cooperation and coordination in this area (most notably with respect to crimes committed in Syria). At the same time, the EU has committed to **improving the position of all victims** within the EU, in particular through its Directive on minimum standards for the rights, support and protection of victims of crime (hereinafter the **Victims' Rights Directive** or **Directive**).

This Report examines the extent to which the specialised units within the EU that investigate and prosecute serious international crimes uphold EU standards on victims' rights. It is based on research conducted between 2019 and 2020, including approximately 140 interviews with practitioners and policy makers in five Member States—Belgium, France, Germany, the Netherlands and Sweden. The Report includes five **country chapters** that examine the law and practice in these countries as well as an analysis of **common challenges and emerging best practices**.

The conclusion we have reached is unequivocal: while substantial progress has been made in recent years, victims of serious international crimes continue to face significant legal and practical barriers that limit the exercise of their rights. Many of these barriers stem from the inherent difficulties in investigating and prosecuting such crimes at the domestic level. For example:

- Many victims are unaware of the possibility to report serious international crimes to national authorities. Moreover, the complex legal framework that applies to such cases means victims can only exercise their rights effectively with the support of a lawyer and/or a specialised NGO.
- Some victims (or their family members) continue to live in conflict areas or situations of ongoing insecurity and are therefore hesitant to cooperate in investigations due to the real risk of reprisal. For Member States to provide any protection in such circumstances is both challenging and costly.
- Requiring victims who have suffered severe trauma to revisit traumatic events carries a high risk of secondary victimisation. Yet general victim support services are not equipped to provide the support such victims need and the few organisations that provide the necessary specialised support cannot meet the current demand.
- Facilitating participation in criminal proceedings for large numbers of victims who are geographically dispersed and who do not necessarily speak the language in which proceedings are conducted is often beyond the capacity of national authorities.

On the other hand, a number of barriers to victims accessing justice stem from **failures by EU Member States to implement their obligations under international law** (in particular, their obligations to criminalise serious international crimes in their domestic laws and establish jurisdiction over them). For example, several of the countries under review have yet to criminalise torture and enforced disappearance as stand-alone crimes. In addition, some severely restrict the circumstances in which their domestic authorities can investigate or prosecute crimes committed abroad. These factors both inhibit the ability of those Member States to contribute to the fight against impunity and prevent victims from seeking redress.

Similarly, several barriers to victims accessing justice are the result of **specific policy decisions to restrict access to certain rights** based on the residence or nationality of the victim or the nature of the crime itself. In particular, the political sensitivities surrounding international crimes cases have led some countries to deliberately curtail the possibilities for victims to initiate criminal proceedings or to seek review of decisions not to prosecute. In addition, access to legal aid is often limited and strict eligibility criteria effectively exclude victims of international crimes committed abroad from obtaining State-funded compensation.

Nevertheless, our research has identified **emerging best practices** that improve victims' access to information, support and protection. The creation, professionalisation and increased resources dedicated to the specialised units are leading to measurable improvements in their capacity to investigate and prosecute serious international crimes. Enhanced **training, expertise and gender balance** within the units are also generating advances in the conduct of witness interviews. The specialised units are more proactive in their engagement with the media, civil society and diaspora communities and are increasingly participating in **outreach**

activities to raise awareness about their work. Some of the units have also made considerable efforts to inform victims and affected communities of the **results of investigations or the outcome of proceedings** through publication of press releases in multiple languages, translation of judgments and use of social media. Finally, the opening of **structural investigations** into largescale crimes as well as anticipatory investigations to **collect and preserve evidence** for use before other jurisdictions is beginning to bear fruit.

While we welcome these advances, more must be done to ensure victims of serious international crimes can exercise their rights under the Victims' Rights Directive and under international human rights law. In some cases, this will require **legislative change** to bring criminal procedural laws into compliance with the Directive (particularly with respect to protection against secondary victimisation). The majority, however, require that Member States match their commitment to the fight against impunity with a similar **commitment to victims' established rights to truth, justice and reparation**.

We recommend to EU Member States: that victims be properly recognised as such, without discrimination based on residence or nationality, and regardless of whether the Member State in question has jurisdiction to investigate or prosecute the offender; that greater attention be given to providing victims with information about their rights in a manner that is specifically adapted to their needs; that victims' effective participation in criminal proceedings be supported by improved access to legal representation and robust victim-oriented communication strategies; that access to specialist support services (including rehabilitation measures and psychosocial support) for all victims be improved; that psychological screening be employed prior to interviews with particularly vulnerable victims or witnesses; and that Member States identify and apply measures to assist victims in enforcing compensation awards against offenders.

We recommend that the EU: reaffirm its commitment to the fight against impunity for serious international crimes and to ensuring victims' rights within the field of Justice and Home Affairs; integrate measures to improve the position of victims of serious international crimes into its **Victims' Rights Strategy**; ensure consistency and coherence of its internal and external policies in this field and increase engagement by key EU institutions; foster greater cooperation at the regional and international levels, including through support for the adoption of a new multilateral treaty on extradition and mutual legal assistance for serious international crimes (the so-called MLA Initiative); and support training and capacity-building initiatives to raise awareness surrounding victims' rights.



Suicide car bombing in Sirte, Libya
© ICRC/Ricardo Garcia Vilanova 2016

ACRONYMS

AFP	Agence France-Presse	DROI	Subcommittee on Human Rights of the European Parliament
AP CIC	Europol's Analysis Project for Core International Crimes	EASO	European Asylum Support Office
BAfF	German Federal Association of Psychosocial Centres for Refugees and Victims of Torture (<i>Bundesweite Arbeitsgemeinschaft Psychosozialer Zentren für Flüchtlinge und Folteropfer e.V.</i>)	ECCHR	European Center for Constitutional and Human Rights
BAMF	German Migration Authority (<i>Bundesamt für Migration und Flüchtlinge</i>)	ECtHR	European Court of Human Rights
BAKA	German Federal Criminal Police (<i>Bundeskriminalamt</i>)	EEAS	European External Action Service
BMJV	German Federal Ministry of Justice and Consumer Protection (<i>Bundesministerium der Justiz und für Verbraucherschutz</i>)	EU	European Union
BrB	Swedish Criminal Code (<i>Brottsbalken</i>)	FDLR	Democratic Liberation Forces of Rwanda (<i>Forces démocratiques de libération du Rwanda</i>)
CCP	Dutch Code of Criminal Procedure (<i>Wetboek van Strafvordering</i>)	FGTI	French Guarantee Fund for Victims of Terrorist and Other Criminal Acts (<i>Fonds de Garantie des Victimes des actes de Terrorisme et d'autres Infractions</i>)
CED	International Convention for the Protection of All Persons from Enforced Disappearance	FIDH	International Federation for Human Rights (<i>Fédération internationale pour les droits humains</i>)
CIC	Belgian Criminal Investigation Code (<i>Code d'instruction criminelle</i>)	FRA	European Union Agency for Fundamental Rights
CIVI	French Crime Victims Compensation Commission (<i>Commission d'indemnisation des victimes d'infractions</i>)	GBA	German Federal Prosecutor General (<i>Generalbundesanwalt</i>)
CJIB	Dutch Central Fine Collection Agency (<i>Centraal Justitieel Incassobureau</i>)	GVG	German Courts Constitution Act (<i>Gerichtsverfassungsgesetz</i>)
CP	Belgian/French Criminal Code (<i>Code pénal</i>)	ICA	Dutch International Crimes Act (<i>Wet Internationale Misdrijven</i>)
CPCR	French Collective of Civil Parties for Rwanda (<i>Collectif des parties civiles pour le Rwanda</i>)	ICC	International Criminal Court
CPP	French Code of Criminal Procedure (<i>Code de procédure pénale</i>)	ICRC	International Committee of the Red Cross
CRD	Civil Rights Defenders	IHL	International humanitarian law
DIIV	French Inter-Ministerial Delegation on Victims' Assistance (<i>Délégation interministérielle à l'aide aux victimes</i>)	IND	Dutch Immigration and Naturalisation Service (<i>Immigratie- en Naturalisatiedienst</i>)
DRC	Democratic Republic of Congo	ISIL	Islamic State of Iraq and the Levant or Da'esh
		JHA	Justice and Home Affairs
		LDH	Belgian League of Human Rights (<i>Ligue des droits humains belge</i>)
		LIBE	Committee on Civil Liberties, Justice and Home Affairs of the European Parliament

MLA	Mutual legal assistance	StGB	German Criminal Code (<i>Strafgesetzbuch</i>)
NGO	Non-governmental organisation	StPO	German Criminal Procedure Code (<i>Strafprozeßordnung</i>)
OCLCH	French Central Office for Combating Crimes against Humanity, Genocide and War Crimes (<i>Office central de lutte contre les crimes contre l'humanité, les génocides et les crimes de guerre</i>)	TIM	Dutch International Crimes Team (<i>Team Internationale Misdrijven</i>)
OEG	German Crime Victims Compensation Act (<i>Opferentschädigungsgesetz</i>)	TPCPP	Belgian Preliminary Chapter of the Code of Criminal Procedure (<i>Titre préliminaire du Code de procédure pénale</i>)
OFPRA	French Office for the Protection of Refugees and Stateless Persons (<i>Office français de protection des réfugiés et apatrides</i>)	UN	United Nations
OSL	Swedish Public Access to Information and Secrecy Act (<i>Offentlighets- och sekretesslag</i>)	UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Pôle	French Crimes against Humanity and War Crimes Unit (<i>Pôle crimes contre l'humanité, crimes et délits de guerre</i>)	UNHCR	United Nations Refugee Agency
PNAT	French National Anti-Terrorism Unit (<i>Parquet national anti-terroriste</i>)	VOCIARE	VSE's Victims of Crime Implementation Analysis of Rights in Europe Project
PsychPbG	German Law on Psychosocial Trial Support in Criminal Procedure (<i>Gesetz über die psychosoziale Prozessbegleitung im Strafverfahren</i>)	VSE	Victim Support Europe
RB	Swedish Code of Judicial Procedure (<i>Rättegångsbalk</i>)	VStGB	German Code for Crimes against International Law (<i>Völkerstrafgesetzbuch</i>)
RiStBV	German Guidelines for Criminal and Administrative Fine Proceedings (<i>Richtlinien für das Strafverfahren und das Bußgeldverfahren</i>)	VWSU	Victim and Witness Support Unit of the Rwandan National Public Prosecution Authority
SARVI	French Crime Victims' Compensation Recovery Assistance Service (<i>Service d'aide au recouvrement des victimes d'infractions</i>)	WWII	World War II
SCM	Syrian Center for Media and Freedom of Expression	ZBKV	German Central Unit for the Fight against War Crimes and Further Offenses pursuant to the Code of Crimes against International Law (<i>Zentralstelle für die Bekämpfung von Kriegsverbrechen</i>)
SGB XIV	German Social Compensation Code (<i>Sozialgesetzbuch Vierzehntes Buch</i>)		
SLN	Syria Legal Network-NL		
SPF	Belgian Federal Public Service (<i>Service Public Fédéral</i>)		



I. INTRODUCTION

THIS REPORT was researched and written by Dr Sarah Finnin of the International Federation for Human Rights (FIDH). It is the culmination of a joint project between FIDH, the European Center for Constitutional and Human Rights (ECCHR) and REDRESS aimed at improving access to justice for victims of serious international crimes in Europe.

The focus of this Report is victims of serious international crimes—namely genocide, crimes against humanity, war crimes, torture and enforced disappearance—who are engaged in investigations and prosecutions before the domestic courts of European Union (EU) Member States. It examines the extent to which those victims can benefit from EU standards on victims’ rights and aims to improve their access to justice.

Our conclusions are based on research conducted throughout 2019 and 2020, including fact-finding missions to Belgium, France, Germany, the Netherlands and Sweden. These five countries were selected as they are amongst the most active in investigating and prosecuting international crimes in Europe. In addition, their different legal traditions and practices presented an opportunity to examine a variety of approaches to implementing EU standards on victims’ rights. Over the course of this research, FIDH conducted in-person or phone interviews with approximately 140 individuals (see [Annex](#)), including: police and prosecutors from specialised units; investigative, trial and appellate judges; immigration and asylum officials; national policy makers, including representatives of national ministries of justice and foreign affairs; national compensation authorities; EU institutions; victims’ lawyers; representatives of victim support services, psychologists and clinical experts specialised in severe trauma; civil society; academics; and victims’ associations. A number of victims were also interviewed, including complainants in recent investigations and prosecutions concerning Syria.

The Report also relies on the results of a practitioner workshop held in The Hague in November 2019 with the support of Eurojust and the EU Genocide Network. The workshop brought together approximately 90 practitioners from across the EU, as well as members of civil society and regional and international institutions working in the field of victims’ rights and international

justice. Finally, the Report draws on the experiences of FIDH, ECCHR and REDRESS in working to realise the rights of victims of serious international crimes (including providing legal and other forms of support to victims in a number of past and recent trials).

The first part of this Report (**Chapters II and III**) sets out the **general context** in which investigations and prosecutions of serious international crimes take place in Europe (including the rise in such cases, the increase in regional and international cooperation, the role played by victims and the scope of victims’ rights). The second part (**Chapters IV to VIII**) comprises the **country chapters** examining the law and practice in each of our five target countries. Finally, **Chapter IX** examines **common challenges and emerging best practices** across these countries and includes **recommendations** to the EU and its Member States to improve victims’ access to justice.

Individuals who were interviewed during our consultations or who participated in our practitioner workshop have been given the opportunity to review any citations or quotations prior to publication. Nevertheless, the contents of this Report are the sole responsibility of FIDH, ECCHR and REDRESS and can in no way be taken to reflect the views of the interviewees, the European Commission nor any other organisation.

We are grateful to all those who gave their valuable time throughout the consultations and to the entire staff of FIDH, ECCHR and REDRESS for their support. In addition, we wish to thank Christophe Deprez, Melissa Eichhorn, Richard Korver and Julia Tétrault-Provencher for their research assistance and advice and for reviewing drafts of the Report. We are particularly indebted to Aida Samani of Civil Rights Defenders (CRD) for both arranging and participating in our consultations in Sweden and to Eugénie De Norre for participating in our consultations in France and Belgium. Finally, we are grateful to the EU’s Justice Programme for funding this project.

II. BACKGROUND

THE RISE IN EXTRA-TERRITORIAL PROCEEDINGS CONCERNING SERIOUS INTERNATIONAL CRIMES

In recent decades, the EU has been faced with an increasing number of migrants fleeing conflict, political turmoil, mass atrocity, persecution and economic hardship. This rise in migration is creating economic, political and humanitarian challenges that have not been seen since the aftermath of World War II (WWII). Some arrive by regular migration routes or resettlement facilitated by the United Nations Refugee Agency (UNHCR). Others—including vulnerable individuals, families and unaccompanied minors—arrive at the EU's borders every day after making the perilous journey across the Mediterranean. Almost 6 million individuals have sought asylum in Europe in the past decade, with 676 250 applications in 2019 alone.¹

Many of those seeking asylum are escaping protracted conflicts and humanitarian crises in Syria and Afghanistan, a resurgence in violence in Iraq and the oppressive dictatorship in Eritrea. Civilians have also been forced to flee ongoing conflicts and political crises in countries such as Venezuela, Colombia, Georgia, Nigeria, Iran and Somalia. In addition, numerous initiatives enable refugees to study in the EU and provide for protection and therapeutic assistance, especially to women and children. For example, the EU has welcomed a significant number of Yazidi refugees, with the largest Yazidi diaspora community now residing in Germany.² A number of these refugees—like those who fled the genocide in Rwanda, the break-up of the former Yugoslavia, the communist regime in Afghanistan and military dictatorships in Chile and other Latin American countries—are searching for justice.

Amongst the persons who enter Europe and seek asylum are a small but significant number of perpetrators. In 2003, the Council of the EU acknowledged this trend, noting that Member States were being confronted on a regular basis with perpetrators of serious international crimes “who are trying to enter and reside in the European Union”.³ These individuals hope to exploit weaknesses in the authorities’ ability to detect them and thereby enjoy impunity for their crimes. In addition, many perpetrators travel to the EU while under the shield of diplomatic immunity. Yet others come to seek medical treatment or to visit family members. Some hold significant assets in EU Member States. For example, family members of Congolese President Denis Sassou-Nguesso—allegedly responsible for the enforced disappearance of more than 350 individuals in Congo-Brazzaville in May 1999, known as the “Disappeared of the Beach” case—are suspected of misappropriation of public funds and money laundering.⁴

In addition to foreign victims, witnesses and perpetrators, EU Member States are increasingly confronted with cases of their own nationals committing international crimes while fighting in conflicts in Syria, Iraq or elsewhere.⁵ An increasing number of businessmen and companies based in or operating out of EU Member States are also being investigated for alleged involvement in international crimes, such as Lundin Petroleum in Sweden, Argor-Heraeus SA in Switzerland, as well as BNP Paribas, Amesys and Lafarge in France. EU Member States have themselves faced allegations of complicity in international crimes (including Belgian officials with respect to the assassination of Congolese Prime Minister Patrice Lumumba in 1961, the French Army with respect to the 1994 Rwandan genocide as well as Poland, Lithuania and Romania for hosting torture black sites). International crimes have also been committed on EU Member States’ territory, in particular during WWII. For

1 Eurostat, *Asylum Statistics* (2020) available at <https://ec.europa.eu/eurostat/>.

2 For example, the German state of Baden-Württemberg accepted more than 1000 vulnerable refugees from northern Iraq (mostly women and children) under a humanitarian admissions program in 2015. See e.g. Jennifer Hillebrecht, Tina Zeiss and Jürgen Bengel, “Psychological and Organizational Aspects of Migration of a Special Group of Refugees: The Example of the Special Quota Project Baden-Wuerttemberg with Yazidi Women and Children in Freiburg” in Helmut Kury and Slawomir Redo (eds), *Refugees and Migrants in Law and Policy: Challenges and Opportunities for Global Civic Education* (2018), p.355.

3 Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes (**Council Decision on International Crimes**).

4 See e.g. Global Witness, “Sassou-Nguesso’s Laundromat: A Congolese State Affair Part II” (6 August 2019), available at <https://www.globalwitness.org>.

5 Eurojust, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-related Offences* (May 2020).



example, EU Member States played a key role in the investigation and prosecution of WWII atrocities (both in the European and Pacific theatres).⁶

As a result of this trend, and in accordance with their obligations under statutory and customary international law, many EU Member States have incorporated serious international crimes—namely **genocide, crimes against humanity, war crimes, torture and enforced disappearance**—into their domestic criminal codes. In addition, many have established extra-territorial jurisdiction over such crimes to enable investigations and prosecutions of perpetrators before their own courts, even where the crimes were committed abroad.

Some EU Member States have also created **specialised units** within their police and prosecution services with responsibility for identifying, investigating and prosecuting perpetrators of international crimes that may be within their jurisdiction.⁷ While victims (and the NGOs supporting them) continue to represent the driving force behind most investigations, an increasing number of cases are now being initiated within the specialised units themselves. Many are the result of referrals by immigration and asylum authorities applying the Article 1F exclusion clause of the Refugees Convention.⁸ As one prosecutor explained during our consultations:

“Most of our cases concern people who have found refuge in Europe. The evolution of geopolitics, the influx of migrants and the ease with which people and information now travel mean that their past will eventually catch up with them, no matter where they try to hide.”⁹

As a consequence, the number of international crimes cases being investigated by Member States rose by a third between 2016 and 2019, making a total of 2943 cases as of May 2019.¹⁰

INCREASING REGIONAL AND INTERNATIONAL COORDINATION IN THE FIGHT AGAINST IMPUNITY

In addition to the marked increase in domestic investigations and prosecutions of serious international crimes, there is also an increasing trend in the initiation of so-called structural investigations into largescale crimes. These investigations—which do not depend on an accused being identified or present on the territory of the country conducting the investigation—allow specialised units to gather and preserve evidence available to them in a proactive manner. Such evidence can then be shared with other national or international jurisdictions. The emergence of structural

⁶ In addition to the trials which occurred in the immediate aftermath of WWII, specialised units were established decades later in some countries to pursue those who had escaped justice. Most have since been disbanded. These early efforts to bring accountability for international crimes are not the focus of this Report. For more information on early practice, see e.g. REDRESS and FIDH, *Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units* (December 2010).

⁷ See Council Decision on International Crimes, art.4.

⁸ Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), art.1F (**Refugees Convention**). Article 1F excludes application of the Refugees Convention where there are serious reasons for considering a person has committed a serious international crime. Exclusion on this basis is also required under Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection (**EU Qualification Directive**).

⁹ Interview with Belgian Federal Prosecutor (15 May 2019).

¹⁰ Eurojust, “Genocide and War Crimes Cases rise by 1/3 in the EU in 3 Years” (23 May 2019), available at <http://www.eurojust.europa.eu/press/PressReleases/Pages/2019/2019-05-23.aspx>.

investigations has also led to greater coordination between the specialised units, as evidenced by the establishment of a Joint Investigation Team between Germany and France to investigate crimes committed by the Syrian regime.

The EU has itself taken a number of steps to promote the fight against impunity and to support Member States in their efforts to hold perpetrators to account. They include establishing the EU Genocide Network hosted by Eurojust as the world's only permanent mechanism specifically designed to facilitate cooperation and coordination in the investigation and prosecution of serious international crimes.¹¹ The mandates of Eurojust and Europol have also been extended to further improve cooperation and coordination in this area.¹² As a result, Europol has established an Analysis Project for Core International Crimes (AP CIC) to help identify and investigate perpetrators of such crimes.¹³ Equally, the EU promotes human rights, the rule of law and transitional justice mechanisms in the countries where international crimes are committed and engages actively with international and regional organisations such as the International Criminal Court (ICC).¹⁴

At the same time, the EU has increasingly made victims' rights a priority in the field of Justice and Home Affairs (JHA). In 2012, the European Parliament and the Council adopted a new EU Directive on minimum standards for the rights, support and protection of victims of crime (the **Victims' Rights Directive** or **Directive**).¹⁵ This became "the cornerstone of the EU victims' rights policy".¹⁶ Under the Directive, Member States are under an obligation to ensure victims of all crimes—including victims of serious international crimes—receive appropriate information, support and protection and are able to participate in criminal proceedings. In June 2020, the European Commission presented its first-ever EU Victims' Rights Strategy demonstrating its ongoing commitment to improving the position of victims within the EU.¹⁷

RECOGNISING VICTIMS AS THE KEY TO ANY VIABLE INVESTIGATION OR PROSECUTION OF SERIOUS INTERNATIONAL CRIMES

Victims often represent the cornerstone of any viable investigation or prosecution of serious international crimes before domestic courts. Because of the intrinsic difficulties involved in investigating crimes that may have occurred thousands of miles away in decades past (including limited access to crime scenes and destruction of forensic and documentary evidence), cases often rely heavily on testimonial evidence. Without the courage of those victims who act as complainants or witnesses, many such cases would never reach trial. Yet victims often contribute more than just their testimony. Amongst the victim community are human rights defenders, dedicated political activists, community leaders and highly-educated professionals capable of bridging the gap between investigating authorities and affected communities. Moreover, involving victims assists investigators, prosecutors and factfinders to comprehend both the context in which the crimes occurred and their impact on the affected community.

"Victims enable judges and prosecutors to understand the scale of the crimes committed, their consequences, their violence, so that they become less abstract."

French Prosecutor

For these reasons, Member States at the forefront of investigating and prosecuting serious international crimes at the national level are increasingly recognising that engaging, supporting and protecting victims is crucial to building strong cases. The EU Genocide Network has also acknowledged this trend, recommending that measures be taken by national authorities to address the rights and needs of victims and witnesses, and that victims' perspectives be integrated into investigation

11 Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes. See also Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), art.48(2) (**Eurojust Regulation**).

12 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol); Eurojust Regulation, Annex 1.

13 For further information, see <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/genocide-crimes-against-humanity-and-war-crimes>. International mechanisms have also been established to assist in the investigation and prosecution of persons responsible for serious international crimes in Syria and Myanmar. These mechanisms are working to collect, preserve and analyse evidence and to facilitate criminal proceedings (including by domestic courts exercising extra-territorial jurisdiction).

14 See e.g. European Commission, *EU Action Plan on Human Rights and Democracy 2020-2024* (25 March 2020); Council of the European Union, *Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – 2019 Revision of the Guidelines (EU Torture Guidelines)*; Council of the European Union, *Report on the EU Guidelines on Promoting Compliance with International Humanitarian Law* (June 2019); European Commission, *Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the Gap between International and National Justice* (31 January 2013).

15 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

16 European Commission, *Report from the Commission to the European Parliament and the Council on the Implementation of Directive 2012/29/EU* (11 May 2020) (**EC Report on Implementation**).

17 European Commission, *EU Strategy on Victims' Rights (2020-2025)* (24 June 2020) (**EU Victims' Rights Strategy**).

and prosecution strategies.¹⁸

We are encouraged by the efforts made over recent years by some Member States to develop expertise in working with victims of serious international crimes and to improve victims' access to information, support and protection. **Despite these efforts, victims of international crimes continue to face significant barriers that inhibit their effective engagement in national proceedings and prevent them from exercising their rights.**

The fact that many international crimes victims normally reside outside the Member State conducting an investigation or prosecution raises obvious challenges. For example, the unique circumstances of such victims—often severely traumatised with limited access to support or rehabilitation, living in ongoing conflict or insecurity—leave them in need of special protection against intimidation, retaliation and repeat or secondary victimisation.

For those victims who find themselves in the EU, the challenges may be different: these victims are far from home and the support structures provided by their communities, navigating unfamiliar legal and institutional frameworks, facing language barriers and often marginalised due to stigma. It is unsurprising that many are hesitant to participate in investigations, particularly if they have not yet secured asylum or fear reprisals against their family members.

These challenges are compounded by numerous other factors: the sheer number of victims potentially implicated in such proceedings; language issues; cultural differences; lack of infrastructure; and insufficient expertise or resources to dedicate to victim engagement. As a result, only a handful of victims have played an active role in investigations and criminal proceedings within the EU. Even fewer have succeeded in obtaining compensation or other forms of reparation.

This Report examines the extent to which victims of serious international crimes engaged in cases before domestic courts in Belgium, France, Germany, the

Netherlands and Sweden have been able to benefit from their rights under the Victims' Rights Directive. While acknowledging the challenges associated with fully implementing the Directive in the context of serious international crimes, the Report seeks to increase awareness amongst Member States of these challenges and to identify ways to address them. In addition, it highlights opportunities for improved cooperation amongst Member States and greater support from EU institutions and agencies.

In many cases, the international crimes victims at the centre of this Report were the driving force behind investigations, without whom the perpetrators would

never have been held to account. In other cases, the victims cooperated with investigations initiated by the authorities and later appeared as witnesses. They include family members of the disappeared, like Obeïda Dabbagh in France, whose brother and nephew were arrested and detained by Syrian intelligence in Damascus in 2013. They include the victims of sexual violence in the Democratic Republic of Congo, who bravely testified against rebel leaders brought to trial in Germany. They include family members of those lost during the Rwandan genocide, like the sister of Belgian citizen Claire Beckers (killed together with her Tutsi husband and daughter in their home in Kigali).

"The role of victims was essential. Without them to file complaints and advance the investigations, probably nothing ever would have happened. The victims worked tirelessly, sometimes for many years, to make things progress in a meaningful way. It should be added that, in these types of cases, practice has shown that the victims are the only ones who can bring balance to the proceedings because, unlike the public prosecutor, they know the language of the country, have information about the places and people involved as well as the historical and cultural context."

Lawyer representing victims of the 1994 Rwandan genocide

They include a former Afghan mayor who, on learning those responsible for a massacre in his village had fled to Europe, brought the allegations to the attention of Dutch authorities. They include a Yazidi mother who travelled to Germany to testify at the trial of the woman allegedly responsible for her five-year-old daughter's death. And they include human rights defenders from Syria, such as Mazen Darwish and Mansour Omari, who have continued their struggle to hold the Assad regime accountable for crimes committed against them and their compatriots, filing complaints with authorities in Austria, France, Germany, Norway and Sweden.

¹⁸ EU Genocide Network, *Strategy of the EU Genocide Network to Combat Impunity for the Crime of Genocide, Crimes against Humanity and War Crimes within the European Union and its Member States* (November 2014), pp.45-46.

III. VICTIMS' RIGHTS UNDER THE DIRECTIVE AND HUMAN RIGHTS LAW

THIS REPORT is primarily concerned with implementation of the EU Victims' Rights Directive. Nevertheless, it is important to locate the Directive (and victims' rights more generally) within the wider human rights context.

VICTIMS' RIGHTS UNDER HUMAN RIGHTS LAW

Victims of serious international crimes benefit from a number of rights under statutory and customary international law. In particular, international human rights treaties recognise that any person whose rights have been violated must be granted an effective remedy.¹⁹ In addition, several treaties concerning serious international crimes contain more specific provisions on victims' rights, including the right to complain to competent authorities, to receive information, to be protected against acts of intimidation and to obtain reparation.²⁰ The UN has adopted numerous declarations, guidelines and principles which elaborate on these rights more fully.²¹

EU human rights instruments have also made an important contribution to victims' rights.²² For example,

the European Convention on Human Rights guarantees the right to an effective remedy to all persons whose rights have been violated (including victims of serious crimes that also constitute a violation of Convention rights).²³ The European Court of Human Rights has held that "the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and **including effective access for the complainant to the investigatory procedure**".²⁴ Similarly, the Court has held that investigations must be independent, impartial and subject to public scrutiny, and that "[i]n all cases **the victim must be involved in the procedure** to the extent necessary to safeguard his or her legitimate interests".²⁵

The EU's Fundamental Rights Charter also guarantees all persons whose rights have been violated an effective remedy.²⁶ However, the Charter goes further: under Article 47, **(direct) victims of serious crimes also enjoy fair trial rights in criminal proceedings**. This implies that victims be given an opportunity to express their views and defend their interests on an equal footing to the public prosecutor and the accused. In implementing the Victims' Rights Directive, Member States are acting within the scope of EU law and remain

19 See e.g. International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art.2(3).

20 See e.g. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), arts.13, 14 (**UNCAT**); International Convention for the Protection of All Persons from Enforced Disappearance, opened for signature 20 December 2006, 2716 UNTS 3 (entered into force 23 December 2010), arts.12, 15, 24 (**CED**). See also International Law Commission's Draft Articles on Prevention and Punishment of Crimes against Humanity, *Report of the International Law Commission: Seventy-First Session*, UN Doc. A/74/10 (2019), ch.IV (**CAH Articles**).

21 See e.g. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN General Assembly resolution 60/147, UN Doc. A/RES/60/147 (16 December 2005) (**UN Basic Principles and Guidelines**); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1 (8 February 2005) (**UN Principles to Combat Impunity**).

22 For a detailed analysis of the interaction between the Victims' Rights Directive and other EU laws, see European Union Agency for Fundamental Rights, *Victims' Rights as Standards of Criminal Justice: Justice for Victims of Violent Crime Part I* (2019) (**FRA Victims of Violent Crime Report**). See also European Commission, *Directorate General Justice Guidance Document related to the Transposition and Implementation of Directive 2012/29/EU* (December 2013), p.1 (**Directive Guidance**) (noting that Member States are also bound by the general principles of EU law, case law of the European Court of Human Rights as well as international standards on victims' rights).

23 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953), art.13 (**European Convention on Human Rights**).

24 See e.g. ECtHR, *Aksoy v. Turkey*, No. 21987/93, 18 December 1996, para.98 (emphasis added).

25 See e.g. ECtHR, *Kolpak v. Russia*, No. 41408/04, 13 March 2012, para.62 (emphasis added).

26 Charter of Fundamental Rights of the European Union, 2012/C 326/02 (26 October 2012), art.47 (**Fundamental Rights Charter**).



Family members of a victim of the second Liberian civil war in a clinic in Monrovia © ICRC/Teun Anthony Voeten 2003

bound by the Charter. They must therefore interpret their obligations under the Directive in a manner that respects these requirements of Article 47.

THE EU VICTIMS' RIGHTS DIRECTIVE

Establishing Minimum Standards on Victims' Rights

The adoption of the Victims' Rights Directive followed a call by the Council of the EU in the 2009 Stockholm Programme to improve existing legislation and practical support measures for victims of crime by creating a comprehensive legal instrument on victims' rights.²⁷ It was based on a proposal presented by the European Commission in May 2011²⁸ and represents a compromise between the Commission, Parliament and Council. While many had hoped for a more progressive instrument (particularly with respect to the right to reparation),²⁹ the Directive nevertheless marks a significant step towards a fuller recognition of victims' rights in the EU. In particular, by establishing *minimum standards* to be applied across the EU, it represents

an important tool by which to ensure all victims can benefit from the same basic rights.

The rights recognised in the Directive focus on ensuring victims are able to access information, to participate in criminal proceedings and to receive support and protection that is adapted to their needs.³⁰ It complements existing and future legislation addressing the needs of victims of specific types of crimes, such as victims of human trafficking and terrorism. As such, the rights set out therein are guaranteed to *all* victims, with "victim" being defined as a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence. The definition also includes family members of victims whose death was caused by a criminal offence and who have suffered harm as a result.³¹ Victim status is not affected by the residence, citizenship or nationality of the victim, nor does it depend on the identification, apprehension, prosecution or conviction of the perpetrator. Moreover, the Directive must be implemented without discrimination of any kind.³²

27 See Council of the European Union, *The Stockholm Programme: An Open and Secure Europe Serving and Protecting the Citizens*, 2 December 2009, p.17.

28 European Commission, *Proposal for a Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*, COM(2011) 275, 18 May 2011.

29 There was also fear amongst some NGOs that the Directive's broad scope might erode more robust internationally recognised standards applicable to victims of serious human rights abuses. See e.g. Amnesty International, *Comments on the European Commission's Proposal for a Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* (February 2012), available at https://www.amnesty.eu/wp-content/uploads/2018/10/AI_comments_on_EC_proposal_on_victim_rights_Feb_2012.pdf.

30 Directive, art.1.

31 Directive, art.2(1)(a).

32 See Directive, recitals 9-10, 13, 19.

As an instrument of harmonisation, the Directive was drafted in a manner to accommodate the differences amongst Member States' criminal justice systems. It therefore gives Member States some flexibility in terms of implementation (which may include a combination of legislative, administrative and practical measures).³³ Importantly, Member States may also choose to **extend** the rights set out in the Directive in order to provide a higher level of protection.³⁴

Essential Rights under the Directive

The provisions of the Directive can be divided into **four key areas**: information, support, participation and protection. First, the Directive aims to ensure victims have sufficient **information** to enable them to exercise their rights and participate in proceedings.

THE RIGHT TO INFORMATION

Member States are under a general obligation to assist victims to understand and be understood in all their interactions with competent authorities in the context of criminal proceedings (Article 3). This includes providing information in simple and accessible language and in a manner **adapted to their needs** (based on factors such as age, language, literacy or any other personal characteristics which might affect their ability to understand).

In particular, Article 4 requires that authorities be proactive in offering victims the information they need to exercise their rights from the point of first contact. This includes information concerning: the procedure for reporting crimes; how to access support and obtain protection; and the conditions for accessing legal aid and compensation for harm suffered. In addition, under **Article 6**, victims are entitled to receive information **about the progress of their case** upon request. This includes information concerning any decision not to proceed with the case, the time and place of the trial and the final judgment.

Second, the Directive requires that victims and their family members be able to access confidential **victim support services**, free of charge, in accordance with their needs and for an appropriate time before, during and after criminal proceedings.

THE RIGHT TO ACCESS VICTIM SUPPORT SERVICES

The right to access victim support services is one of the “core rights” in the Directive as it is often crucial to victims coping with the aftermath of a crime and with the strain of any criminal proceedings. Moreover, providing support can have broader benefits to society in terms of victims' willingness to cooperate with the authorities and in reducing the burden on health care and social services.³⁵ Access to such support services under Article 8 is not dependent on a victim making a formal complaint with regard to a criminal offence. Victim support services should include **information and advice, emotional or psychological support and practical assistance**. In addition, Member States should provide access to **specialist support services** for particularly vulnerable victims, such as trauma support and counselling.

³³ See Directive, recitals 11, 20; Directive Guidance, pp.4, 10-11; Albin Dearing and Holly Huxtable, “Doing Justice for Victims of Violent Crime in the European Union: Reflections on Findings from a Research Project Conducted by the European Agency for Fundamental Rights” in *International Journal of Comparative and Applied Criminal Justice* (2020), p.4 (**Dearing and Huxtable**).

³⁴ See Directive, recital 11.

³⁵ Directive Guidance, p.24.

Third, the Directive includes several **procedural rights**. Recognising that participation in criminal proceedings can take different forms depending on the relevant legal system, these rights are general in nature and the precise modalities are left to national law.

THE RIGHT TO PARTICIPATE IN CRIMINAL PROCEEDINGS

Articles 10 to 17 concern participation in criminal proceedings. Article 10, for example, requires that victims be given an opportunity to **be heard** and **provide evidence**. In addition, Article 11 provides that victims of serious crimes (at least) must have the **right to a review of a decision not to prosecute**. Under Articles 13 and 14, victims must also be provided with access to **legal aid** where they have the status of parties to criminal proceedings as well as **reimbursement of expenses** incurred as a result of their participation. Finally, Article 16 establishes a right to a decision on **compensation** from the offender for harm suffered.

Finally, the Directive requires that measures be made available to **protect** victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm. Repeat victimisation occurs where a victim experiences the same or a similar type of crime repeatedly. Secondary victimisation refers to any manner of engaging with the victim in the aftermath of the crime that causes further harm or deepens their victimisation. The Directive also requires measures to protect the dignity and privacy of victims during investigations and criminal proceedings.

THE RIGHT TO PROTECTION

Articles 18 to 24 concern the right to protection. Certain provisions relate to all victims, such as separate waiting areas for victims in court premises (Article 19) and the requirement that victims be permitted to be accompanied during interviews by a lawyer or support person (Article 20). In addition, every victim must receive an **individual assessment** to identify specific protection needs and to determine whether and to what extent he or she would benefit from special protection measures (Article 22). These measures may include, for example: ensuring interviews are carried out by trained professionals in premises that are specifically adapted for that purpose; measures to prevent visual contact with the offender in the courtroom; and measures to avoid unnecessary questioning concerning the victim's private life.

Following its adoption, Member States were required to transpose the Directive into their domestic laws by 16 November 2015.³⁶ Implementation of the Directive is subject to review by the European Commission and the Court of Justice of the European Union (CJEU).³⁷ However, even if the Directive has not been adequately transposed into domestic law, victims are able to invoke their rights under the Directive before domestic courts.³⁸ In May 2020, the European Commission published a report concluding that most Member States have failed to adequately transpose the Directive. Infringement proceedings against 21 Member States are ongoing (including Belgium, France, Germany and Sweden).³⁹

³⁶ Directive, art.27.

³⁷ Treaty on the Functioning of the European Union, C 326/49 (26 October 2012), arts.258, 288.

³⁸ See *Yvonne van Duyn v Home Office*, CJEU Case No. 41/74 (4 December 1974).

³⁹ See EC Report on Implementation. In addition, assessments of the implementation of the Directive have been commissioned or published by a number of other bodies, including the European Parliament, the European Union Agency for Fundamental Rights (FRA) and Victim Support Europe (VSE).

Application of the Victims' Rights Directive to Serious International Crimes

The Directive primarily concerns victims of crimes committed in the EU. Specifically, it aims at ensuring victims can benefit from the same rights “whatever their nationality and wherever in the EU the crime takes place”.⁴⁰ However, the Directive also confers rights on victims of **crimes committed outside the EU** (including serious international crimes).

There are two factors that limit the extent to which the Directive will apply to victims of serious international crimes:

FIRST, the Directive only applies to crimes committed outside the EU **where criminal proceedings take place in a Member State**.⁴¹ In other words, the Directive generally only applies once the authorities have commenced an investigation (with some exceptions).⁴²

SECOND, the authorities in a particular Member State can only commence an investigation into international crimes committed abroad **where the law provides for extra-territorial jurisdiction over such crimes** (see *opposite*).

On the other hand, the fundamental objective of the Directive is that *all* victims receive appropriate information, support and protection, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted. The Directive also emphasises the importance of victims being recognised as such, without discrimination of any kind, including on the basis of their residence status, citizenship or nationality.⁴³ Moreover, as noted above, the Directive only lays down minimum standards. As such, Member States may be obliged under **other sources of law**—including human rights law—to accord a higher level of protection to victims of serious international crimes.

The Directive applies where Member States investigate and prosecute serious international crimes committed abroad

⁴⁰ Directive Guidance, p.3.

⁴¹ Criminal proceedings are considered to begin when a complaint is made or authorities decide to initiate proceedings *ex officio*. However, complaints made to competent authorities *outside* the EU (such as embassies) do not trigger obligations set out in the Directive. Directive, recitals 13, 22; Directive Guidance, pp.7-9.

⁴² Arguably, victims of crimes committed outside the EU should still benefit from those rights that do not depend on the existence of criminal proceedings (at least where they reside in the EU). For example, *all* victims should be provided with information concerning victims' rights and should have access to victim support services. See further *Chapter IX*.

⁴³ See Directive, recitals 9, 10, 19, art.1.

JURISDICTION OVER SERIOUS INTERNATIONAL CRIMES

Primary responsibility for investigating and prosecuting international crimes resides with individual States. As such, States must **(1) criminalise serious international crimes** in their domestic law and **(2) establish jurisdiction** over such crimes. The extent to which States have done so varies widely.

Criminalisation

A number of treaties oblige States Parties to incorporate international crimes into their domestic law. For example, States that have ratified the Rome Statute of the International Criminal Court have an obligation to criminalise Rome Statute crimes (that is, genocide, crimes against humanity and war crimes).⁴⁴ Similarly, the UNCAT and the CED oblige States Parties to criminalise torture and enforced disappearance as stand-alone crimes. Nevertheless, **gaps in criminalisation remain**. In addition, States often **modify the definitions** of the relevant crimes, either narrowing or broadening their scope. Finally, a State's laws concerning **complicity, command responsibility** and **corporate liability** will determine who can be held criminally liable.

Jurisdiction

The conditions for exercising jurisdiction over serious international crimes differ significantly between States. The State on whose territory the crime was committed (the territorial State) possesses the strongest claim on jurisdiction (**the territoriality principle**). Investigating and prosecuting international crimes **where they occur** also allows the affected community to participate more fully in criminal proceedings and can thereby contribute to peace and reconciliation.

However, where neither the authorities in the territorial State nor international courts are willing or able to address serious international crimes, recourse to national courts exercising extra-territorial jurisdiction (that is, **jurisdiction over crimes committed outside their territory**) often represents the only opportunity for victims to seek redress.

Different Bases for Exercising Extra-Territorial Jurisdiction

Some States—such as **GERMANY** and **SWEDEN**—have enacted laws recognising **universal jurisdiction** over international crimes. This allows them to investigate and prosecute serious international crimes committed abroad, even where the crimes have no direct impact on their national interests. This form of extra-territorial jurisdiction is founded on the claim that certain crimes so deeply shock the conscience of humanity that every State has an interest in holding the perpetrators accountable. States exercising universal jurisdiction therefore act in the interests of the international community as a whole.

Other States—such as **BELGIUM, FRANCE** and **THE NETHERLANDS**—recognise a more limited form of universal jurisdiction over serious international crimes where there exists a specific legal obligation to extradite or to prosecute an accused who is present on their territory (the **aut dedere aut judicare** and **judicare vel dedere** principles).

Yet other States recognise extra-territorial jurisdiction over serious international crimes only where they have a specific nexus to the crime. States may consider that a sufficient nexus exists where, for example:

- I. the perpetrator is one of their own citizens or residents (the **active personality** principle); or
- II. the victim is one of their own citizens or residents (the **passive personality** principle).

Other Limits on Jurisdiction

A number of other legal concepts which fall outside the scope of this Report may act to limit jurisdiction over serious international crimes in a particular case. For example, jurisdiction may be limited by rules concerning the **immunity** of public officials or **statutes of limitations** that prescribe time limits for initiating a criminal prosecution. Although customary international law provides that serious international crimes cannot be subject to **amnesty laws**, some States may also refrain from exercising jurisdiction in cases where amnesty laws exist.

⁴⁴ Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) (**Rome Statute**). The ICC's jurisdiction over the crime of aggression has been activated as of 17 July 2018. States Parties that have ratified the amendment are obliged to criminalise aggression in their domestic criminal codes. However, as no investigations or prosecutions of the crime of aggression have occurred to date, this Report uses the term "**Rome Statute crimes**" to refer to genocide, crimes against humanity and war crimes.





COUNTRY CHAPTERS

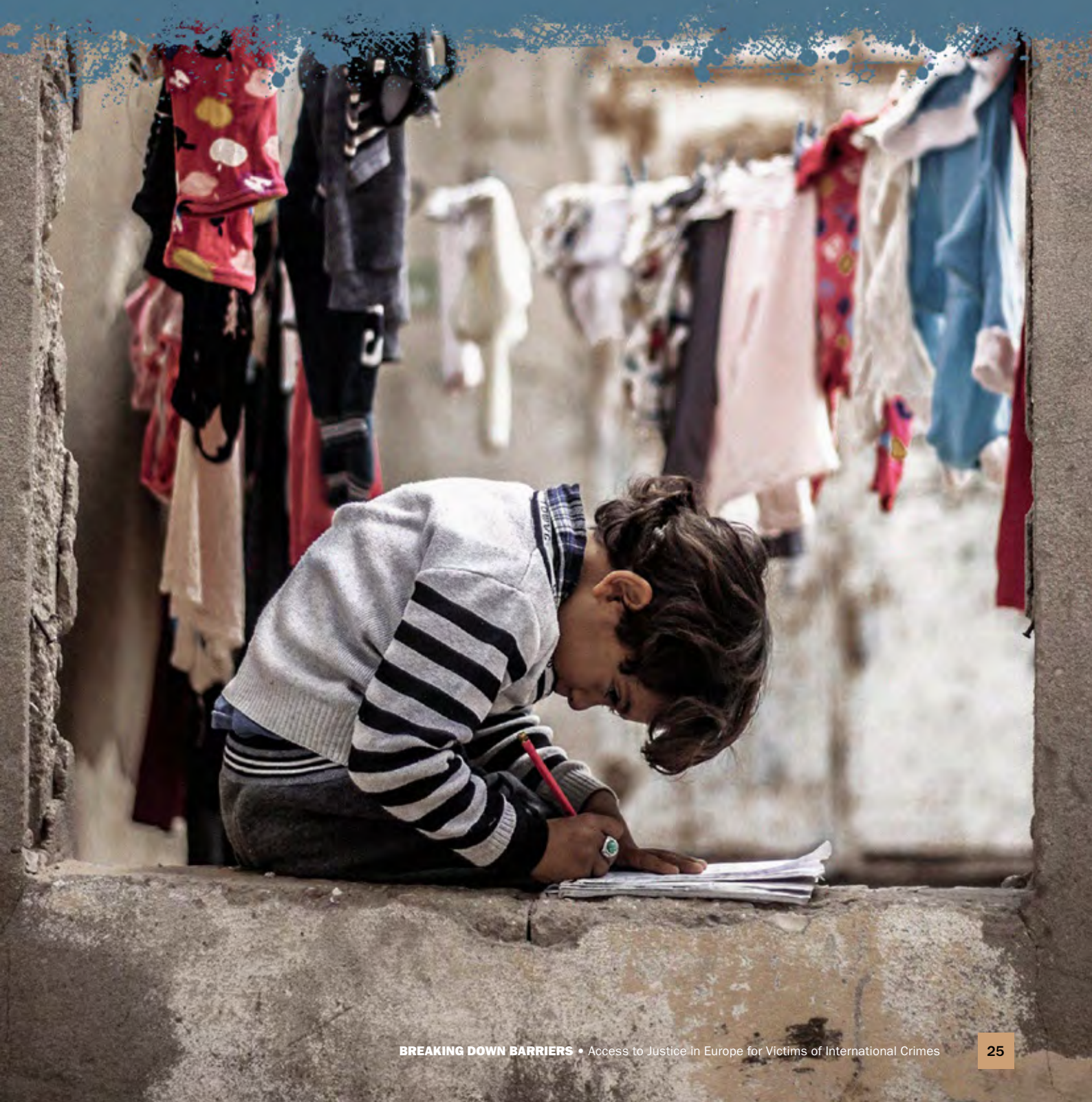
ROLE OF VICTIMS IN CRIMINAL PROCEEDINGS

BELGIUM	<p>A victim can join criminal proceedings as a CIVIL PARTY (<i>partie civile</i>) in order to claim compensation from the offender. This can occur at any stage during the judicial investigation or trial (up to the close of arguments).</p> <p>Civil parties are not considered formal parties to the criminal proceedings and therefore cannot appeal against the verdict or sentence. They nevertheless benefit from very extensive procedural rights that allow them to participate actively in proceedings.</p> <p>A victim who does not wish to join proceedings as a civil party may register as an INJURED PERSON (<i>personne lésée</i>) which provides more limited procedural rights.</p> <p>Civil parties cannot testify under oath. As such, a victim who also has the status of WITNESS may wait until after they have testified to join proceedings as a civil party.</p>
FRANCE	<p>A victim can join criminal proceedings as a CIVIL PARTY (<i>partie civile</i>) in order to claim compensation from the offender. This can occur at any stage during a judicial investigation or trial (up to the close of arguments).</p> <p>Civil parties are not considered formal parties to the criminal proceedings and therefore cannot appeal against the verdict or sentence. They nevertheless benefit from very extensive procedural rights that allow them to participate actively in proceedings.</p> <p>Civil parties cannot testify under oath. As such, a victim who also has the status of WITNESS may wait until after they have testified to join proceedings as a civil party.</p>
GERMANY	<p>A victim can join the criminal proceedings as an INJURED PARTY (<i>Verletzte</i>) in order to claim compensation from the offender. This can be done at any stage up to the moment of closing arguments.</p> <p>In addition, a victim of a serious crime or family member of a victim who has been killed can join the criminal proceedings as a JOINT PLAINTIFF (<i>Nebenkläger</i>). This can occur at any stage after criminal proceedings have commenced (including for the purposes of bringing an appeal).</p> <p>Joint plaintiffs are accorded several procedural rights and are considered formal parties to the criminal proceedings. This means they can appeal against the decision on compensation as well as the verdict and sentence.</p> <p>A victim may also have the status of WITNESS. However, they are generally not required to testify under oath.</p>
THE NETHERLANDS	<p>A victim can participate in criminal proceedings by exercising a right to speak on any issue at stake in the case.</p> <p>A victim can also join criminal proceedings as an INJURED PARTY (<i>benadeelde partij</i>) in order to claim compensation from the offender.</p> <p>Injured parties are not considered formal parties to the criminal proceedings and therefore cannot appeal against the verdict or sentence. Although they benefit from some limited procedural rights, injured parties generally do not participate actively in proceedings.</p> <p>A victim may also have the status of WITNESS and may be required to testify under oath.</p>
SWEDEN	<p>A victim can participate in criminal proceedings as an INJURED PARTY (<i>målsägare</i>) in order to claim compensation from the offender (<i>skadestånd</i>).</p> <p>A victim can also become an injured party by supporting the prosecution.</p> <p>Injured parties that support the prosecution are accorded several procedural rights and are considered formal parties to the criminal proceedings. This means they can appeal against the decision on compensation as well as the verdict and sentence.</p> <p>A victim may also have the status of WITNESS, however they are not required to testify under oath.</p>

Figure 1 – Role of Victims in Criminal Proceedings

A child doing his homework on the balcony of his makeshift house in Gaza © ICRC/Sanad Abu Latifeh 2017

IV. BELGIUM



FRAMEWORK FOR INVESTIGATION AND PROSECUTION OF INTERNATIONAL CRIMES⁴⁵

At the time of its ratification of the Rome Statute in 2000, Belgium already possessed extra-territorial jurisdiction over serious international crimes. Under a 1993 law, Belgian courts were initially granted universal jurisdiction over **war crimes**.⁴⁶ This meant Belgian authorities could investigate and prosecute war crimes even where they were committed on foreign soil and in circumstances where neither the victim nor perpetrator had any link to Belgium. The 1993 law was later amended to provide universal jurisdiction over **crimes against humanity** and **genocide**, as well as **torture** as a stand-alone crime.⁴⁷

Until 2003, Belgian courts could exercise universal jurisdiction, meaning they could investigate and prosecute war crimes, crimes against humanity, genocide and torture committed by anyone, anywhere in the world

In the wake of mounting political pressure to repeal its broad universal jurisdiction law, Belgium restricted its jurisdiction over international crimes in August 2003.⁴⁸ As a result of the 2003 law, Belgian courts can now exercise extra-territorial jurisdiction over international crimes only where one of three jurisdictional links (referred to as **liens de rattachement**) exists. **First**, Belgian courts can exercise extra-territorial jurisdiction where the alleged perpetrator is a Belgian company, a Belgian citizen or a person who has his/her principal residence in Belgium (the **active personality** principle).⁴⁹ In such cases, the accused need not be physically

present in Belgium and a trial can occur *in absentia*.⁵⁰

Second, Belgian courts can exercise extra-territorial jurisdiction where, at the time of the alleged crimes, the victim was a Belgian citizen, a recognised refugee with his/her habitual residence in Belgium or an individual who had effectively, habitually and legally resided in Belgium for at least three years (the **passive personality** principle).⁵¹ Again, the accused need not be physically present in Belgium and the trial can be held *in absentia*.⁵²

Since 2003, Belgian courts can exercise extra-territorial jurisdiction only where one of three jurisdictional links (**liens de rattachement**) exists

Third, Belgian courts can exercise a limited form of universal jurisdiction where and strictly insofar as a binding treaty or customary international law requires Belgium to prosecute (for example, pursuant to the **aut dedere aut judicare** or **judicare vel dedere** principle).⁵³ This means Belgian courts can exercise jurisdiction with respect to certain international crimes irrespective of the nationality of the perpetrator or victim or the place of commission of the crime. In practice, this effectively only requires investigation and prosecution where the accused is **present on Belgian territory**.⁵⁴ As such, this third **lien de rattachement** is rarely invoked.

Despite the significant number of cases concerning serious international crimes that potentially fall within the scope of Belgian jurisdiction, the Belgian units responsible for investigating and prosecuting

45 The original French terms (rather than the Flemish) have been used throughout this chapter because our interviews were conducted primarily in French (as were all trials concerning international crimes to date).

46 Law on the Punishment of Serious Violations of International Humanitarian Law (*Loi relative à la répression des violations graves du droit international humanitaire*) (16 June 1993) (allowing for investigations and prosecutions of crimes committed prior to enactment, to the extent that the relevant conduct constituted a crime under customary international or Belgian law).

47 Law on the Punishment of Serious Violations of International Humanitarian Law (*Loi relative à la répression des violations graves du droit international humanitaire*) (10 February 1999); Law on the Incorporation into Belgian Law of the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Loi de mise en conformité du droit belge avec la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*) (14 June 2002) (both allowing for investigations and prosecutions of crimes committed prior to enactment, to the extent that the relevant conduct constituted a crime under customary international or Belgian law). A new draft Criminal Code is currently before the Belgian Parliament which incorporates the stand-alone crime of **enforced disappearance**. See Belgian Chamber of Representatives, Bill introducing a New Criminal Code Books 1 and 2 (*Proposition de loi restaurant un nouveau Code pénal Livre 1 et Livre 2*), No. 55K0417/001 (24 September 2019), arts.87-89, available at <https://www.lachambre.be/FLWB/PDF/55/0417/55K0417001.pdf>. See also United Nations Committee on Enforced Disappearances, *Information received from Belgium on Follow-Up to the Concluding Observations*, UN Doc. CED/C/BEL/CO/1/Add.1 (15 January 2016), paras.10-14.

48 The Belgian legislature initially passed a law providing certain filters on the exercise of universal jurisdiction. See Law amending the Law of 16 June 1993 on the Punishment of Serious Violations of International Humanitarian Law and Article 144ter of the Judicial Code (*Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire*) (23 April 2003). When this did not appease opponents of the 1993 law, the legislature repealed it and enacted a new legislative framework which significantly limited Belgian jurisdiction over serious international crimes committed abroad. See Law on Serious Violations of International Humanitarian Law (*Loi relative aux violations graves du droit international humanitaire*) (5 August 2003). See also Criminal Code (*Code pénal* or **CP**), Book II, Title Ibis.

49 Act containing the Preliminary Chapter of the Code of Criminal Procedure (*Loi contenant le Titre préliminaire du Code de procédure pénale* or **TPCPP**), art.6 § 1°bis. See also CP, art.5 (providing for criminal responsibility of legal persons).

50 TPCPP, art.12 § 1°.

51 TPCPP, art.10 § 1°bis.

52 TPCPP, art.12 § 2°.

53 TPCPP, art.12bis.

54 *Belgium, Comments by Belgium on the Scope and Application of the Principle of Universal Jurisdiction* (2010) available at https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf (**Belgium UJ Observations**); Eric David, "The Belgian Experience" in M. Cherif Bassiouni, *International Criminal Law: Volume III International Enforcement* (3rd ed, 2008) at pp.362-364. But see TPCPP, art.12 § 5°.

such cases are only “modest” in size.⁵⁵ In the past, international crimes cases were handled by Crown prosecutors (*procureurs du Roi*) under the hierarchical supervision of the Prosecutor General’s Office (*Parquet général*). Since 2003, however, the Federal Prosecutor’s Office (*Parquet fédéral*) has possessed exclusive competence over serious international crimes, under the hierarchical supervision of the Federal Prosecutor (*procureur fédéral*).⁵⁶ Such cases are handled by a **specific section** within the Federal Prosecutor’s Office composed of three federal prosecutors (*magistrats fédéraux*) and the deputy federal prosecutor (*adjoint du procureur fédéral*).⁵⁷

There are **no specialised investigating judges** for serious international crimes cases in Belgium; rather, if the suspect or victim resides in Belgium, an investigating judge from their region will be appointed.⁵⁸ In 2007, an “international humanitarian law (IHL) section” was created within the 7th investigation service of the Federal Judicial Police in Brussels (*la section droit pénal international humanitaire du 7^{ème} Service d’enquêtes de la Police judiciaire fédérale de Bruxelles*). It currently comprises just **seven investigators**.⁵⁹ In addition, a Belgian Task Force for International Criminal Justice (BTF ICJ) exists within the Federal Ministry of Justice (*Service Public Fédéral Justice* or SPF Justice) to improve coordination amongst the relevant authorities involved in international crimes cases.⁶⁰

Due to the limited resources allocated to such cases, the Federal Prosecutor’s Office prioritises investigations based on factors including the gravity

of the crimes and feasibility of the investigation. For example, if the State where the crimes were committed is unlikely to cooperate, the Federal Prosecutor’s Office will be less likely to invest resources in investigating such crimes.⁶¹ Moreover, Belgium does not currently conduct anticipatory or structural investigations.⁶² As discussed in more detail below, the inevitable

prioritisation of certain cases over others—which is entirely discretionary and not subject to any form of judicial or administrative review—has a significant impact on access to justice.

Every case that has proceeded to trial to date has concerned the 1994 genocide in Rwanda. Many of the accused possessed Belgian citizenship or had their primary residence in Belgium at the time of their arrest. Cases are increasingly being opened on the basis of referrals from the Belgian asylum authority (*Commissariat*

général aux réfugiés et aux apatrides or CGRA), which informs the Federal Prosecutor’s Office where there are serious reasons to believe an individual seeking asylum has committed a serious international crime (so-called Article 1F cases).⁶³ As of July 2020, however, not one of these referrals has resulted in a trial or conviction for serious international crimes before Belgian courts.⁶⁴

Investigations and prosecutions of serious international crimes are governed by the Criminal Investigation Code (*Code d’instruction criminelle* or CIC) and specific rules governing extra-territorial jurisdiction are found in the Preliminary Chapter of the Code of Criminal Procedure (*Titre préliminaire du Code de procédure*

“In terms of resources, clearly we don’t have enough. Choices therefore have to be made in terms of priorities.”

Federal Prosecutor

“From the point of view of the Federal Prosecutor’s Office, there is always this question of the feasibility of the investigation, which includes questions of policy.”

Former Investigating Judge

55 See e.g. Federal Judicial Police, “First Conviction in Belgium for Genocide” (*Première condamnation en Belgique pour génocide*), 23 December 2019 available at <https://www.police.be/5998/fr/presse/premiere-condamnation-en-belgique-pour-genocide>.

56 Judicial Code (*Code judiciaire*), arts.144bis, 144quater; Interview with Federal Prosecutor’s Office (15 May 2019).

57 This section also has responsibility for prosecuting crimes committed abroad by Belgian soldiers and certain cases concerning corruption. The section is supported by one full-time jurist and one part-time jurist. Interview with Federal Prosecutor’s Office (15 May 2019).

58 Interview with Federal Prosecutor’s Office (15 May 2019); Interview with SPF Justice (15 May 2019). In the past, there has been a concentration of cases in Brussels as a number of suspects resided there. As a result, there are four judges in Brussels who have developed some expertise in such cases. However, a number of upcoming trials may take place outside Brussels.

59 Correspondence with Federal Prosecutor’s Office (17 July 2020); Correspondence with Federal Judicial Police (14 July 2020). The Federal Judicial Police work under the supervision of the Federal Prosecutor’s Office until the matter is brought before the investigating judge, who then takes over supervision of the investigation. The IHL section in Brussels is often supported by the judicial police in other *arrondissements* (e.g. the *arrondissement* of the investigating judge conducting the judicial investigation, as has occurred in the **Martina Johnson** case).

60 Interview with Federal Prosecutor’s Office (15 May 2019); Interview with SPF Justice (15 May 2019).

61 Interview with Federal Prosecutor’s Office (15 May 2019). Political considerations can often result in systematic refusal or delay in responding to requests for assistance, particularly where the investigation implicates State agents. See FIDH, ECCHR and REDRESS, *Enhancing Victims’ Rights in Mutual Legal Assistance Frameworks* (May 2020), pp.6-7, available at <https://www.fidh.org>.

62 Correspondence with Federal Prosecutor’s Office (31 July 2020).

63 Law on Entry, Temporary and Permanent Residence and Removal of Foreigners (*Loi sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers*), art.57/27 referring to Criminal Investigation Code (*Code d’instruction criminelle* or **CIC**), art.29; Interview with Federal Prosecutor’s Office (15 May 2019); Interview with SPF Justice (15 May 2019). See also Refugees Convention, art.1F.

64 Correspondence with Federal Prosecutor’s Office (17 July 2020).

pénale or TPCPP).⁶⁵ The pre-trial stage is inquisitorial in nature, while the trial and appeal phases have both inquisitorial and accusatorial elements. Certain coercive acts can only be carried out on the order of an investigating judge (*juge d'instruction*). As such, the current practice of the Federal Prosecutor's Office is to seize an investigating judge once a preliminary examination (*information*) has determined that there is sufficient evidence to warrant a judicial investigation (*instruction*).⁶⁶ In doing so, the Federal Prosecutor's Office acts independently of the Minister of Justice. However, the Minister retains the power to order the initiation of an investigation through positive injunction (*droit d'injonction positive*).⁶⁷ In limited circumstances, a victim may be able to trigger the opening of a judicial investigation by filing a civil party complaint with an investigating judge.⁶⁸

Following a threshold assessment of jurisdiction,⁶⁹ the investigating judge carries out a confidential investigation independently of the Federal Prosecutor's Office.⁷⁰ The judge can exercise broad coercive powers to collect both inculpatory and exculpatory evidence, with the support of the Federal Judicial Police.⁷¹ The results of the investigation are bundled together in the criminal file which is then returned to the Federal Prosecutor's Office to determine what action should be taken. The Federal Prosecutor's Office may submit the file to a pre-trial chamber (*chambre du conseil*) for a hearing to determine whether to refer the case for trial (referred to as the *règlement de la procédure*).⁷² Both the Federal Prosecutor's Office and civil parties benefit from a full right to appeal such decisions before an indictments chamber of the court of appeal (*chambre des mises en accusation de la Cour d'appel*) and then the Court of Cassation (*Cour de cassation*) (with the accused benefiting from a more limited right to appeal on questions of law).⁷³

International crimes trials before the *cour d'assises* in Belgium can take up to three months

International crimes cases are tried before one of Belgium's 11 *cour d'assises* which are composed of three judges and a 12-person jury (with the possibility for 12 alternate jurors).⁷⁴ To date, all trials concerning international crimes have taken place before the *cour d'assises* in Brussels, however a number of upcoming trials could take place in Ghent, Liège or Namur.⁷⁵ While the principle of orality governs proceedings,⁷⁶ fact-finders can rely on evidence collected during the pre-trial phase without the need to re-examine every witness. There is no *de novo* appeal from a decision of the *cour d'assises*, however appeals on questions of law (*pourvoi*) may be brought before the Court of Cassation.⁷⁷

65 There are plans to modernise Belgium's criminal procedural law (as well as the criminal code), however the new code has yet to be adopted. Correspondence with SPF Justice (20 July 2020). See Belgian Chamber of Representatives, Bill containing the Criminal Procedure Code (*Proposition de loi contenant le Code de procédure pénale*), No. 55K1239/001 (11 May 2020) available at <https://www.lachambre.be/FLWB/PDF/55/1239/55K1239001.pdf>.

66 Correspondence with Federal Prosecutor's Office (17 July 2020). See also TPCPP, arts.10 § 3, 12bis § 3.

67 Coordinated Constitution (*Constitution coordonnée*), art.151 § 1er; CIC, arts.364, 441. This occurred in March 1995 when, under intense media and political pressure, the Minister of Justice made use of his power to order the opening of a judicial investigation into the 1994 Rwandan genocide. Interview with Former Investigating Judge (16 May 2019). There is no corresponding power to prevent or end an investigation.

68 See below under "Role of the Victim in Criminal Proceedings".

69 Investigating judges in Belgium are required to investigate once they have established that they have jurisdiction over the crimes alleged in the complaint. This preliminary determination of jurisdiction will examine issues such as immunities and prescription. Where necessary, the judge may refer a question of law to an indictments chamber in order to ensure the case will be admissible at the end of the investigation. Interview with Investigating Judge (16 May 2019).

70 See CIC, arts.55, 57. The Federal Prosecutor's Office nevertheless closely follows the evolution of the judicial investigation and can, for example, access the criminal file and engage in complementary investigative acts. See e.g. CIC, art.61quinquies; Interview with Federal Prosecutor's Office (15 May 2019).

71 CIC, art.56. The prosecutor's powers during an investigation, by contrast, are limited. Interview with LDH (13 May 2019).

72 CIC, art.127. See also arts.128, 133.

73 CIC, arts.135, 217, 221, 229, 231, 417.

74 Judicial Code, arts.119, 123; CIC, art.216novies.

75 Interview with Federal Prosecutor's Office (15 May 2019).

76 CIC, arts.280, 295.

77 CIC, arts.359, 421, 436. If the Court of Cassation rules that a decision is void, the decision will be sent back to the *cour d'assises*.



Diamond prospectors in the diamond-rich Kono district in eastern Sierra Leone © AFP/Issouf Sanogo 2012

OVERVIEW OF RECENT INTERNATIONAL CRIMES CASES IN BELGIUM

Five trials concerning serious international crimes have taken place in Belgium on the basis of universal or extra-territorial jurisdiction in recent decades. All five concerned the 1994 Rwandan genocide and were held before the Brussels *cour d'assises*. The investigations were prompted by the relatives of Rwandan and Belgian victims who made complaints to the authorities as early as July 1994. In all five trials, a significant number of victims and their families have participated as civil parties and the authorities have arranged for witnesses to travel to Belgium to testify at trial.

The first trial concerned the **Butare Four** or **Quatre de Butare**. The accused included a university professor (Vincent Ntezimana) and factory director (Alphonso Higanro) accused of inciting the genocide, as well as two Benedictine nuns (Consolata Mukangango and Julienne Mukabutera) accused of complicity in the killing of Tutsis who sought refuge in a convent. All four were convicted of war crimes after an eight-week trial in 2001 and were sentenced to terms of imprisonment ranging from 12 to 20 years. The second trial concerned the brothers **Samuel Ndashyikirwa and Etienne Nzabonimana** who were businessmen allegedly involved in massacres in the Kibungo prefecture. The two accused were convicted of war crimes in 2005 and sentenced to 10 and 12 years' imprisonment respectively.

The third trial concerned **Bernard Ntuyahaga**, an ex-major of the *Forces Armées Rwandaises*. He was prosecuted for the murder of 10 Belgian blue helmets and an unspecified number of Rwandan victims, amongst other charges. He was convicted at trial in 2007 of war crimes and sentenced to 20 years' imprisonment. The fourth trial was held *in absentia* due to the ill-health of the accused, **Ephrem Nkezabera**. Nkezabera was suspected of participating in the genocide by financing and providing arms to extremist militias. This was the first case that explicitly included sexual violence charges. He was convicted of war crimes at trial in 2009 and sentenced to 30 years' imprisonment. In 2010, the *cour d'assises* ruled that there should be a re-trial in order to allow the accused to attend the proceedings. Nkezabera died an innocent man before the re-trial could take place.

"Everything starts with the victims. These were survivors who, having barely arrived in Belgium, came face-to-face with those responsible for the atrocities in the streets and who demanded justice. The accused had come to Europe thinking they'd be able to find refuge and enjoy impunity. They were wrong."

Victims' Lawyer

The most recent trial took place a decade later, in late 2019. **Fabien Neretse**, an influential businessman and bureaucrat, was charged with complicity in the murder of a number of individuals in the first days of the genocide, including a Belgian-Rwandan family. He was also alleged to have created and maintained an Interahamwe militia in the village of Mataba. Neretse was convicted after a six-week trial of genocide and war crimes and sentenced to 25 years' imprisonment (confirmed by the Court of Cassation in May 2020).

While a large number of complaints have been brought by victims concerning international crimes—including against former Israeli Prime Minister Ariel Sharon and former US President George Bush Sr—no other cases have reached trial to date. Previous investigations include, for example, investigations of: former Chadian dictator **Hissène Habré** (which contributed to Habré's conviction for crimes against humanity, war crimes and torture before the Extraordinary African Chambers in Senegal in 2016); several leaders of the Democratic Republic of Congo, including former Minister for Foreign Affairs **Abdoulaye Yerodia** (which resulted in a judgment against Belgium by the International Court of Justice for failing to respect the immunity enjoyed by State officials under customary international law); former President of Chile **Augusto Pinochet** (alongside investigations by a number of other European States, including Spain); the French oil company **Total** for complicity in crimes against humanity in Myanmar, including forced labour during the construction of a pipeline in the south of the country; the Belgian armed forces for the role they played in the “**Left-to-Die Boat**” incident (where NATO vessels enforcing an arms embargo left a small boat with 72 migrants onboard to drift off the coast of Libya for 14 days; only nine passengers survived); and **Alexis Thambwe Mwamba**, former Minister of Justice in the Democratic Republic of Congo, for war crimes and crimes against humanity including a missile attack on a plane carrying dozens of civilians in 1998.

In recent years, two investigations have been launched by victims supported by Civitas Maxima. The first was an investigation of US-Belgian national **Michel Desaeleer** for involvement in the trade of so-called blood diamonds in Sierra Leone. The accused was arrested in Spain and transferred to Belgium to face charges of war crimes and crimes against humanity but died while in pre-trial detention in 2016. The second is the ongoing investigation of Liberian-born **Martina Johnson** for war crimes and crimes against humanity during Liberia's first civil war. Other ongoing investigations include: the investigation into high-ranking Israeli officials (including former Minister for Foreign Affairs Tzipi Livni) for alleged war crimes committed during **Operation Cast Lead** in Gaza in 2008 and 2009; the investigation of **Dexia Bank** for allegedly financing the illegal settlement of occupied Palestinian territories; and the investigation of a number of Belgian officials (only two of whom remain alive) suspected of complicity in the assassination of Congolese Prime Minister **Patrice Lumumba** in 1961.

As of July 2020, Belgian authorities have 111 open cases concerning serious international crimes (44 of which are before investigating judges). A number of alleged Rwandan génocidaires are awaiting trial on charges of genocide and war crimes, including Ernest Gakwaya, Emmanuel Nkunduwimye, Mathias Bushishi and Thaddée Kwitonda. The Federal Prosecutor's Office also receives a significant number of requests for mutual legal assistance from other jurisdictions.

“I believe the investigation still had an impact, to see a European country sending a judge to a remote area of Sierra Leone, meeting people for hours to listen to their story and telling them that it interests us because it's a Belgian who has tried to profit from a situation of civil war.”

Investigating Judge

FRAMEWORK FOR VICTIMS' RIGHTS

Criminal justice reforms in Belgium in the late 1990s had already improved the position of victims (in particular, allowing victims the possibility to follow the evolution of and actively contribute to investigations).⁷⁸ As such, no significant legislative changes were made to implement the Victims' Rights Directive.⁷⁹ The only international crimes trial that has taken place following implementation of the Directive occurred in 2019 (after an absence of any such trials for a full decade). In the intervening period between the **Quatre de Butare** trial in 2003 and the **Neretse** trial in 2019, there has been some evolution in practice. Improvements appear to have been made as a result of lessons learned and due to the transfer of competence for such cases to a specific section within the Federal Prosecutor's Office.

Nevertheless, certain limitations on access to justice have persisted. In particular, there remain considerable legal and practical obstacles which limit the exercise of victims' procedural rights in such cases. And yet, victims continue to act as the driving force behind many investigations into serious international crimes in Belgium. As such, this chapter draws on practices surrounding the early Rwanda trials to the extent that those practices have continued or to provide the context necessary to understand recent developments.

Since 2003, victims of serious international crimes can only initiate criminal proceedings in cases where there is a strong link to Belgium—that is, where the crime was at least partly committed in Belgium or where the perpetrator is a Belgian company, citizen or resident

Role of the Victim in Criminal Proceedings in Belgium

One of the characteristics of Belgian criminal procedure is that the victim and public prosecutor ordinarily have a parallel right to initiate criminal proceedings. This is derived from the victim's interest in claiming compensation from the offender as a **civil party (partie civile)** during criminal proceedings.⁸⁰ Any natural person who has suffered harm (including physical, mental or moral harm or material loss) that was directly caused by a criminal offence can qualify as a civil party⁸¹ and can trigger the opening of a judicial investigation by filing a complaint with an investigating judge.⁸² Legal persons that have suffered direct harm (such as loss of their assets or damage to reputation) can also qualify as civil parties.⁸³ Following a recent amendment to Belgium's Judicial Code (*Code judiciaire*), certain NGOs may also be permitted to act as civil parties in their own right (although it remains to be seen whether this provision will be applied in the context of criminal proceedings).⁸⁴

However, in cases involving serious international crimes, the 2003 change to the law on universal jurisdiction severely curtailed the possibilities for victims to trigger a judicial investigation. Judicial investigations can now only be initiated by civil party complaint in cases where there is a strong link to Belgium; that is, where the crime is committed wholly or partly in Belgium or where the perpetrator is a Belgian company, Belgian citizen or a person with his/her principal residence in Belgium (that is, the first *lien de rattachement*) (see **Figure 2**).⁸⁵ In such cases, the investigating judge will be obliged to investigate (subject to a threshold assessment of jurisdiction).

78 Interview with LDH (13 May 2019). In particular, the *Dutroux* scandal in the 1990s—which arose out of the kidnapping and sexual abuse of several young girls, four of whom were murdered—exposed a number of flaws in the criminal justice system and acted as a catalyst for reform.

79 Victim Support Europe, *VOCIARE National Report: Belgium* (2019), p.9 (**VOCIARE Belgium Report**).

80 See TPCPP, arts.3, 4.

81 Circular No.16/2012 of the College of General Prosecutors concerning Reception of Victims by Prosecutors and Courts (*Circulaire No.16/2012 du Collège des procureurs généraux relative à l'accueil des victimes au sein des parquets et des tribunaux*) (12 November 2012), s.2.5 (**Circular No.16/2012**).

82 CIC, art.63. As noted above, there are plans to modernise Belgium's criminal procedural law to give the prosecutor the task of leading criminal investigations rather than an independent investigating judge. These reforms would also abolish the possibility for victims to initiate criminal proceedings by civil party complaint.

83 Court of Cassation, Decision of 19 November 1982 in *Pasicrisie Belge* (1982-1983), vol.1, 372 at pp.380-382.

84 Judicial Code, art.17 § 2 (concerning the standing of legal persons whose object is to protect human rights and fundamental freedoms). This provision has no equivalent in the CIC, but see Judicial Code, art.2.

85 This also applies where the suspect is a legal person. As such, victims can initiate criminal proceedings against (i) companies that are registered in Belgium (the active personality principle), or (ii) companies that operate (in part) in Belgium, such that certain elements of the crime were committed on Belgian territory (the territoriality principle). Interview with Victims' Lawyer IV (10 May 2019).

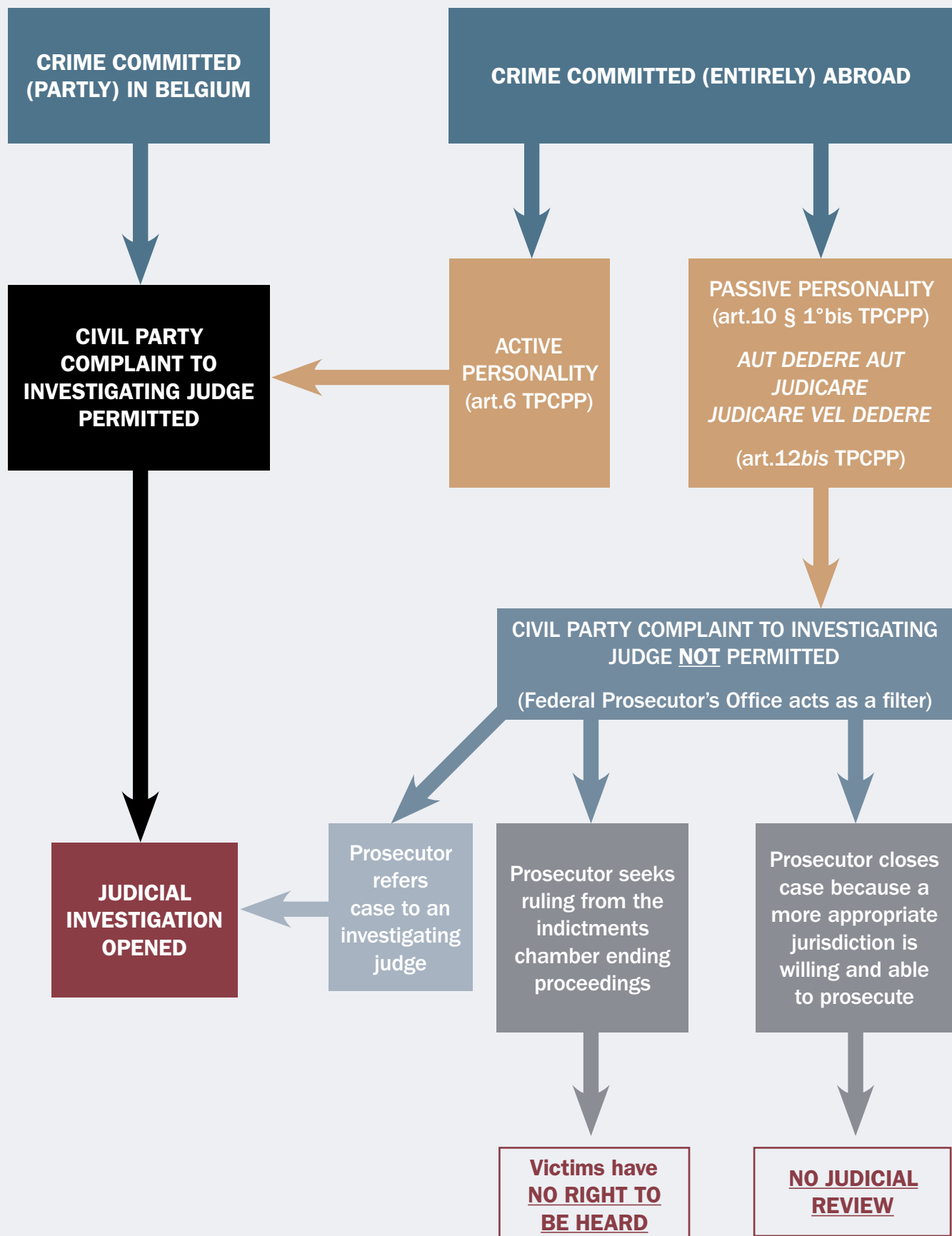


Figure 2 – Impact of the jurisdictional links (*liens de rattachement*) on the role of victims

This process can represent a “powerful weapon” in situations where the Federal Prosecutor’s Office is reluctant to act.⁸⁶ As such, Belgium’s victim-friendly procedures have “proved to be of paramount importance” in the different investigations and prosecutions which have taken place in Belgium.⁸⁷ Nevertheless, even where the victim initiates an investigation, the role of the authorities remains indispensable as they retain responsibility for the investigation (which, in the case of international crimes, require extraordinary resources). For example, cases will be more likely to progress if the Federal Prosecutor’s Office signals its support by seizing the investigating judge in parallel to the victim.⁸⁸

In all other cases, a judicial investigation can only be initiated at the request of the Federal Prosecutor’s Office.⁸⁹ The victim may still make a complaint to the police or Federal Prosecutor’s Office, but the 2003 change in the law provided for the Office to act as a gatekeeper or **filter (le filtre du Parquet)**. On receiving a complaint, the Federal Prosecutor’s Office may seek a ruling from the indictments chamber of the court of appeal ending proceedings on the basis that: (i) the complaint is manifestly unfounded; (ii) the facts cited in the complaint do not correspond to an international crime contained in the Criminal Code; or (iii) a case brought on the basis of the complaint would be inadmissible.⁹⁰

Only the Federal Prosecutor’s Office will be heard prior to the indictments chamber making such a ruling; **victims are not permitted to take any part in such proceedings.**⁹¹ In fact, victims and their legal counsel will not even be informed that the hearing is taking

place, will be actively excluded if they attend and are not entitled to receive a copy of the decision (a practice which federal prosecutors indicated during our consultations causes them some “unease”).⁹² The indictments chamber may refuse to issue a ruling ending proceedings and instead refer the case to an investigating judge, subject to appeal by the Federal Prosecutor’s Office to the Court of Cassation.⁹³ **The victim has no such right of appeal** if the indictments chamber ends proceedings. The victim’s only recourse in such cases is to petition the Minister of Justice to order the initiation of an investigation through the power of positive injunction.⁹⁴

In addition, the prosecutor can decline to refer the case to an investigating judge on the basis that it would be more appropriate to bring the case before another jurisdiction that is willing and able to prosecute.⁹⁵ Such a determination is **not subject to judicial review.**⁹⁶

Moreover, there are often **considerable delays** in bringing cases before the courts which in itself represents a very real limitation on access to justice. For example, in the first Rwanda case—which later became known as the **Quatre de Butare** case—significant political pressure led the Crown prosecutor (at that time) to make a written request to the pre-trial chamber to close the case and release the accused Vincent Ntezimana from pre-trial detention. When this was unsuccessful, the Prosecutor General’s Office prevented the case from being set for trial,⁹⁷ instead leaving it “dormant” for three years.⁹⁸

⁸⁶ Interview with Former Investigating Judge (16 May 2019).

⁸⁷ Katharine Fortin, “Interview with Luc Walleyn, Victims’ Representative in the Case against Martina Johnson”, *Armed Groups and International Law* (7 October 2014), available at <https://armedgroups-internationallaw.org/>.

⁸⁸ Interview with Federal Prosecutor’s Office (15 May 2019); Interview with Investigating Judge (16 May 2019). This occurred, for example, in the cases concerning **Michel Desadeleer** and **Martina Johnson**. However, it is entirely within the discretion of the Federal Prosecutor’s Office to decide to endorse a civil party complaint in this manner. If the Office does not consider that the case merits its intervention (as was initially the case in **Dexia**, for example), it may take a more passive role. Interview with Victims’ Lawyer IV (10 May 2019); Interview with LDH (13 May 2019); Interview with Victims’ Lawyer VI (17 May 2019).

⁸⁹ Even where civil party complaint is permitted, the victim may choose to file a complaint with the Federal Prosecutor’s Office in order to avoid the financial risks associated with initiating criminal proceedings.

⁹⁰ TPCPP, arts.10 § 3(1-3°), 12bis § 3(1-3°). The Federal Prosecutor’s Office has at times obtained a preliminary ruling on jurisdiction and admissibility before investing resources in an investigation (see CIC, art.235). This occurred, for example, in the case concerning the assassination of **Patrice Lumumba**, where the Office obtained confirmation from the indictments chamber that the crimes alleged constituted war crimes, such that they were not subject to prescription. In another example, the **Alexis Thambwe Mwamba** case was ruled inadmissible in January 2020 upon the request of the Federal Prosecutor’s Office. Correspondence with Federal Prosecutor’s Office (17 July 2020).

⁹¹ TPCPP, arts.10 § 4, 12bis § 4; Interview with Federal Prosecutor’s Office (15 May 2019).

⁹² Interview with Federal Prosecutor’s Office (15 May 2019); Interview with Victims’ Lawyer I (4 April 2019); Interview with Victims’ Lawyer IV (10 May 2019); Interview with Victims’ Lawyer VI (17 May 2019).

⁹³ TPCPP, arts.10 § 5-6, 12bis § 5-6.

⁹⁴ See above under “Framework for Investigation and Prosecution of International Crimes”.

⁹⁵ TPCPP, arts.10 § 3(4°), 12bis § 3(4°).

⁹⁶ TPCPP, arts.10 § 8, 12bis § 8. According to the Court of Arbitration (*Cour d’arbitrage*), allowing victims to appeal the decision of the Federal Prosecutor’s Office not to pursue a case and the debate to which such a procedure would give rise could seriously harm Belgium’s international relations. Decisions regarding the appropriate jurisdiction, which do not prejudice the basis for the complaint, do not require judicial oversight: Judgment No. 62/2005, 23 March 2005, pp.13-14.

⁹⁷ As noted above, after the investigating judge has completed the judicial investigation, the criminal file is returned to the Federal Prosecutor’s Office (previously, the Prosecutor General’s Office). The Office may then submit the file for a hearing before the pre-trial chamber to determine whether it will go to trial (*règlement de la procédure*). See CIC, art.127. If the Federal Prosecutor’s Office refuses to do so, the civil party has no effective remedy. Interview with LDH (13 May 2019); Interview with Former Investigating Judge (16 May 2019). While art.136 of the CIC allows the indictments chamber to monitor the conduct of investigations, practitioners reported that this is ineffective. Interview with LDH (13 May 2019). As one victims’ lawyer put it, “you have no judicial review if the prosecutor is sitting on a case; you’re finished”. Interview with Victims’ Lawyer IV (10 May 2019).

⁹⁸ Interview with Former Investigating Judge (16 May 2019); Interview with Victims’ Lawyer II (4 April 2019); Interview with Victims’ Lawyer V (17 May 2019). A Parliamentary Commission of Inquiry on Rwanda reported in 1997 that the investigating judge responsible for the Rwanda files felt his investigation was just for show and was sceptical about the will to prosecute such cases in Belgium (citing the failure by the Prosecutor General’s Office to refer matters for trial). The Commission itself highlighted the failure to allocate sufficient resources to the investigations and the lack of due diligence on the part of the Prosecutor General’s Office, which appeared to have led to the cases becoming “blocked”. See Parliamentary Commission of Inquiry concerning Events in Rwanda, *Final Report*, Belgian Senate Doc. No. 1-611/7 (6 December 1997), pp.665, 680, 721-722 available at <https://www.senate.be/>.

“For three years, the Parquet did not refer the case for trial, it just sat on it. It was only after a change in government that things finally became unblocked.”

Former Investigating Judge

More recently, it took over eight years for the Federal Prosecutor’s Office to seize an investigating judge in the investigation concerning **Operation Cast Lead** in Gaza.⁹⁹ Similarly, the investigation into the assassination of **Patrice Lumumba** remains ongoing almost a decade after his family initially lodged the complaint.¹⁰⁰ In addition, although two Rwanda cases (involving four accused) were referred for trial before the *cour d’assises* in Brussels in December 2018, trial dates have still not been fixed¹⁰¹—a situation that is not only frustrating to victims, but may also violate the accused’s right to a trial without unreasonable delay. These delays (which began with the early Rwanda trials but persist to this day) suggest that **the allocation of sufficient resources to the investigation and prosecution of serious international crimes is not considered a priority.**

Most victims of serious international crimes do not enjoy the right to review of decisions not to prosecute as required in Article 11 of the Directive

In conclusion, the limitations on the right to trigger a judicial investigation by civil party complaint, combined with the impact of decisions to prioritise certain cases over others, the considerable delays in bringing cases before the courts and the absence of any effective review of decisions not to proceed with investigations or prosecutions, mean most victims of international crimes do not enjoy the right to review set out in Article 11 of the Directive. Moreover, actively excluding victims from hearings relating to jurisdiction and admissibility is inconsistent with their right to be heard under Article 10 of the Directive. Finally, marginalisation of victims during key stages of the proceedings hampers their ability to

understand (and therefore accept) a decision not to proceed with their case.

A more inclusive process that preserves the limited scope of the indictment chamber’s review while nevertheless recognising the victim as an individual who has been harmed as a result of a crime would be more in line with the Directive. Victims (as well as the accused) should also be granted an effective remedy in cases of unreasonable delay. Finally, greater transparency surrounding the prioritisation of resources within the Federal Prosecutor’s Office is warranted.

Procedural Rights during Criminal Proceedings

Victims who cannot or choose not to initiate proceedings through civil party complaint can join the proceedings at any stage after the case reaches the investigating judge until the close of arguments at trial.¹⁰² Thereafter, they enjoy the same procedural rights as those civil parties who initiated proceedings.

Civil parties have considerable scope to contribute to a judicial investigation. For example, civil parties have the right to be heard by the investigating judge and to request access to the criminal file (*dossier*) every three months.¹⁰³ By requesting access to the file, civil parties are able to learn what steps have been taken by the investigating judge and also bring the file back to the top of the judge’s desk to ensure it receives further attention.¹⁰⁴ Civil parties also have the right to request any complementary investigative acts (*actes d’instruction complémentaire*) which are necessary to determine the truth.¹⁰⁵ Such acts may include, for example, that particular witnesses or experts be heard or that the suspect be summonsed for questioning. If the investigating judge refuses or fails to respond to requests for access to the file or for complementary investigative acts, the civil party may seek judicial review before the indictments chamber.¹⁰⁶

Victims make use of these procedural rights more actively in international crimes cases than in ordinary

99 Interview with Victims’ Lawyer VI (17 May 2019). A request to join an additional complaint (brought by victims of the same military operation who subsequently obtained asylum in Belgium) to that of the original complainant (a dual Belgian-Palestinian citizen) was denied by the indictments chamber in January 2019.

100 Interview with Victims’ Lawyer IV (28 July 2020).

101 Correspondence with Federal Prosecutor’s Office (17 July 2020).

102 CIC, arts.63, 66-67.

103 CIC, arts.21bis, 61ter § 1, 63. See also CIC, art.242.

104 Interview with Victims’ Lawyer IV (10 May 2019).

105 CIC, art.61quinquies. A request for complementary investigative acts may also be rejected if they are prejudicial to the investigation (§ 3). Practitioners reported that civil parties also benefit from regular access to the Federal Prosecutor’s Office and investigating judges and can make requests or bring relevant information to their attention (with investigating judges acting, nonetheless, impartially and in accordance with their obligation to investigate both inculpatory and exculpatory evidence). Interview with Investigating Judge (16 May 2019); Interview with Former Investigating Judge (16 May 2019). For example, in the case involving **Operation Cast Lead**, victims informed the Federal Prosecutor’s Office of **Tzipi Livni’s** intended visit to Brussels to attend a conference at the European Parliament and requested that she be summonsed for questioning. Interview with Victims’ Lawyer III (5 April 2019); Interview with Victims’ Lawyer VI (17 May 2019).

106 See CIC, arts.21bis, 61ter, 61quinquies, 136. Civil parties can only be refused access to the criminal file or parts thereof on limited grounds (e.g. where access would endanger the investigation or where the civil party has no legitimate interest in gaining access). Practitioners reported that access is rarely refused. Interview with Victims’ Lawyer IV (10 May 2019); Interview with Victims’ Lawyer VI (17 May 2019).

cases.¹⁰⁷ As one victims' lawyer explained of the Rwanda cases: "it was mainly the victims who fuelled the investigation because they had a lot of information about what happened to their loved ones, even in some cases the names of those responsible. The telephone lines hadn't actually been cut so people here in Belgium listened over the phone as their loved ones were killed."¹⁰⁸

Similarly, as an investigating judge reported concerning a more recent investigation: "since these crimes were committed many years ago and thousands of miles away, our method of investigating is not at all the same. We are somewhat dependent on what victims bring us. They have access to an enormous amount of information because, unlike us, they have connections on the ground. This is even more true in cases where the State may bear some responsibility for the crimes. But we must be careful not to become the agents of NGOs so we double-check everything and sometimes we reject or contest certain information."¹⁰⁹

In addition, in cases that require detailed documentation and expert analysis—for example, establishing the location of different vessels for the **Left-to-Die Boat** case or the analysis of the links between different corporate entities in the **Dexia** case—NGOs can play a crucial role in supporting the investigation.¹¹⁰

Civil parties can equally intervene and be heard during the *règlement de la procédure* (the hearing to determine whether the case will be referred for trial) and they benefit from a full right to appeal decisions taken during this procedure to the indictments chamber and subsequently the Court of Cassation.¹¹¹ Once at trial, civil parties continue to participate actively

in proceedings. For example, they have the right to attend the trial and be represented by a lawyer, to call and question witnesses and experts, to produce additional evidence and to make submissions.¹¹² Civil parties cannot testify under oath as witnesses;¹¹³ as such, it is sometimes preferable for victims to join the proceedings only after they testify at trial.¹¹⁴ As

a formal matter, civil parties are not considered procedural parties with respect to the criminal proceedings (as opposed to their civil claim) and can therefore only appeal against those parts of the judgment that concern their claim for compensation.¹¹⁵

For victims who do not wish to participate actively in proceedings or seek compensation, there is the possibility to register as an **injured person** (*personne lésée*). This entails more limited procedural rights, including the right: to submit evidence; to be represented by a lawyer; to be informed of key developments in the case; and to access to the criminal file.¹¹⁶

"We have access to the file, we have access to the judge and we can suggest further investigations. So the victim is aware of how the case is progressing."

Victims' Lawyer

"In these types of cases, there is a lot of direct and indirect contact with victims who give names, leads and information. The procedural rights of victims are in fact very broad."

SPF Justice

Access to Information on Victims' Rights

Belgian law requires that victims be provided with information about their rights—including the possibility to register as an injured person or become a civil party—and that they be referred to support services that can assist them in this process.¹¹⁷ In addition, prosecutors are required to inform *all* victims of the place, day and time of the trial.¹¹⁸

Belgian authorities reported that they **do not inform victims of serious international crimes who reside abroad of the possibility to register as an injured person or become a civil party until they arrive**

¹⁰⁷ Interview with Investigating Judge (16 May 2019).

¹⁰⁸ Interview with Victims' Lawyer V (17 May 2019).

¹⁰⁹ Interview with Investigating Judge (16 May 2019).

¹¹⁰ Interview with Victims' Lawyer VI (17 May 2019).

¹¹¹ CIC, arts.127, 135, 217, 221, 223, 229, 231, 235bis, 417; Interview with Victims' Lawyer IV (10 May 2019).

¹¹² See e.g. CIC, arts.277, 278, 301, 302, 306, 307, 309, 320.

¹¹³ CIC, art.305.

¹¹⁴ Interview with Victims' Lawyer I (4 April 2019); Interview with Victims' Lawyer II (4 April 2019).

¹¹⁵ CIC, art.359.

¹¹⁶ TPCPP, art.5bis; CIC, arts.21bis, 61ter § 1.

¹¹⁷ TPCPP, arts.3bis, 5bis. See also Circular No.5/2009 of the College of General Prosecutors concerning Lodging of Complaints and Declarations of Injured Persons (*Circulaire No.5/2009 du Collège des procureurs généraux relative aux attestations de dépôt de plainte et à l'enregistrement des déclarations de personne lésée*) (20 December 2012), p.10 (**Circular No.5/2009**).

¹¹⁸ CIC, art.182. See further Circular No.6/2007 of the College of General Prosecutors concerning Courts for the Enforcement of Sentences (*Circulaire No.6/2007 du Collège des procureurs généraux relative aux tribunaux de l'application des peines*) (revised version, 7 November 2008), pp.8-9 (noting that although art.182 requires that such information be communicated to victims only in cases before the correctional courts, it should also be provided in cases before the *cour d'assises*; confirming that the notion of victim should be interpreted broadly to include all natural and legal persons directly or indirectly harmed as a result of a crime, not merely those with the status of injured person or civil party). See also TPCPP, art.5bis § 3; CIC, art.127 § 2.

in Belgium to testify as witnesses before the *cour d'assises*.¹¹⁹ For example, in the most recent trial in 2019, Rwandan witnesses were provided with a written explanation in Kinyarwanda as to the possibility to register as civil parties upon their arrival in Belgium.¹²⁰ This puts victims who reside abroad at a **considerable disadvantage** (not only with respect to the right to information, but also the procedural rights accorded to civil parties during the judicial investigation). As such, victims residing abroad will not be in any position to exercise their rights prior to trial unless they are supported by a specialised NGO or lawyer. For those who have the opportunity to travel to Belgium to testify, they will have only a short time to retain a lawyer and introduce a civil claim for compensation.

Normally, police must also provide victims with the victims' rights brochure prepared by SPF Justice.¹²¹ Again, this brochure is generally not provided to victims who reside abroad.¹²² In any event, this brochure assumes some basic knowledge of the Belgian criminal justice system and will therefore be of limited assistance to most victims. No brochure, poster or any other means is used to inform victims of the possibility to report international crimes to the Belgian authorities. In addition, in contrast to some of the other countries examined in this Report, very little information about the work of the Federal Prosecutor's Office and Federal Judicial Police is made publicly available.

Even though the authorities do not appear to proactively inform victims who reside abroad of their rights, a large number of victims have reported international crimes to the authorities, initiated criminal proceedings through civil party complaint and/or participated actively in the trials held to date. For example, in the fourth Rwanda

trial (**Nkezabera**), a total of 163 victims were admitted as civil parties (many of whom registered during the trial itself).¹²³

Updates on Proceedings

The early Rwanda cases have been described as unique in the sense that the civil parties were well organised in collectives and maintained close contact with established networks in Rwanda. Many also spoke French in addition to Kinyarwanda which helped to overcome some of the language issues.¹²⁴ This—in addition to the media coverage of the trials¹²⁵—meant that both victims and the broader community were able to follow proceedings.¹²⁶ As one investigating judge described, “when it came to the trial, they heard about the judgment the very same day without anyone informing them”.¹²⁷ Similarly, the most recent trial in 2019 was reported on in the Belgian, Rwandan and international media, including by two Rwandan journalists who were financed by the Belgian NGO *RCN Justice & Démocratie*.

In other cases, victims are dependent on their lawyers to keep them informed of progress in their case (particularly during the investigation by virtue of their continuous access to the criminal file).¹²⁸ In addition, NGOs that have already established trust with victim communities residing outside Belgium can act as an intermediary between civil parties and their lawyers (as has been the case for victims in Sierra Leone, Liberia and Gaza).¹²⁹

“These families were in contact with each other. They had created a collective of civil parties in order to support one another, to meet up, to stay informed, to speak with the lawyers. Basically they were self-organised. The courtroom was full of Rwandans who understood the two languages. It is true that we were working with a very privileged community, very well prepared in this respect.”

Victims' Lawyer

119 Correspondence with Federal Prosecutor's Office (17 July 2020). Moreover, while registering as an injured person is free, if the police do not facilitate registration, the victim must submit a formal declaration (*déclaration de personne lésée*) in person or send it by registered mail. Interview with Police Victim Assistance Service (*Service d'assistance policière aux victimes*) (17 May 2019). This can represent a significant obstacle to victims residing abroad.

120 Correspondence with Federal Prosecutor's Office (17 July 2020).

121 See Circular No.5/2009, pp.14-15. The brochure is equally available online in French, Dutch, German and English at https://justice.belgium.be/fr/publications/u_bent_slachtoffer. Similar information is provided by Victim Reception Services. See e.g. www.victimtimes.cfwb.be.

122 Correspondence with Federal Prosecutor's Office (17 July 2020); Correspondence with Federal Judicial Police (14 July 2020).

123 Interview with Federal Prosecutor's Office (15 May 2019).

124 For those witnesses who only spoke Kinyarwanda, interpreters were provided during their testimony. Interview with Victims' Lawyer V (17 May 2019).

125 For example, the *Quatre de Butare* trial was audio-recorded by Belgian NGO (*RCN Justice & Démocratie*). The recordings later formed part of a radio series broadcast by *Radio France-Culture*. Transcripts of the trial and radio broadcasts are available at www.assisesrwanda2001.org. A documentary entitled *Bruxelles-Kigali* was made about the fourth trial (**Nkezabera**) in 2012.

126 Interview with Victims' Lawyer V (17 May 2019); Interview with Former Investigating Judge (16 May 2019); Interview with Former Prosecutor (16 May 2019).

127 Interview with Former Investigating Judge (16 May 2019).

128 Victims can also access information about their case by contacting the relevant Victim Reception Service (*service d'accueil des victimes*) in each house of justice (*maison de justice*). Nevertheless, the Service can face difficulties in maintaining contact with victims who reside abroad or who require an interpreter. Correspondence with Victim Reception Service (23 July 2019). See further below under “Support Services”.

129 Interview with Victims' Lawyer I (4 April 2019); Interview with Victims' Lawyer VI (17 May 2019).

Legal Representation and Access to Legal Aid

Injured persons and civil parties have the right to be assisted or represented by a lawyer.¹³⁰ However, the legal costs associated with international crimes cases can act as a significant barrier to victims participating in criminal proceedings in Belgium. First, there are strict eligibility requirements for legal aid and, as such, **very few victims qualify**.¹³¹ Second, although legal aid is available to all natural persons (regardless of their nationality or residence status) and during all phases of a case,¹³² the pre-determined amount allocated to the pre-trial phase of proceedings in particular is incommensurate with the complexity of international crimes cases. As one lawyer put it, “whether it’s a car accident or a genocide, the amount is the same”.¹³³ Moreover, legal aid will not cover certain types of expenses incurred in such cases, such as travel abroad.¹³⁴

In some cases, lawyers may act *pro bono* or with the support of an NGO until the matter reaches trial in order to alleviate the financial burden on victims.¹³⁵ Nevertheless, **the unavailability of legal aid has a considerable impact on the ability of victims to exercise their rights**. This is particularly true for the right to information and to participate in proceedings, as the bureaucracy surrounding the criminal justice process is difficult for victims to navigate.

“Everything is very bureaucratic, inaccessible, confusing, procedural ... without a lawyer, it’s impossible to know where to turn to find out what is happening with the case.”

Victims’ Lawyer

In addition, there are significant **financial risks** associated with initiating proceedings as a civil party. For example, a victim who initiates proceedings will be required to pay a guarantee (*consignation*) and, if the complaint is dismissed, may bear the legal and procedural costs of both the State and the accused.¹³⁶ In addition, the civil party may be required to advance a more significant amount to cover the costs of investigative acts.¹³⁷ This amount can easily reach over EUR 10 000 for investigative acts that require the appointment of an expert or travel abroad.¹³⁸ Such costs can be avoided, however, if the Federal Prosecutor’s Office supports the investigation (thus “covering the costs” normally incurred through civil party complaint).¹³⁹ Nevertheless, there is no guarantee that the Federal Prosecutor’s Office will do so in a particular case.¹⁴⁰

“A mutual legal assistance request usually costs between EUR 5 000 and 10 000 because you have to cover the travel expenses of the judge, a prosecutor and investigators. This financial aspect can be an obstacle.”

Belgian League of Human Rights
(*Ligue des droits humains belge*)

Finally, civil parties who reside in Belgium are only reimbursed for expenses incurred on the days they are heard by the court. Given the length of international crimes trials (which often last a number of weeks or even months), failure to cover the cost of lost wages can prevent victims from fully participating.¹⁴¹

By contrast, Belgian authorities have devoted significant resources to bringing witnesses (many of whom are also victims) from abroad to enable them to testify. In

130 See e.g. TPCPP, art.5bis § 3; CIC, art.277.

131 While basic legal advice (*aide juridique de première ligne*) is accessible to all free of charge, individuals are ordinarily required to satisfy a number of criteria (including a strict means test) to qualify for fully or partially subsidised legal aid (*aide juridique de deuxième ligne*) and exemptions from procedural costs (*assistance judiciaire*). As an exception, subsidised legal aid may be provided irrespective of an individual’s income based on their social situation (*situation sociale*) (e.g. individuals receiving social welfare) or precarious situation (*situation de faiblesse momentanée*) (e.g. individuals in detention and asylum seekers). See Policy of 26 May 2014 of the Francophone and Germanophone Bar modifying article 5.17 of the Lawyers’ Code of Ethics (*Règlement du 26 mai 2014 de l’Ordre des barreaux francophones et germanophone modifiant l’article 5.17 du Code de déontologie de l’avocat*), arts.20, 25-49, 110 (**Legal Aid Policy**). See also Judicial Code, arts.508/1, 508/13, 664-669.

132 Legal Aid Policy, arts.15, 20. Exemptions from procedural costs, however, are generally limited to Belgian citizens or residents (with some limited exceptions). See Judicial Code, arts.667-668.

133 Interview with Victims’ Lawyer I (4 April 2019). Unlike in other countries under examination in this Report, there is no possibility for the courts to appoint a common legal representative. However, civil parties may choose to be represented by the same lawyer (although the legal aid will remain the same, regardless of the number of civil parties a lawyer represents). Interview with Victims’ Lawyer V (17 May 2019).

134 Interview with Victims’ Lawyer I (4 April 2019).

135 Interview with Victims’ Lawyer I (4 April 2019); Interview with Victims’ Lawyer II (4 April 2019); Interview with Victims’ Lawyer III (5 April 2019); Interview with Victims’ Lawyer V (17 May 2019).

136 See CIC, art.128; Judicial Code, art.1022. Where an NGO is supporting the victims, they may pay the guarantee on behalf of the victim. The investigating judge may also adapt the amount of the guarantee, such that it will generally not act as a bar to a victim filing a *bona fide* complaint. Interview with Victims’ Lawyer I (4 April 2019); Interview with Commission for Financial Aid (14 May 2019).

137 This may be required, for example, to cover the costs of experts, translation of documents or mutual legal assistance requests (*commissions rogatoires*). Interview with LDH (13 May 2019); Interview with Victims’ Lawyer I (4 April 2019).

138 Interview with LDH (13 May 2019).

139 Interview with Federal Prosecutor’s Office (15 May 2019).

140 As noted above (under “**Role of the Victim in Criminal Proceedings**”), it is entirely within the discretion of the Federal Prosecutor’s Office to decide to endorse a civil party complaint. Where the case is not considered a priority for the Office, it may choose to take a more passive role. Interview with Victims’ Lawyer IV (28 July 2020).

141 Interview with Civil Party (9 July 2020).

all five trials concerning the 1994 Rwandan genocide, the Crown prosecutors or Federal Prosecutor's Office—in coordination with the Federal Judicial Police, the Ministry of Foreign Affairs, the SPF Justice, the Belgian Embassy in Kigali and the Rwandan authorities—arranged for witnesses to travel to Brussels to testify before the *cour d'assises*.¹⁴² This has represented a huge logistical challenge, as it requires that the Belgian authorities: serve summonses on the witnesses (with the cooperation of Rwandan authorities); organise passports and visas; arrange local and international travel; furnish warm clothing where necessary; and provide collective accommodation in military/police compounds or hotels.¹⁴³

In the first trial—the **Quatre de Butare** case—the witnesses were brought in “four waves” on military flights and accommodated in refurbished military barracks for up to a week. They were transported to the court each day under the protection of the Federal Judicial Police, however Belgium's general victim support services were not engaged.¹⁴⁴ By contrast, in the most recent **Neretse** trial, witnesses were accommodated in a hotel and accompanied both by the Rwandan National Public Prosecution Authority's Victim and Witness Support Unit (VWSU) as well as Belgian victim support services.¹⁴⁵

Support Services

While criminal justice (including victims' rights within the justice system) falls within the competence of the Belgian federal State, the Belgian communities are responsible for victim support services. For the previous trials concerning international crimes, victim support relating to the criminal proceedings has been provided by the French Community (*Communauté française* or *Fédération Wallonie-Bruxelles*).¹⁴⁶

The French Community organises **Victim Reception Services (*services d'accueil des victimes*)** in each of the houses of justice (*maisons de justice*) that provide information and support to victims in connection with criminal proceedings, free of charge.¹⁴⁷ In particular, their justice assistants (*assistants de justice*) ensure victims can exercise their rights by providing specific information about their case (with the authorisation of the prosecutor or investigating judge), more general explanations concerning criminal procedure as well as accompaniment during proceedings.

Victim Reception Services can also provide information regarding legal aid, psychosocial support and compensation and can make referrals to more specialised services.¹⁴⁸ However, victims who reside abroad generally only travel to Belgium for a short time to testify as witnesses, making after-care difficult.¹⁴⁹ As a result, victims generally rely on local services (to the extent they exist) for more long-term psychosocial support or rehabilitation. Specialised NGOs

and victims' lawyers also play an important role in supporting victims.¹⁵⁰ According to one civil party: “The role of lawyers is really important. A lawyer who is available, supportive, empathetic ... who thinks about more than the legal proceedings, this is precious.”¹⁵¹

There have been some improvements in practice concerning the support for victims over the past two decades. In the early cases, support was provided (to varying degrees) by the Victim Reception Service in Brussels, with the support of the Federal Judicial Police.¹⁵² For **victims who resided abroad**, the Victim Reception Service was generally only engaged shortly before the trial and support was provided solely in connection with the trial itself.¹⁵³ As one justice assistant put it, “we arrived a little late”.¹⁵⁴ In some respects, no differentiation was made between victims

“It requires an awful lot of logistics. We really have to organise everything. We take care of it all, from beginning to end.”

Federal Prosecutor

142 Interview with Federal Prosecutor's Office (15 May 2019). In each of the Rwanda trials, the Federal Prosecutor's Office has added witnesses identified by the defence and/or the civil parties to their list of witnesses to enable their travel expenses to be paid by the State. Interview with Victims' Lawyer V (17 May 2019). See CIC, art.307.

143 Interview with Federal Prosecutor's Office (15 May 2019); Interview with SPF Justice (15 May 2019); Interview with Former Prosecutor (16 May 2019).

144 Interview with Victims' Lawyer V (17 May 2019). See further below under “Support Services”.

145 Correspondence with Federal Prosecutor's Office (17 July 2020).

146 Similar services are provided by the Flemish and German Communities. As noted above, there has previously been a concentration of international crimes cases before the *cour d'assises* in Brussels. If future trials are to take place elsewhere, the Victim Reception Services in those jurisdictions would be responsible for victim support during the criminal proceedings.

147 Interview with Victim Reception Service (14 May 2019); Circular No.16/2012, s.6.1. The support of the Victim Reception Services is available throughout the criminal proceedings (i.e. during the judicial investigation, trial and any appeal, as well as during proceedings relating to the execution of the sentence).

148 Circular No.16/2012, s.6.6. Justice assistants are social workers, rather than psychologists, and therefore can provide emotional support but not therapeutic intervention. Psychosocial support is provided by victim support services (*services d'aide aux victimes*). Interview with Victim Reception Service (14 May 2019).

149 Interview with Victim Reception Service (14 May 2019).

150 Interview with Victims' Lawyer I (4 April 2019); Interview with Victims' Lawyer III (5 April 2019).

151 Interview with Civil Party (9 July 2020).

152 The Victim Reception Service in Brussels has been engaged in all but the first Rwanda trial (the **Quatre de Butare** case). Interview with Victim Reception Service (14 May 2019).

153 Interview with Federal Prosecutor's Office (15 May 2019); Interview with SPF Justice (15 May 2019). Victim Reception Services can only intervene in a particular case if they are formally requested to do so by the prosecutor or investigating judge or contacted directly by the victim. Circular No.16/2012, ss.6.3, 6.5.4. **For Rwandan victims, their intervention has only been requested with respect to the trial.** Interview with Victim Reception Service (14 May 2019).

154 Interview with Victim Reception Service (14 May 2019).

and non-victims, which made it challenging to provide appropriate support.

For instance, victims who were brought from Rwanda to testify as witnesses in the early trials were accommodated together with other witnesses (including defence witnesses). As such, the Victim Reception Service could only give a general presentation to all witnesses as a group to familiarise them with the procedure and inform them of the possibility to become a civil party.¹⁵⁵ During the hearings themselves, the Victim Reception Service was nevertheless continuously available to provide targeted information and support to those witnesses who were also victims. Medical care was also provided by the Belgian Red Cross and psychological support was made available in connection with hearings.¹⁵⁶

By contrast, for **victims who resided in Belgium**, the Victim Reception Service was able to provide assistance *throughout* criminal proceedings (including during the pre-trial phase), in accordance with its usual practice. For example, the Service intervened during the judicial investigation in the third Rwanda trial (**Ntuyahaga**) following a request from the families of the Belgian blue helmets.¹⁵⁷ This earlier engagement allowed the Service to participate in preparatory meetings prior to the trial, which also facilitated their engagement with respect to victims travelling from abroad. In the subsequent trials, the Service has therefore been included in all such preparatory meetings.¹⁵⁸

More recently, in the **Neretse** trial, victims and witnesses were supported by both the Victim Reception Service and the Rwandan VWSU, as well as the newly created victims' unit within the Federal Prosecutor's Office (*cellule victime au sein du Parquet fédéral*). Victims were permitted to visit the *cour d'assises* in advance of the trial and were accommodated on a different floor to other witnesses within the hotel, which facilitated the provision of support. The involvement of the Rwandan VWSU also allowed for support to be provided prior to and following the trial.¹⁵⁹

Despite these improvements, more must be done to ensure victims receive adequate support during the early phases of criminal proceedings. In particular, engaging the Victim Reception Service earlier would put them in a better position to reach victims both in Belgium and abroad (including, where necessary, through intermediaries such as support services or specialised NGOs operating in the country where the crimes were committed).¹⁶⁰ Ideally, the Victim Reception Service should therefore be seized by the Federal Prosecutor's Office during the *investigations* phase.

Protection Measures

The accused ordinarily has access to the criminal file throughout the investigation and, as such, will know the identities of both witnesses and civil parties. Some limited protection measures are available to witnesses. For example, witnesses who are at risk of retaliation may have certain personal information omitted from the criminal file and, in extreme cases, may benefit from total anonymity. These protection measures continue to apply at trial.¹⁶¹

"Threatened witnesses" and their family members can benefit from more enhanced protection measures if they satisfy certain strict criteria.¹⁶² These measures are granted by a Commission on Witness Protection (Commission de protection des témoins) and range from police patrols and installation of alarms to relocation and, in exceptional circumstances, change of identity.¹⁶³ Witnesses under protection may be permitted to testify remotely by video or teleconference (and, where necessary, with image or voice-distortion).¹⁶⁴ However, the authorities are reluctant to rely on such measures as they will reduce the weight of the testimony and may give witnesses a false sense of security.¹⁶⁵ As such, anonymity has never been used in a trial concerning international crimes, nor have the authorities considered enhanced protection measures to be warranted.¹⁶⁶

¹⁵⁵ Correspondence with Victim Reception Service (23 July 2020).

¹⁵⁶ Interview with Victim Reception Service (14 May 2019); Interview with Federal Judicial Police (14 May 2019); Interview with Former Prosecutor (16 May 2019).

¹⁵⁷ Interview with Victim Reception Service (14 May 2019). Similarly, in the recent **Neretse** trial, the Service intervened earlier with respect to one of the civil parties who resides in Belgium. Interview with Civil Party (9 July 2020).

¹⁵⁸ Correspondence with Victim Reception Service (23 July 2020).

¹⁵⁹ Correspondence with Federal Prosecutor's Office (17 July 2020); Interview with Civil Party (9 July 2020).

¹⁶⁰ Correspondence with Victim Reception Service (23 July 2020).

¹⁶¹ CIC, arts.75bis, 86bis, 86ter, 294, 296.

¹⁶² A "threatened witness" is defined as a person who is in danger as a result of giving evidence in the course of a criminal investigation or proceedings and who is prepared to testify if requested at trial. CIC, art.102.

¹⁶³ CIC, arts.103-111. See also CIC, art.90ter § 2(2°). Change of identity is only available for Belgian citizens (art.106).

¹⁶⁴ CIC, arts.112bis, 112ter.

¹⁶⁵ See CIC, arts.112bis § 6, 298 § 5, 299 § 4-5, 326; Interview with Former Investigating Judge (16 May 2019); Interview with LDH (13 May 2019); Interview with Investigating Judge (16 May 2019).

¹⁶⁶ Interview with Federal Judicial Police (14 May 2019); Correspondence with Federal Prosecutor's Office (17 July 2020).



Israeli settlements in the Binyamin Region of the West Bank

“The possibilities to testify anonymously are very limited and the conditions are very strict, so it’s rare. In addition, anonymous testimony has less probative value.”

Belgian League of Human Rights

Furthermore, these measures only apply to witnesses; very few measures are available to protect victims who do not have the status of witnesses. The investigating judge has the authority to limit access to certain parts of the criminal file where access would endanger a person or seriously infringe upon their privacy.¹⁶⁷ Yet the identity of the civil party will never be withheld.¹⁶⁸ As one victims’ lawyer stated during our consultations: “The decision to become a civil party, to start an investigation, involves taking risks.”¹⁶⁹

Similarly, lawyers representing victims from Palestinian occupied territories regretted the fact that there was little they could do to protect their clients from reprisal: “They were afraid that they would accelerate the appropriation of their land. In these kinds of situations, we’re completely powerless and clearly Belgium will never warn the State of Israel against any form of retaliation.”¹⁷⁰

Following a recent change to the Judicial Code, NGOs may in future be able to shield victims from exposure to retaliation by registering as civil parties in their own name.¹⁷¹ This could, for example, enable them to initiate proceedings and/or gain access to the file early in the investigation without the need to identify

the victims (who would remain free to register as civil parties at a later stage). However, it remains unclear whether the courts will allow the provision to be used in this way.¹⁷²

Another limit on the authorities’ ability to protect victims is the lack of jurisdiction to grant protection measures outside of Belgium. For example, witnesses who were brought to Belgium to testify during the Rwanda trials were under the protection of the Federal Judicial Police throughout the period of their stay in Brussels.¹⁷³ However, this protection ended once the witnesses returned home. Similarly, where investigating judges hear witnesses abroad, protection poses a real challenge: “When investigating abroad, we are under the jurisdiction of the country concerned so we aren’t in a position to offer protection. Ultimately, as long as we are there, we can hope that nothing will happen since they know that at least one European country has its eyes on them. But once we leave, we don’t know.”¹⁷⁴

Instead of formal protection, the police and investigating judge must rely on measures to minimise the risk of retaliation, such as arranging to hear witnesses discreetly in a neighbouring country or by video-conference.¹⁷⁵

Far fewer measures are available to protect victims against secondary victimisation and our consultations suggest this is not sufficiently prioritised.¹⁷⁶ Normally, the Victim Reception Service acts as a general safeguard against secondary victimisation (this, in fact, was one of the reasons for their creation).¹⁷⁷ Ordinarily,

¹⁶⁷ CIC, art.61ter § 3.

¹⁶⁸ Interview with Victims’ Lawyer IV (10 May 2019).

¹⁶⁹ Interview with Victims’ Lawyer I (4 April 2019).

¹⁷⁰ Interview with Victims’ Lawyer VI (17 May 2019).

¹⁷¹ Judicial Code, arts.2, 17 § 2.

¹⁷² This provision has no equivalent in the CIC. Moreover, previous jurisprudence suggests courts may require that the victims at least be identified. Interview with LDH (13 May 2019).

¹⁷³ Interview with Federal Prosecutor’s Office (15 May 2019); Interview with Former Prosecutor (16 May 2019).

¹⁷⁴ Interview with Investigating Judge (16 May 2019).

¹⁷⁵ Interview with SPF Justice (15 May 2019).

¹⁷⁶ Interview with Investigating Judge (16 May 2019); Interview with Victims’ Lawyer IV (10 May 2019).

¹⁷⁷ Correspondence with Victim Reception Service (23 July 2020). See generally Circular No.16/2012. The Circular was issued in 2012 with the precise aim of minimising the risk of secondary victimisation. The principal measure foreseen by the Circular is the intervention by Victim Reception Services.

the Service could be engaged by the prosecutor at an early stage to provide explanations and updates to victims during the investigation and assist them in exercising their rights. This also allows the Service to evaluate victims' needs and to take steps to reduce the risk of secondary victimisation.¹⁷⁸ However, as noted above, the Service is generally only engaged with respect to international crimes cases just prior to trial, preventing them from fully discharging this role.

None of the practitioners interviewed during the course of our research cited specific examples of measures employed to protect victims during investigations (such as psychological screening, accompaniment by a support person, conducting interviews in victim-friendly premises or through professionals trained for that purpose, or ensuring gender balance within the specialised units).¹⁷⁹

With respect to the trial itself, some limited measures are available. In theory, the parties cannot directly question witnesses, but rather pose questions to the presiding judge who acts as intermediary.¹⁸⁰ This can considerably reduce the stress of testifying. Nevertheless, the efficacy of this measure depends on the presiding judge; as a result, there have been cases where victims have faced intense and confronting questioning.¹⁸¹ Similarly, while the presiding judge can refuse to allow certain questions,¹⁸² there is no explicit limitation on questioning concerning a victim's private life. Moreover, defence counsel are given considerable latitude to comment upon the credibility of witnesses and civil parties during oral argument, which one civil party reported was difficult to endure.¹⁸³

The historic *Palais de Justice* where the Brussels *cour d'assises* sits does not provide for a separate entrance or waiting area for victims. The courtroom itself is "intimidating" and the waiting room for witnesses "resembles a prison cell".¹⁸⁴ Nor is the courtroom designed to avoid contact between victims and the accused's family members or supporters.¹⁸⁵ This meant that in the courtroom "you had the two

sides of the genocide facing each other".¹⁸⁶ In the early cases, this was compounded by the fact that no distinction was made between defence witnesses and victims who came from Rwanda to testify: they travelled together, shared collective accommodation and received (to some degree) the same support from the Victim Reception Service and other authorities.¹⁸⁷ This issue was addressed in the recent **Neretse** trial in 2019, during which victims were accommodated on a different floor to other witnesses in the hotel. Nevertheless, the civil parties in that case were still required to wait in line immediately outside the courtroom and face security screening alongside members of the public, journalists and the accused's family members.¹⁸⁸

"On the left side you had the victims and on the right side there were the relatives of the accused. There was constant intimidation, even right outside the courtroom."

Victims' Lawyer

Recent reforms expanded the categories of individuals eligible to benefit from measures aimed at reducing the risk of secondary victimisation, such as: the possibility to provide pre-recorded testimony (with questioning conducted by trained professionals in premises adapted for that purpose); the possibility to testify from a separate room by video-link; and measures to limit or prevent visual contact with the offender.¹⁸⁹ Although these measures are now also available to "vulnerable adults", vulnerability is defined so strictly that only a small percentage of victims will qualify.¹⁹⁰ Moreover, our consultations also revealed some reluctance to employ them despite their benefit to victims who suffer from trauma. In particular, there was a strong preference for in-court testimony as it was considered to have greater "impact".¹⁹¹ Video-link is therefore reserved for witnesses who cannot physically

178 Correspondence with Victim Reception Service (23 July 2020).

179 The Federal Prosecutor's Office indicated, however, that victims can turn to the Victim Reception Service for assistance. In addition, the presence of the Rwandan VWSU minimised the risk of secondary victimisation during the most recent **Neretse** trial. Correspondence with Federal Prosecutor's Office (17 July 2020).

180 CIC, art.301; Interview with SPF Justice (15 May 2019).

181 Interview with Victims' Lawyer IV (10 May 2019).

182 CIC, art.301.

183 Interview with Civil Party (9 July 2020).

184 Interview with LDH (13 May 2019); Interview with Victim Reception Service (14 May 2019).

185 See Directive, recital 53, art.19; Directive Guidance, pp.40-41.

186 Interview with Former Prosecutor (16 May 2019).

187 As noted above, the same information was given by the Victim Reception Service to all witnesses prior to testifying. However, during the hearings, the Service provided more targeted support to those witnesses who were also victims. Correspondence with Victim Reception Service (23 July 2020).

188 Interview with Civil Party (9 July 2020). See further above under "**Support Services**".

189 CIC, arts.92-101, 311.

190 CIC, art.91bis. These measures can be employed with respect to: minors; victims and witnesses of certain listed crimes (such as sexual offences, kidnapping and physical assault, but not serious international crimes as such); and, since June 2019, "vulnerable adults" (defined as persons who are vulnerable due to age, pregnancy, illness or physical or mental disability).

191 Interview with Former Prosecutor (16 May 2019); Interview with Federal Prosecutor's Office (15 May 2019); Interview with LDH (13 May 2019); Interview with Investigating Judge (16 May 2019). See also **Chapter IX**.

be present (in particular, for defence witnesses who are in custody).

“Why are so few measures available? That’s a good question. It’s the philosophy. There is definitely still a lot to be done in that respect here. I’ve never seen these types of measures put in place during the criminal trial.”

Victims’ Lawyer

Compensation

As in the other countries under examination in this Report, Belgium follows an adhesion model whereby victims can join criminal proceedings in order to claim compensation from the offender. Victims can register as civil parties before the investigative judge or the trial court at any time prior to the close of the trial. The *cour d’assises* is competent to adjudicate the victim’s civil claim during the criminal proceedings, provided the accused is found guilty. For example, during the recent **Neretse** trial, 18 of the civil parties were awarded compensation for moral damages, with awards ranging from EUR 5 000 to 37 000 (totalling EUR 317 000).

Compensation remains a matter of civil law, meaning the victim is responsible for enforcing the award.¹⁹² There are no direct incentives for offenders to pay and the State does not assist in enforcing the award. Instead, victims must enlist the services of a bailiff to investigate the solvency of the offender and then bring civil proceedings to seize any assets, which can be both costly and complicated (particularly if the assets are located abroad).¹⁹³ “The court awarded compensation but nobody ever received anything. If the offenders had any property, it was in Rwanda. It would have been very expensive to travel there, initiate civil proceedings, seize the assets, and all that to maybe end up with nothing. But what was really important, at least for that first case, was to get a conviction and to have what happened recognised as a genocide.”¹⁹⁴

For example, in the second Rwanda trial (**Ndashyikirwa and Nzabonimana**), victims’

lawyers attempted to seize assets located in Rwanda, but this was ultimately unsuccessful.¹⁹⁵ Our consultations did not identify any cases where a civil party had received compensation from an offender.

Where compensation cannot be obtained from the offender, victims of deliberate acts of violence can ordinarily apply for State-funded compensation which is administered by the Commission for Financial Aid for Victims of International Acts of Violence (*Commission pour l’aide financière aux victimes d’actes intentionnels de violence* or Commission for Financial Aid).¹⁹⁶ State-funded compensation is limited, however, to crimes committed in Belgium (with certain specific exceptions for Belgians serving abroad and victims of terrorism).¹⁹⁷

“We are a last resort. We won’t intervene on behalf of the victim to assist in enforcement of a compensation award against an offender.”

Commission for Financial Aid

CONCLUSION

Since abolishing pure universal jurisdiction in 2003, Belgium now only exercises extra-territorial jurisdiction over serious international crimes where one of three jurisdictional links (*liens de rattachement*) exists. This is compounded by the comparatively limited resources dedicated to investigating and prosecuting international crimes and the inevitable prioritisation of certain cases over others. Moreover, the 2003 change to the law restricts the circumstances in which victims of international crimes can initiate criminal proceedings and denies victims the possibility to review decisions not to prosecute. This marginalisation of victims during a key stage of the proceedings not only limits victims’ access to justice, but also denies victims the right to be heard and risks deepening their victimisation.¹⁹⁸

Once the matter reaches an investigating judge, victims are accorded extensive procedural rights that allow them to play an active role in the judicial investigation and any subsequent trial. Nevertheless,

¹⁹² The parole board (*Commission de libération conditionnelle*) can grant interim release (*mise en liberté provisoire*) even where the offender has failed to pay compensation, however this is a factor to be taken into consideration. Law regarding Legal status of Persons Sentenced to Imprisonment and Rights Accorded to Victims in the Execution of Sentences (*Loi relative au statut juridique externe des personnes condamnées à une peine privative de liberté et aux droits reconnus à la victime dans le cadre des modalités d’exécution de la peine*), art.28 § 1(6°), 2(4°).

¹⁹³ Interview with Commission for Financial Aid (14 May 2019); Interview with LDH (13 May 2019); Interview with Civil Party (9 July 2020).

¹⁹⁴ Interview with Victims’ Lawyer V (17 May 2019).

¹⁹⁵ Interview with Victims’ Lawyer I (4 April 2019).

¹⁹⁶ Victims can only apply to the Commission for Financial Aid once they have exhausted all other possibilities (including a claim against the offender). There are a number of other restrictions on the financial aid that can be provided by the Commission (based on the type and severity of the harm suffered) and financial aid is capped at EUR 125 000. These restrictions do not apply to compensation awards against offenders. Interview with Commission for Financial Aid (14 May 2019).

¹⁹⁷ See Law regarding Fiscal and Other Matters (*Loi du portant des mesures fiscales et autres*), art.31bis § 1.

¹⁹⁸ EU Agency for Fundamental Rights, *Proceedings that Do Justice: Justice for Victims of Violent Crime Part II* (2019), pp.89-91.



Memorial in Kigali, Rwanda © AFP/Yasuyoshi Chiba 2019

numerous practical obstacles can inhibit the exercise of those rights. **First**, there can be considerable delays in bringing cases before the courts, with some files languishing in the pre-trial stage for decades. **Second**, victims who live abroad will face difficulties obtaining information about their rights (particularly their right to join proceedings as a civil party). Unless supported by an NGO or represented by legal counsel, many victims will only have the opportunity to join proceedings if and when they are called to testify. Victims and affected communities are similarly dependent on lawyers, NGOs, the media and their own networks to keep them informed of the progress of proceedings.

Third, the legal costs and other financial risks associated with investigations and prosecutions of international crimes in Belgium can act as a barrier to victims' participation. Legal aid is largely unavailable or insufficient in the pre-trial phase and victims who initiate proceedings may have to cover the cost incurred as a result of the judicial investigation. **Fourth**, few measures are available to protect victims from retaliation (particularly victims who reside abroad). Witness protection measures are rarely used as they will have an impact on the weight of the testimony. Even fewer measures are available to protect victims against secondary victimisation. In particular, victims who attend proceedings before the *cour d'assises* in Brussels are not protected against unwanted contact with the accused's family members and supporters. **Finally**, while victims can obtain a decision on compensation from the offender, no measures exist to assist them enforce such decisions. Nor do victims of serious international crimes committed outside Belgium have access to State-funded compensation.

A number of good practices have emerged from our consultations which deserve commendation. For example, despite the comparatively limited resources put at the disposal of the authorities, Belgium has nevertheless played an important role in the repression of serious international crimes at the domestic level. In particular, Belgium has conducted more trials concerning the Rwandan genocide than any other EU Member State. Several other investigations have also made meaningful contributions to the fight against impunity. For instance, the investigation by a Belgian investigating judge of former Chadian dictator Hissène Habré paved the way for his trial before the Extraordinary African Chambers in Senegal. Similarly, the investigation of Michel Desaedeleer sent a clear message that Belgian citizens who exploit situations of armed conflict for profit will be held to account.

In addition, Belgium is the only country under examination in this Report where victim support services have played a proactive role in supporting victims participating in international crimes trials. There remains room for improvement. For example, the Victim Reception Service must be formally engaged before they can offer their services to victims and have faced difficulties providing services remotely. As such, victims who reside abroad will likely only receive access to support in connection with the trial itself. Nevertheless, the efforts of the Service to support victims in the Rwanda trials set an example for other authorities across Europe.

Residents slowly
return home to ruins in
Homs, Syria © UNHCR/
Christopher Reardon 2019

V. FRANCE



Extra-territorial jurisdiction of French courts over genocide, crimes against humanity and war crimes is severely restricted by what is referred to as the “*quatre verrous*”

FRAMEWORK FOR INVESTIGATION AND PROSECUTION OF INTERNATIONAL CRIMES

French courts can exercise extra-territorial jurisdiction over serious international crimes in several situations, each with its own set of distinct criteria. **First**, French courts can exercise extra-territorial jurisdiction pursuant to legislation implementing the Rome Statute into domestic law, specifically with respect to genocide, crimes against humanity and war crimes committed on or after 11 August 2010.¹⁹⁹ Jurisdiction is subject to strict criteria—referred to by practitioners and policy-makers as the *quatre verrous* (literally “four locks”)—that severely inhibit France’s ability to prosecute such crimes. In particular, jurisdiction is limited to situations where the suspect habitually resides in France,²⁰⁰ and the public prosecutor is granted sole discretion as to whether to open an investigation.²⁰¹

French courts can also exercise extra-territorial jurisdiction over torture and enforced disappearance as stand-alone crimes where the accused is present in France

Second, French courts can exercise a limited form of universal jurisdiction on the basis of the *aut dedere aut judicare* principle, subject only to the requirement that the accused be present in France at the time proceedings are initiated. This applies to the stand-alone crimes of torture and enforced disappearance,²⁰² as well as genocide, crimes against humanity and war crimes committed during the conflict in the former Yugoslavia and the 1994 Rwandan genocide.²⁰³ **Third**, French courts can exercise extra-territorial jurisdiction over any crime in the Criminal Code where either: (i) the perpetrator is a French citizen (the **active personality** principle); or (ii) the victim was a French citizen at the time of the crime (the **passive personality** principle).²⁰⁴ **Finally**, since 2004, companies can also be subject to prosecution for any crime in the Criminal Code, including with respect to their activities abroad.²⁰⁵

“We are playing catch-up. We have more staff but we also have more and more cases each year.”

Prosecutor with the *Pôle*

Investigations of international crimes are conducted primarily by the Central Office for Combatting Crimes against Humanity, Genocide and War Crimes (*Office central de lutte contre les crimes contre l’humanité, les génocides et les crimes de guerre* or OCLCH), which is a specialised unit attached to the French national gendarmerie comprised of both gendarmes and police officers. The unit, which was created in November 2013, currently has 24 staff.²⁰⁶ Investigations are carried out under the supervision of a specialised judicial unit,²⁰⁷ the *Pôle crimes contre l’humanité, crimes et délits de guerre* (*Pôle*) created in 2012. In 2019, the *Pôle* was brought under the authority of the new national anti-terrorism unit (*Parquet national anti-*

199 Law No. 2010-930 implementing the Rome Statute (*Loi no. 2010-930 du 9 août 2010 portant adaptation du droit pénal à l’institution de la Cour pénale internationale*); Code of Criminal Procedure (*Code de procédure pénale*) (**CPP**), arts.689-1, 689-11; Criminal Code (*Code pénal*) (**CP**), arts.211-1, 211-2, 212-1, 461-1 to 461-31. Prior to implementation of the Rome Statute, French courts could exercise jurisdiction over genocide and crimes against humanity committed on or after 1 March 1994, but only if the crime was committed on French territory or by/against a French citizen. See CP, arts.211-1, 212-1; CPP, arts.113-6, 113-7. France had no jurisdiction over war crimes prior to 2010.

200 The current head and deputy head of the specialised unit of the French police have recommended that this condition be replaced with mere presence on French territory. Éric Émeraux and Nicolas Le Coz, “*Les Spécificités des enquêtes pénales sur les crimes internationaux les plus graves*” (2019), p.15 (**Émeraux and Le Coz**).

201 As a further requirement, either (i) the conduct must be criminalised in the territorial State or (ii) the territorial State or State of which the suspect is a national must be a State Party to the Rome Statute. Since 25 March 2019, this requirement of dual criminality no longer applies in the case of genocide. Finally, jurisdiction is limited to cases where no other international or national jurisdiction has requested the surrender or extradition of the suspect. CPP, art.689-11.

202 CPP, arts.689-1, 689-2, 689-13; CP, arts.221-12, 222-1. Extra-territorial jurisdiction is limited to acts of torture committed on or after 1 February 1986 and enforced disappearance committed on or after 7 August 2013.

203 Law No. 95-1 implementing UN Security Council resolution 827 (*Loi no. 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations Unies*); Law No. 96-432 implementing UN Security Council resolution 955 (*Loi no. 96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations Unies*). In addition to presence in France, jurisdiction is limited to cases where the United Nations International Residual Mechanism for Criminal Tribunals (IRMCT) has not asserted jurisdiction.

204 CP, arts.113-6, 113-7. Extra-territorial jurisdiction over French nationals is limited to cases where the conduct was also criminalised in the territorial State.

205 CP, art.121-2.

206 This number will be increased to 34 in the course of 2020, however some will be assigned to a new “Hate Crimes” division which will be created in mid-2020. Correspondence with OCLCH (14 April 2020).

207 In France, public prosecutors are members of the judiciary, together with judges.

terroriste or PNAT).²⁰⁸ The *Pôle* currently comprises five prosecutors (supported by three legal analysts) and three specialised investigative judges (supported by four legal analysts).

Since 2015, the French asylum authority (*Office français de protection des réfugiés et apatrides* or OFPRA) is required to inform the *Pôle* where it has serious reasons to believe an individual seeking asylum has committed an international crime (so-called Article 1F cases).²⁰⁹ The systematic referral of such cases each month has led to a greater number of investigations being opened by the *Pôle* of its own initiative.²¹⁰ While the capacity of the *Pôle* and the OCLCH has increased in recent years, additional resources are needed to address the increasing number of cases.²¹¹

Investigations and prosecutions are governed by the Criminal Procedure Code (*Code de procédure pénale* or CPP). The pre-trial stage is inquisitorial in nature, while the trial and appeal phases have both inquisitorial and accusatorial elements. For international crimes, a judicial investigation (*information judiciaire*) before an investigating judge (*jugé d'instruction*) within the *Pôle* must always take place before charges are referred for trial. However, the manner in which the investigating judge is seized will differ depending on the crime concerned, reflecting the different criteria for exercising extra-territorial jurisdiction set out above. For crimes to which the *quatre verrous* apply, the public prosecutor exercises a monopoly over the initiation of criminal proceedings. In such cases, the prosecutor conducts a preliminary investigation (*enquête préliminaire*) and then determines whether there is sufficient evidence to refer the case to an investigating judge. No political approval is required.²¹² However, our consultations with practitioners suggest that the public prosecutor is not entirely free of political interference, given the sensitivity of many international crimes investigations.²¹³ In all other cases, the victim

can trigger the opening of a judicial investigation by filing a complaint directly with an investigating judge, thus bypassing the public prosecutor.²¹⁴

Investigating judges exercise broad coercive powers to collect both inculpatory and exculpatory evidence, with the support of OCLCH investigators in the majority of the investigations.²¹⁵ On the basis of this evidence, the investigating judge may dismiss the case (*ordonnance de non-lieu*) or refer it for trial (*ordonnance de mise en accusation*).²¹⁶ Trials concerning international crimes are held before the Paris *cour d'assises*, consisting of three judges and six lay jurors.²¹⁷ The principle of orality requires that witness testimony collected during the investigation be heard directly by the court. As such, witnesses must appear to give evidence again at trial. Judges retain significant power to order the appearance of additional witnesses or to request new evidence.

Witnesses must be heard again at trial before the Paris *cour d'assises*, meaning trials of international crimes can last many weeks

Appeals involve a new trial before the court of appeal (*cour d'assises d'appel*) comprising three judges and nine lay jurors,²¹⁸ with a further appeal on questions of law to France's Court of Cassation (*cour de cassation*).²¹⁹

208 The *Pôle* was originally established under the authority of the Paris federal prosecutor (*le Parquet du procureur de la République près le tribunal de grande instance de Paris*) on 1 January 2012. See Law No. 2011-1862 relating to the Allocation of Disputes and the Streamlining of Certain Judicial Procedures (*Loi no. 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles*). On 1 July 2019, the unit was merged with the PNAT. The PNAT is divided into two autonomous sections headed by two deputy prosecutors (*procureurs adjoints*). The section dedicated to international crimes has maintained its name, however its staff may be required to reinforce anti-terrorism investigations if needed. Interview with *Pôle* (19 June 2019). See also CPP, art.628-1; Law No. 2019-222 on Programming 2018-2022 and Justice Reform (*Loi no. 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice*).

209 Code on Entry and Stay of Foreigners and the Right to Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile*), art.L722-3; CPP, art.40; Interview with OFPRA (1 July 2019); Interview with *Pôle* (19 June 2019). See also Refugees Convention, art.1F.

210 Interview with FIDH (5 July 2019); Émeraux and Le Coz, p.6.

211 Interview with *Pôle* (19 June 2019).

212 The prosecutor general (*procureur général*) may, however, order the public prosecutor to initiate proceedings in specific cases. CPP, art.36.

213 Interview with Victims' Lawyer II (18 June 2019); Interview with Victims' Lawyer IV (20 June 2019).

214 See further below under "Role of the Victim in Criminal Proceedings in France".

215 CPP, arts.81, 81-1.

216 CPP, arts.177, 181.

217 CPP, arts.628, 628-1. Since June 2016, the Paris *cour d'assises* is exclusively competent in cases concerning serious international crimes. See Law No. 2016-731 Strengthening the Fight against Organised Crime, Terrorism and their Financing and Improving the Effectiveness and Guarantees of the Criminal Procedure (*Loi no. 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale*), art.97.

218 CPP, art.628-1. There are no jurors where the trial is held *in absentia* (*par défaut*). CPP, art.379-3.

219 CPP, art.628-6.



Members of the *Collectif des Parties Civiles pour le Rwanda* at the appeal hearing of **Pascal Simbikangwa** © AFP/Bertrand Guay 2016

OVERVIEW OF RECENT INTERNATIONAL CRIMES CASES IN FRANCE

In recent decades, there have been **five international crimes trials** in France brought on the basis of extra-territorial jurisdiction. Three of those trials were held *in absentia* (*par défaut*) after investigations were commenced on the initiative of victims. Captain **Ely Ould Dah** was convicted and sentenced to 10 years' imprisonment in 2005 for the torture of five detained African-Mauritanians while he was an intelligence officer in the 1990s. Ould Dah was initially arrested while participating in a training programme in Montpellier but fled France after being released from pre-trial detention. The five victims participated in the trial as civil parties and were awarded compensation. **Khaled Ben Saïd** was convicted and sentenced to eight years' imprisonment in 2008 for complicity in torture while he served as a police captain in Tunisia. His sentence was subsequently increased to 12 years. He had been identified by his victim while posted to the Tunisian consulate in Strasbourg but left France before he could be arrested. Lastly, 13 former **leaders during the Pinochet dictatorship** were convicted in 2010 of the torture and disappearance of four French-Chilean citizens in the 1970s. Their sentences ranged from 15 years to life imprisonment. The families of the four victims participated as civil parties.

The remaining two trials concerned the 1994 genocide in Rwanda. **Pascal Simbikangwa**, a former Rwandan intelligence chief, was convicted of genocide and crimes against humanity for his role in the genocide in 2014. During the six-week trial, the court heard over 70 witnesses, including a number of individuals who travelled from Rwanda. His conviction was confirmed on appeal in 2016. No direct victims participated as civil parties. **Tito Barahira and Octavien Ngenzi** were both charged with genocide and crimes against humanity in relation to a church massacre in the village of Kabarondo. After an eight-week trial in 2016, both accused were convicted and sentenced to life imprisonment. Their convictions were confirmed on appeal in 2018 and again by the Court of Cassation in 2019. Twenty-five victims participated as civil parties.

As of June 2020, the *Pôle* has approximately 150 open cases (both preliminary and judicial investigations relating to 27 different

countries) and receives over 50 requests for mutual legal assistance from other jurisdictions each year.²²⁰ In addition, since 2015 the *Pôle* has been conducting a structural investigation—the so-called **Caesar investigation**—following the release of a collection of tens of thousands of photos depicting widespread torture in Syrian detention facilities. This investigation into crimes committed by the Syrian regime is now the object of a Joint Investigation Team with Germany.

Several cases concerning **Rwandan genocidaires** are expected to reach trial in the coming years, including: Claude Muhayimana (awaiting trial in 2021), Philippe Hategekimana, Laurent Bucyibaruta, Sosthène Munyemana and Laurent Serubuga. Other key cases under active investigation or awaiting trial include: the **Lafarge** case involving allegations that the French cement company and several of its top executives were complicit in crimes against humanity in Syria; the **Kunti K** case against a former commander allegedly responsible for crimes against humanity during the first Liberian civil war; the investigation into the **bombardment of a media centre** in Syria in 2012 which resulted in the deaths of two journalists (Rémi Ochlik and Marie Colvin) and serious injury to several others; the **Islam Alloush** case against a senior official with rebel group Jaysh al-Islam for alleged war crimes, torture and enforced disappearance in Syria; the **Amesys** investigation, triggered by a complaint that the French company supplied surveillance material to the Gaddafi regime which was used to monitor communications of the Libyan population; the investigation of two French foreign fighters for crimes against humanity and genocide against **Yazidis** in Iraq and Syria; and the **Dabbagh** case, concerning the disappearance of a French-Syrian man and his father following their arrest by Syrian intelligence officers in Damascus in 2013. This last investigation led to international arrest warrants being issued in October 2018 against **three high-ranking members of the Syrian regime**.



Photographer Rémi Ochlik in North Kivu, DRC in 2008 © Corentin Fohlen

²²⁰ Correspondence with *Pôle* (17 June 2020). The OCLCH also has 150 ongoing investigations. In addition to investigations concerning serious international crimes, this number includes investigations concerning hate crimes (which also fall within OCLCH's mandate). Correspondence with OCLCH (11 June 2020).

FRAMEWORK FOR VICTIMS' RIGHTS

Increasing attention has been given to the position of victims in France since the early 1980s with reforms aimed at improving access to compensation and facilitating participation in criminal proceedings. As a result, few legislative changes were considered necessary to implement the Victims' Rights Directive into French law. The most significant changes related to the requirement for an individual assessment of victims' specific protection needs.²²¹ Nevertheless, Victim Support Europe concluded that practical implementation of these rights remains uneven.²²²

Role of the Victim in Criminal Proceedings in France

In France, victims have traditionally held a special position within the criminal justice system that has allowed them to join criminal proceedings as a **civil party** (*partie civile*) in order to claim compensation from the offender.²²³ Natural and legal persons will qualify as civil parties if they have personally suffered harm (including physical, mental or emotional harm or economic loss) directly caused by an offence.²²⁴

Most procedural rights are linked to this formal status in criminal proceedings.²²⁵ For example, civil party status allows a victim to initiate criminal proceedings against an offender on almost an equal footing to the public prosecutor. By lodging a complaint directly with an investigating judge (*plainte avec constitution de partie civile*),²²⁶ the victim can trigger an obligation to open a judicial investigation.²²⁷ A civil party complaint can be filed against an unknown suspect, a legal person or a named individual. Victims who wish to initiate criminal proceedings must pay a sum determined by the investigating judge by way of a guarantee (*consignation*), unless they are entitled to legal aid or the judge dispenses with this requirement.²²⁸

Legislation implementing the Rome Statute has limited the victim's traditional right to initiate criminal proceedings through civil party complaint

Civil party status also applies to NGOs that defend a special interest enumerated in the law.²²⁹ Historically, the driving force behind international crimes cases in France has been NGOs and victims' associations such as FIDH and the *Collectif des parties civiles pour le Rwanda* (CPCR) that have exercised this right to file a civil party complaint. For example, all five civil parties participating in the **Simbikangwa** trial in 2014 were NGOs.²³⁰

The legislation implementing the Rome Statute into French law sought to limit this traditional right to initiate criminal proceedings by civil party complaint for serious international crimes. This was achieved by giving the public prosecutor a monopoly over the initiation of criminal proceedings in cases concerning Rome Statute crimes (genocide, crimes against humanity and war crimes).²³¹ In such cases, the prosecutor conducts a preliminary investigation (*enquête préliminaire*), and then determines whether there is sufficient evidence to refer the case to an investigating judge.²³² In other words, the prosecutor can exercise his or her discretion to refuse to prosecute such crimes and cannot be bypassed by the victim (as can occur with respect to ordinary crimes).

The implementation of the Rome Statute did not, however, change the situation with respect to the stand-alone crimes of torture or enforced disappearance or crimes committed in the context of the conflict in the former Yugoslavia or the 1994 Rwandan genocide (that is, cases brought on the basis of the **aut dedere aut judicare** principle). In such cases, victims can still initiate proceedings through civil party complaint (the only requirement being that the accused is present in

221 Victim Support Europe, *VOCIARE National Report: France* (2019), p.6 (**VOCIARE France Report**). The Directive was implemented by Law No. 2015-993 concerning Adaptation of Criminal Procedure to EU Law (*Loi no. 2015-993 du 17 août 2015 portant adaptation de la procédure pénale au droit de l'Union européenne*), ch.V.

222 VOCIARE France Report, p.75.

223 See below under "**Compensation**".

224 CPP, arts.2, 3. See e.g. Decision of 26 February 2020 (Court of Cassation, Criminal Chamber, n° de pourvoi 19-82119), para.10.

225 Victims who choose not to participate in proceedings as a civil party are nevertheless guaranteed several rights in the CPP, such as the right to access support services. See CPP, art.10-2.

226 CPP, art.85.

227 The investigating judge is obliged to investigate except in very limited circumstances where an order declining to investigate (*ordonnance de refus d'informer*) is permitted, that is: (i) where the facts do not give rise to a criminal act; (ii) where the public action is extinguished (e.g. by a statute of limitations); and (iii) where the complaint is manifestly unfounded. CPP, art.86. Such an order may be appealed by the civil party before a pre-trial chamber within the court of appeal (*la chambre de l'instruction de la cour d'appel*).

228 CPP, art.88. The guarantee is often symbolic in such cases, in light of the financial situation of the victim/NGO concerned, meaning it does not generally act as an obstacle. Interview with CPCR (18 June 2019); Interview with Victims' Lawyer I (18 June 2019). Nevertheless, there have been examples of an excessive guarantee being imposed to discourage certain complaints. Interview with Victims' Lawyer II (18 June 2019); Interview with Victims' Lawyer IV (20 June 2019).

229 CPP, arts.2-1 to 2-24. For example, under CPP, art.2-4, NGOs combatting international crimes can apply for civil party status, regardless of whether they have suffered direct harm. They then have the same rights as any other civil party.

230 Interview with FIDH (5 July 2019).

231 CPP, art.689-11.

232 Victims, NGOs and any other persons who have witnessed or who have information concerning a serious international crime can bring it to the public prosecutor's attention by filing a report (*plainte simple*). The report can be filed against an unknown suspect, a legal person or a named individual. Victims may still lodge a civil party complaint directly with an investigating judge, however the judge can only open an investigation on the request of the prosecutor.

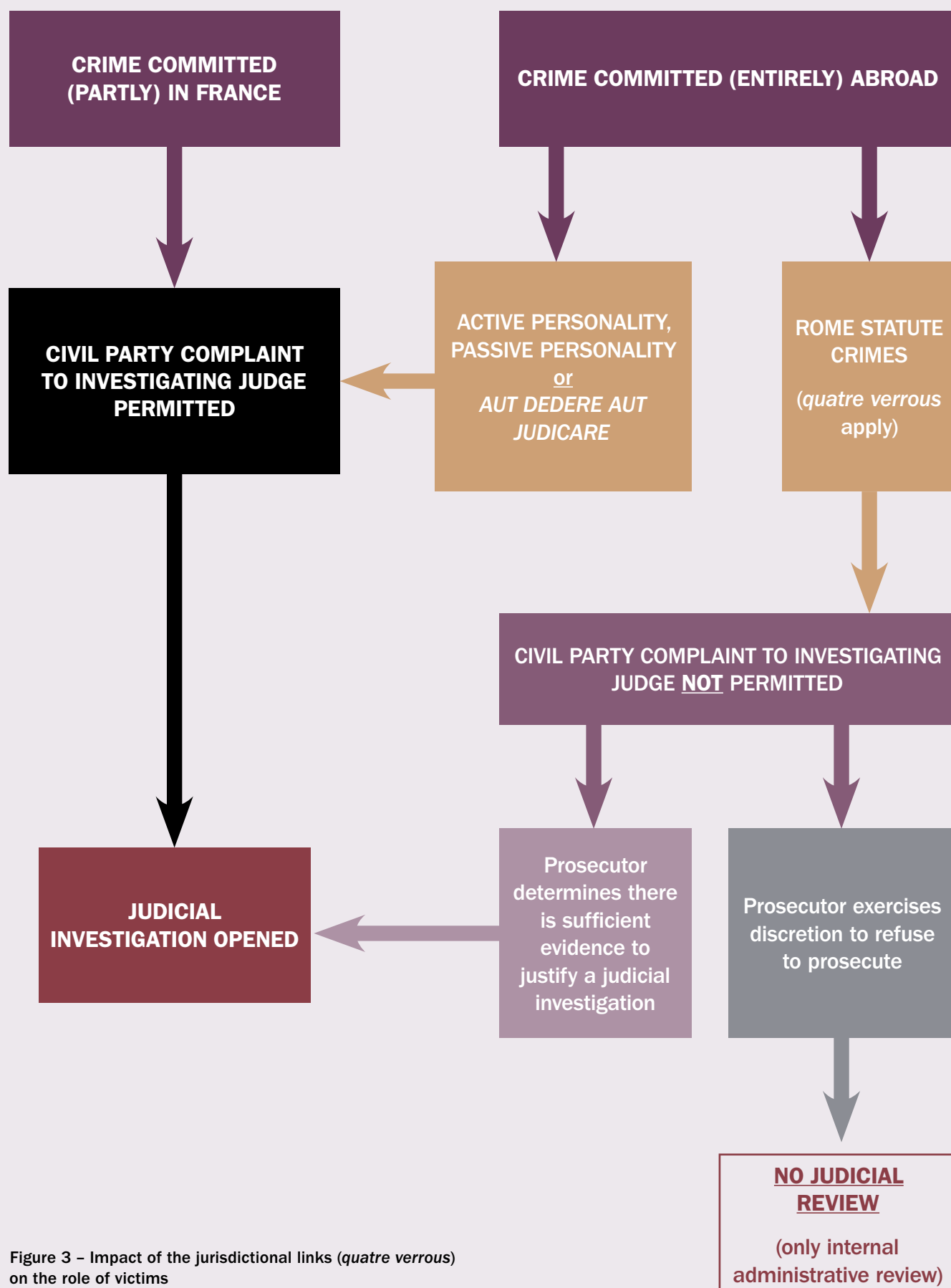


Figure 3 – Impact of the jurisdictional links (*quatre verrous*) on the role of victims

France). Similarly, victims maintain the right to initiate proceedings by civil party complaint in cases where the crime was committed at least partly in France or by/against a French citizen (that is, on the basis of the **territorial, active personality** and **passive personality** principles) (see **Figure 3**).²³³

In any event, victims who cannot initiate proceedings through civil party complaint can nevertheless join the proceedings once the case reaches the investigating judge (and at any stage up to the close of arguments at trial). Thereafter, they will enjoy the same procedural rights as any other civil party.²³⁴ Where the public prosecutor exercises discretion to close a case without further action (*classement sans suite*), the victim must be informed and provided with a reasoned decision.²³⁵ This applies whether or not the offender is identified. Victims may seek review (*recours*) of the public prosecutor's decision, but this is merely an internal administrative review and was described by practitioners as being ineffective.²³⁶ The review is conducted by the prosecutor general (*procureur général*), who may hear the victim and will analyse the file to determine whether there are grounds to initiate a prosecution, following which he or she can order the opening of proceedings.²³⁷ The decision of the prosecutor general is final and cannot be appealed. The right to review has been used infrequently in cases concerning international crimes and without success.²³⁸

Victims only have access to internal administrative review of a public prosecutor's discretionary decision to close a case

"Victims contribute to the investigation in an extremely important way. We wouldn't be able to obtain this information otherwise."

Prosecutor with the *Pôle*

In addition to the right to initiate criminal proceedings, civil party status entails a number of other procedural rights. During a judicial investigation, civil parties may access the entirety of the criminal file through their lawyers,²³⁹ request that specific investigative acts be undertaken, request an expert opinion, submit information, be heard by the investigating judge and file legal submissions.²⁴⁰ As such, victims—directly or through their legal representatives or NGOs with local contacts and country-specific knowledge—can provide access to evidence that would otherwise be out of reach of the authorities.

Examinations of the suspect and any witnesses are conducted by the investigating judge, however the civil party can pose questions and make observations through his/her lawyer.²⁴¹ Civil parties may appeal decisions of the investigating judge concerning the conduct of the investigation and dismissal or

referral to trial before a pre-trial chamber within the court of appeal (*chambre de l'instruction de la cour d'appel*).²⁴²

Similarly, civil parties enjoy extensive rights during trial, such as the ability to access the criminal file, to question witnesses,²⁴³ to make oral submissions (*débat contradictoire*)²⁴⁴ and to file legal briefs.²⁴⁵ Civil parties do not give evidence under oath as witnesses; if a victim also has the status of witness, they may therefore wait until after their testimony to register as a civil party.²⁴⁶ Civil parties are considered formal parties to the proceedings only with respect to their civil action

233 In the past, the Court of Cassation has limited the possibility to initiate proceedings by civil party complaint on the basis of the passive personality principle to **direct victims**. As a result, French family members of non-French victims have been prevented from initiating proceedings. For example, the Court refused to permit a French citizen to initiate proceedings with respect to crimes committed against her husband (a Sahrawi human rights defender detained and tortured by Moroccan police). Decision of 8 November 2016 (Court of Cassation, Criminal Chamber, n° de pourvoi 16-84115). However, the Court has recently held that any person who has personally suffered harm as a result of a crime has an independent right to initiate proceedings through civil party complaint. This includes family members—so-called *victimes par ricochet*—who have suffered moral harm as a result of a crime against the direct victim. Decision of 26 February 2020 (Court of Cassation, Criminal Chamber, n° de pourvoi 19-82119). In any event, victims who cannot themselves initiate proceedings may be permitted to join proceedings that are already on foot. For instance, in a case initiated by family members of two French journalists killed during an attack on a media centre in Syria, the Court of Appeal has permitted four non-French victims of the same attack to join as civil parties. Interview with Victims' Lawyer IV (20 June 2019); Interview with FIDH (5 July 2019).

234 CPP, arts.80-3, 87; Decision of 21 December 1966 (Court of Cassation, Criminal Chamber, n° de pourvoi 66-92873). The civil party cannot join criminal proceedings for the first time on appeal.

235 CPP, art.40-2; Interview with *Pôle* (19 June 2019).

236 Interview with FIDH (5 July 2019); Interview with Victims' Lawyer II (18 June 2019); Interview with Victims' Lawyer IV (20 June 2019).

237 CPP, arts.40-3, 689-11.

238 None of the practitioners identified during the course of our consultations were able to provide an example of a successful recourse to the prosecutor general in a case concerning international crimes.

239 CPP, art.114. Access to the criminal file is permitted only after the civil party has been heard by the investigating judge. Interview with Victims' Lawyer IV (20 June 2019).

240 See e.g. CPP, arts.81, 81-1, 82-1, 82-2, 156, 175, 175-1. Civil parties may not request an arrest warrant or indictment (*mise en accusation*).

241 CPP, arts.82-2, 120.

242 CPP, art.186.

243 CPP, arts.312, 332.

244 CPP, art.346.

245 CPP, art.315.

246 CPP, arts.335(6°), 422.

(*action civile*), and therefore cannot appeal against decisions concerning guilt or sentence.²⁴⁷

Access to Information

Information about the OCLCH's mandate and interest in investigating international crimes has been available on its website since September 2018, together with a video in French with English subtitles.²⁴⁸ It provides the contact information for the OCLCH, but does not contain any information about the possibility to report crimes to the French authorities or about victims' rights more generally. A call for witnesses (*appel à témoins*) providing contact details for the Pôle has been available on OFPRA's website since 2018 and is shared with **refugees** by mail together with the decision granting them asylum. It also contains very limited information concerning victims' rights.²⁴⁹ The Ministry of Justice provides more general information concerning victims' rights on its website however it is only accessible in French.²⁵⁰

OFPRA's call for witnesses (*appel à témoins*)



"In the Rwanda cases, we had a large number of people who knew they could be witnesses but didn't know they could claim the status of civil party."

Victims' Lawyer

Investigators with the OCLCH are obliged to provide victims with information concerning their rights, including their right to participate as a civil party.²⁵¹ Similarly, where an investigating judge opens an investigation, the judge is required to inform the victim of the possibility to become a civil party and to be assisted by a lawyer.²⁵² There are no broader efforts on the part of the authorities to inform victim communities (whether in France or abroad) of the possibility to participate as a civil party or to facilitate access to

legal representation.²⁵³ This has meant that victims generally only participate actively in proceedings where they are supported by a specialised NGO or victims' association.²⁵⁴ For instance, very few victims actively participated in the two Rwanda trials that have taken place.²⁵⁵ Recently, there appears to have been some improvement, with certain investigators (particularly female investigators who interviewed Yazidi victims) taking time to explain the legal process at the beginning of the interview. Nevertheless, it remains unclear whether this practice is applied to all victims.²⁵⁶

²⁴⁷ CPP, art.380-2(4°).

²⁴⁸ Available at <https://www.gendarmerie.interieur.gouv.fr/Notre-institution/Nos-composantes/Au-niveau-central/Les-offices/L-Office-central-de-lutte-contre-les-crimes-contre-l-humanite-les-genocides-et-les-crimes-de-guerre-OCLCH>.

²⁴⁹ Interview with OFPRA (1 July 2019); Interview with Pôle (19 June 2019). The call for witnesses is available online in French (see <https://ofpra.gouv.fr/fr/l-ofpra/actualites/appele-a-temoins-lutte-contre-l>) and in hard copy in French, English, Arabic and Kurdish. The hard copy is provided as an attachment to the decision granting asylum. Due to confidentiality requirements, OFPRA is not able to share information about victims without their consent.

²⁵⁰ An inter-ministerial delegation (*Délégation interministérielle à l'aide aux victimes* or DIAV) proposes to examine ways to improve access to information concerning victims' rights for victims who reside outside France. While this initiative will be primarily concerned with foreigners who become victims of crimes while in France, it may nevertheless benefit victims of serious international crimes. For example, the initiative will aim to produce practical tools to assist authorities in providing information concerning the role of civil parties in the French criminal justice system. Correspondence with DIAV (29 June 2020).

²⁵¹ CPP, art.10-2(2°).

²⁵² CPP, art.80-3.

²⁵³ There have been no information campaigns to inform potential victims of the possibility to participate as civil parties in the Rwanda cases. Moreover, although victims who wish to participate as civil parties may request that a lawyer be designated by the president of the Paris bar association (*bâtonnier de l'ordre des avocats*), this does not occur where victims reside abroad. CPP, art.10-2(3); Interview with Victims' Lawyer I (18 June 2019); Interview with Victims' Lawyer II (18 June 2019); Interview with OCLCH (20 June 2019).

²⁵⁴ Interview with FIDH (5 July 2019); Interview with Victims' Lawyer II (18 June 2019).

²⁵⁵ As noted above, no direct victims participated as civil parties in the *Simbikangwa* trial. In the *Ngenzi and Barahira* case, it appeared that a number of witnesses had themselves suffered harm, yet they were unaware of their right to become civil parties. Their dual status as victims and witnesses only became apparent when they testified at trial and could be questioned by the parties. Interview with FIDH (5 July 2019); Interview with Victims' Lawyer I (18 June 2019); Interview with French Judges (19 June 2019).

²⁵⁶ Interview with FIDH (5 July 2019).

Only victims who formally participate in proceedings as civil parties are entitled to receive updates on the progress of proceedings

During the pre-trial stage, criminal proceedings are governed by the secrecy principle, meaning they are shielded from any publicity.²⁵⁷ Only civil parties have a right to be informed of the development of the investigation, not victims more broadly.²⁵⁸ Even so, civil parties are rarely kept sufficiently informed by the authorities. In practice, once a civil party has been heard early in the investigation, they will have little to no direct contact with the authorities.²⁵⁹ Instead, information is channelled exclusively through their lawyers by virtue of their access to the criminal file and informal exchanges with the investigating judges.²⁶⁰ Similarly, civil parties are insufficiently informed of the outcome of criminal proceedings by the authorities and there are no efforts to inform the broader victim community.²⁶¹

The *Pôle*, which would ordinarily have responsibility for communication surrounding criminal proceedings,²⁶² very rarely issues press releases. Even then, their press releases only announce that a particular procedural step has been taken and therefore do little to inform victims of what they might expect.²⁶³ As a result, victims and affected communities rely almost entirely on lawyers, civil society and other external actors to obtain information.²⁶⁴

The *Pôle* cites the secrecy of the investigation to explain their hesitance towards engaging in any broader outreach concerning their work.²⁶⁵ While there may be valid concerns about jeopardising ongoing

investigations, this would not prevent the *Pôle* from releasing more detailed information (at an appropriate stage) on the scope of the charges and possibilities for victims to contribute to or participate in proceedings. Moreover, the secrecy of the investigation does not explain the *Pôle*'s failure to communicate the final outcome of proceedings to victims and affected communities.

Legal Representation and Reimbursement of Expenses

Victims are entitled to be accompanied at all stages of the proceedings by a legal representative.²⁶⁶ In addition, victims who wish to participate as civil parties are entitled to be assisted by a lawyer of their choice or to have one appointed to them.²⁶⁷

Legal aid is available to civil parties regardless of their nationality.²⁶⁸ However, it is largely inadequate for such cases (particularly in the pre-trial phase). As a result, victims depend heavily on NGO funding and *pro bono* lawyers for representation.²⁶⁹

While victims who appear as witnesses may be reimbursed for expenses incurred during participation in investigations, they often experience significant delays in obtaining reimbursement.²⁷⁰ As most victims cannot afford to wait for reimbursement, this can represent a practical impediment to them being heard during the investigation.²⁷¹ Once a case reaches the trial phase, the authorities take charge of all travel and accommodation for witnesses. In particular, France has dedicated substantial resources to bringing witnesses from abroad to enable them to testify during the two Rwanda first instance and appeal trials.

"In France, we don't have a culture of communicating about our work. For us, it's very important to protect the investigation. The law requires that we be careful."

Prosecutor with the *Pôle*

257 CPP, art.11.

258 See CPP, art.90-1. In addition, when the investigating judge finalises the judicial investigation, he or she will send a notification to the parties, at which point they will have an opportunity to make written observations and request additional investigative measures. See CPP, art.175.

259 For example, in one ongoing case before the *Pôle*, the victims (who reside abroad) have only been heard once by the investigating judge in seven years. The only information they have received on the progress of the investigation has been provided by their lawyers. Interview with FIDH (5 July 2019).

260 Interview with FIDH (5 July 2019); Interview with Victims' Lawyer I (18 June 2019); Interview with Victims' Lawyer IV (20 June 2019).

261 Interview with Victims' Lawyer II (18 June 2019); Interview with FIDH (5 July 2019).

262 Interview with *Pôle* (19 June 2019).

263 Interview with FIDH (5 July 2019).

264 Interview with FIDH (5 July 2019). By contrast, in investigations concerning the recent terrorist attacks in France, investigating judges have been more proactive, gathering victims together each year over several days to provide updates on how the investigation is progressing. Interview with Victims' Lawyer II (18 June 2019).

265 Interview with *Pôle* (19 June 2019).

266 CPP, arts.10-2(8°), 10-4.

267 CPP, art.10-2(3°).

268 Law No. 91-647 concerning Legal Aid (*Loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique*), art.3; VOICARE Report France, p.38.

269 Interview with Victims' Lawyer I (18 June 2019); Interview with Victims' Lawyer II (18 June 2020); Interview with Victims' Lawyer III (18 June 2019); Interview with Victims' Lawyer IV (20 June 2019); Interview with CPCR (18 June 2019); Interview with FIDH (5 July 2019); Interview with NGO (2 April 2019).

270 Advance payments for expenses can be made for victims who reside in France, however this has been refused for victims who reside abroad. See Circular on Victims' Rights in Criminal Trials and their Implementation (*Circulaire du SADJPV du 9 octobre 2007 relative aux droits des victimes dans le procès pénal et à leur mise en œuvre*), Annex V; CPP, art.R134; Interview with Victims' Lawyer I (18 June 2019); Interview with NGO (2 April 2019).

271 Interview with FIDH (5 July 2019); Interview with Victims' Lawyer I (18 June 2019); Interview with Victims' Lawyer II (18 June 2019); Interview with Syrian Center for Media and Freedom of Expression (SCM) (17 June 2019); Interview with NGO (2 April 2019).

“Being in a city like Paris can be scary, especially when you don’t speak the language, so we had to accompany them everywhere. Some victims didn’t know how to open their hotel room with a key card, how to use the shower ... we had to show them everything.”

Representative of a Victim Support Association

Support Services

In the early 1980s, France chose to assign victim support to NGOs. The majority of victim support associations (*les associations d’aide aux victimes*) in France are members of the national federation France Victimes. These associations provide general support, including basic legal information and psychosocial support.²⁷² These services are not specifically adapted to the unique circumstances of victims of serious international crimes. This is understandable, given the infrequent occurrence of such trials before French courts. Even so, one such association was seized by the courts to provide support services during the second Rwanda trial and appeal (the **Ngenzi and Barahira** case).

“There are major shortcomings in the accompaniment of victims.”

Victims’ Lawyer

With no dedicated witness support unit within the court or *Pôle*, this association was responsible for the enormous task of ensuring the appearance of all witnesses in court (whether victims or not).²⁷³ In addition to the necessary logistical arrangements, psychologists and social workers were made available throughout the trial.²⁷⁴ However, this assistance was

strictly available in connection with trial proceedings—the association had very limited contact with witnesses before they arrived in France, and after-care was not available.²⁷⁵

Beyond this example, victim support associations have rarely been called upon to support victims in international crimes cases.²⁷⁶ Moreover, despite their particular vulnerability, specialised psychosocial support is rarely available to victims of international crimes during their interactions with the authorities.²⁷⁷ Where medical and psychological examinations have taken place, they have been conducted primarily for evidentiary purposes.²⁷⁸

In the absence of any broader practice of accompanying and supporting victims of serious international crimes on the part of the authorities or generic victim support services, it generally falls on specialised NGOs to take charge of victims (including logistical support, around-the-clock accompaniment while travelling abroad, psychosocial support during interviews and court proceedings, and specialised psychological care).²⁷⁹

Protection Measures

In 2016, a series of enhanced protection measures were made available for **witnesses** involved in investigations and prosecutions of international crimes.²⁸⁰ Previously, it had been possible for witnesses to testify anonymously during the investigation, however anonymity is not permitted during the trial, nor where it may interfere with the accused’s fair trial rights.²⁸¹ Moreover, witnesses who are also victims cannot benefit from anonymity if they wish to participate as civil parties because they must be identified in the file.²⁸² The only other available measure was requesting that the witness’ address not be recorded in the file.²⁸³ Since the 2016 amendments, the public prosecutor or a party to the proceedings can request that a witness’ identity be made confidential vis-à-vis the public during

272 Interview with France Victimes (19 June 2019).

273 Interview with French Judges (19 June 2019).

274 Interview with Paris Aide aux Victimes (17 July 2019); Interview with CPCJ (18 June 2019).

275 Interview with Paris Aide aux Victimes (17 July 2019). One victims’ lawyers expressed concern that victims who appeared as witnesses arrived in the middle of the night, were insufficiently familiarised with the process and left the day after they completed their testimony. Interview with Victims’ Lawyer II (18 June 2019).

276 Interview with Paris Aide aux Victimes (17 July 2019); Interview with FIDH (5 July 2019).

277 However, victims who are also asylum seekers may be referred for psychosocial support by immigration authorities (*Office français de l’immigration et de l’intégration*). Interview with OFPRA (1 July 2019).

278 Interview with FIDH (5 July 2019); Interview with Victims’ Lawyer I (18 June 2019); Interview with NGO (2 April 2019).

279 Interview with Victims’ Lawyer I (18 June 2019); Interview with Victims’ Lawyer III (18 June 2019); Interview with SCM (17 June 2019). For example, FIDH works in collaboration with the TRACES Réseau Clinique International to provide specialised psychological support to victims engaged in investigations and criminal proceedings. Interview with FIDH (5 July 2019); Interview with TRACES Réseau Clinique International (20 June 2019).

280 See Law No. 2016-731 Reinforcing Measures to Combat Organised Crime and Terrorism (*Loi n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l’efficacité et les garanties de la procédure pénale*).

281 CPP, art.706-58 to 706-62. These provisions provide that the identity of a witness at risk of retaliation will not appear in the criminal file. The order is made by a judge (*un juge des libertés et de la détention*) on the request of the public prosecutor or investigating judge. Anonymity is not available in circumstances where knowledge of the identity of the witness is essential to the accused’s exercise of his/her right to a fair trial.

282 Interview with Victims’ Lawyer IV (20 June 2019). As NGOs that defend a special interest are permitted to act as civil parties in their own name, they may initiate an investigation through civil party complaint on behalf of victims who fear retaliation. Interview with FIDH (5 July 2019).

283 CPP, art.706-57.

the trial.²⁸⁴ In addition, witnesses residing in France who are at risk of retaliation can now benefit from relocation and a change of identity if their evidence is crucial to the case.²⁸⁵

Witnesses both in France and abroad can now benefit from confidentiality vis-à-vis the public in order to protect them against retaliation

However, these measures are only available to *witnesses* and/or their family members. The only measures that are also available to **victims and civil parties** who do not appear as witnesses are the possibility to replace their own address with that of a third party²⁸⁶ and the imposition of conditions on the accused's release from pre-trial detention (*contrôle judiciaire*) (for example, to refrain from contacting certain individuals or frequenting certain locations).²⁸⁷ Moreover, measures such as anonymity and relocation are only available to witnesses on French territory. For those who reside outside France, the means of protection are therefore much more limited. OCLCH investigators can provide their phone number to witnesses and put them in touch with the French embassy if there is a problem. Alternatively, French authorities can arrange for witnesses to travel to France where they can apply for asylum, but this is very rarely done.²⁸⁸

The means to protect victims, civil parties and witnesses who reside abroad are much more limited

There have been some improvements in practices aimed at minimising secondary victimisation at the level of investigations. In light of the difficulties encountered when questioning Syrian victims, there was a real desire on the part of the authorities to adapt their approach to the needs of severely traumatised victims.²⁸⁹ Since then, the OCLCH has put in place a procedure similar to

that applicable to minors or victims of sexual violence to avoid secondary victimisation. The OCLCH has also renovated its premises to provide a dedicated witness interview room with a more welcoming environment.²⁹⁰

“Our former premises looked a bit like a prison and when we interviewed Syrian victims, it of course brought back bad memories.”

Investigator with OCLCH

While psychological screening is not integrated into the interview process, the OCLCH intends to have psychologists available on standby if the need arises. These psychologists will follow the interview from a separate room by video-link and provide input to investigators²⁹¹ (although this appears to be geared more towards enhancing interrogation methods than supporting vulnerable victims). Specialised training has also led to some improvements in the quality of witness interviews and more than a third of the investigators are now women.²⁹²

Being accompanied by a lawyer or support person during an interview can significantly reduce the risk of secondary victimisation. As such, victims and civil parties are entitled by law to be accompanied by a lawyer or support person when they are interviewed.²⁹³ However, this is not common practice in international crimes cases. This is due to the fact that the majority of individuals interviewed by the OCLCH as witnesses are not (yet) recognised as having the status of victims or civil parties. The OCLCH is therefore reluctant to allow them to be accompanied.²⁹⁴ Our consultations also suggest improvements could be made to the manner in which witnesses are summonsed as the formality of the procedure can induce significant anxiety. Similarly, greater reflection could be given to arranging witness interviews in a manner that is adapted to the needs and circumstances of each witness (particularly those travelling from abroad).²⁹⁵

284 CPP, arts.306-1, 706-62-1. The witness' identity will not be mentioned during any public hearing nor appear in any public records, and the witness will give evidence in closed court.

285 CPP, art.706-62-2. These protection measures are granted by a national commission (*Commission nationale de protection et de réinsertion*) and implemented by an inter-ministerial technical service (*Service interministériel d'assistance technique* or SIAT). In order to benefit from these measures, the witness must satisfy strict criteria based on the value of their testimony, the financial cost of relocation and the level of threat faced by the witness and/or their family members.

286 CPP, arts.10-2(9°), 40-4-1 (concerning victims and civil parties), 706-57 (concerning witnesses).

287 CPP, art.138.

288 Interview with OCLCH (20 June 2019).

289 Interview with Pôle (19 June 2019).

290 Interview with OCLCH (20 June 2019); Interview with Pôle (19 June 2019).

291 Correspondence with OCLCH (14 April 2020).

292 Interview with FIDH (5 July 2019); Interview with OCLCH (20 June 2019). See also Émeraux and Le Coz, p.10.

293 CPP, arts.10-2(8°), 10-4. See also National Assembly (15th Parliament, question n° 16044, 5 February 2019) (where the Minister for Justice confirmed the right to be accompanied when filing a complaint).

294 Interview with FIDH (5 July 2019); Interview with Victims' Lawyer V (23 September 2019).

295 Interview with FIDH (5 July 2019); Interview with NGO (2 April 2019). For example, it was reported that one victim who had travelled overnight to Europe was brought immediately from the airport to the interview.



Court sketch from the trial of **Pascal Simbikangwa**
© AFP/Benoit Peyrucq 2014

Very few measures are available to minimise the risk of secondary victimisation in court. Court hearings before the *cour d'assises* can be closed in cases concerning sexual violence if the civil party so requests.²⁹⁶ In addition, the court can invoke its general power to facilitate the conduct of proceedings to permit a sexual violence victim to testify in the absence of the accused.²⁹⁷ Beyond these limited exceptions, measures such as video-link are generally only employed where necessary for the conduct of the trial (for example, for witnesses who are in custody or otherwise unable to travel to France). Moreover, they often face considerable opposition on the part of the defence.²⁹⁸ As such, France fails to provide sufficient measures to avoid visual contact with the offender and to allow the victim to be heard without being present, as required by the Directive.²⁹⁹ In addition, witnesses will be questioned directly by the parties (which can at times be quite harsh). The court's general power to control the conduct of proceedings may be employed to limit questioning of witnesses.³⁰⁰ However, there is no specific requirement to dismiss unnecessary questions concerning the victim's private life.³⁰¹

"The witnesses from Rwanda are parachuted into the cour d'assises in Paris, they don't understand who we are, they are asked to tell us their story then sometimes the defence is extremely aggressive and treat them like liars. This is obviously something terrible for them."

French Judge

Compensation

Victims can obtain compensation by submitting an application to the Crime Victims Compensation Board (*Commission d'indemnisation des victimes d'infractions* or CIVI) attached to each court. This enables victims of serious crimes to obtain full compensation independently of or in parallel to the criminal proceedings, and even where the perpetrator has not been identified.³⁰² The onus is on the victim to establish harm, and the CIVI is not bound by decisions of the court regarding the admissibility of the claim or the amount awarded. Where the CIVI awards compensation, the award is paid by the Guarantee Fund for Victims of Terrorist and Other Criminal Acts (*Fonds de Garantie des Victimes des actes de Terrorisme et d'autres Infractions*

296 CPP, art.306.

297 See e.g. Decision of 17 December 1997 (Court of Cassation, Criminal Chamber, n° de pourvoi 97-81318); Correspondence with Judge (17 July 2020).

298 Interview with FIDH (5 July 2019); Interview with Victims' Lawyer III (18 June 2019); Interview with French Judges (19 June 2019).

299 Directive, art.23(3).

300 In particular, the presiding judge may intervene where questions tend to compromise the dignity of the proceedings. See e.g. Decision of 5 March 1986 (Court of Cassation, Criminal Chamber, n° de pourvoi 85-91259); Correspondence with Judge (17 July 2020).

301 Interview with Victims' Lawyer I (18 June 2019); Interview with Victims' Lawyer II (18 June 2019). See also Directive, art.23(3)(c).

302 CPP, art.706-3.



Portraits of Syrian individuals detained by the Assad regime (collected and disseminated by Syrian activists)

"I think the decision that awarded them compensation had a positive impact. But then, all the obstacles that were put in their way discouraged them, as if they were no longer recognised as victims."

Victims' Lawyer

or FGTI).³⁰³ The FGFI will then attempt to recover the amount from the offender. Applications to the CIVI can only be made by French citizens (at the time the crime was committed) and victims of crimes committed on French territory, effectively excluding most victims of international crimes.³⁰⁴

Where victims cannot obtain compensation from the CIVI, they may seek compensation directly from

the offender. Like many other jurisdictions, France follows an adhesion model whereby victims can join criminal proceedings as a civil party and claim damages for physical, material and moral harm.³⁰⁵ Claims may also be filed by legal persons who have suffered direct harm. Victims may join the proceedings at any stage during the trial prior to the close of arguments. The judges of the *cour d'assises* will reach a decision on the compensation claim after a determination of guilt and in the absence of the jury,³⁰⁶ and compensation may still be awarded even in the case of an acquittal.³⁰⁷ Civil parties may appeal decisions relating to their civil claim.³⁰⁸ Generally, the victim is responsible for enforcing the decision.³⁰⁹ As a result, there remains a significant gap between the right to obtain compensation from the offender and its actual application in terms of enforcement of awards.

303 The FGFI, which is not State-funded, is financed primarily by insurance contributions.

304 CPP, art.706-3(3°); Interview with FGFI (15 July 2019). Three victims who had acquired French citizenship *after* the commission of the crimes (but prior to their application to the CIVI) received compensation in the **Ely Ould Dah** case. The applications for compensation made by two other victims who did not yet possess French citizenship were ruled inadmissible by the court of appeal. Decision of 6 June 2008 (Paris Court of Appeal, First Civil Chamber); Interview with Victims' Lawyer III (18 June 2019). However, this jurisprudence has since been overturned by the Court of Cassation. Decision of 12 February 2009 (Court of Cassation, Second Civil Chamber, n° de pourvoi 08-12987).

305 CPP, arts.2, 3.

306 CPP, art.371.

307 CPP, art.372.

308 CPP, art.380-2(4°).

309 The sentencing judge may order the payment of compensation in combination with a deferred sentence and monitors whether the offender fulfils his obligations. Similarly, prison services may deduct sums from prisoners' wages to put towards compensation.

In 2008, a mechanism was created in an attempt to close this gap by enabling victims that cannot be compensated by the CIVI to nevertheless benefit from the FGTI's intervention. The Crime Victims' Compensation Recovery Assistance Service (*Service d'aide au recouvrement des victimes d'infraction* or SARVI) can provide an advance payment of up to EUR 3000 and will then assist the victim to recover the full amount from the offender. Unlike the CIVI, all natural persons who, as civil parties, have obtained a compensation award from a French court can be assisted by the SARVI in enforcing the award.³¹⁰

CONCLUSION

France has implemented a complex web of legislation providing for extra-territorial jurisdiction over serious international crimes in different situations, each with its own set of distinct criteria. These strict criteria—particularly the *quatre verrous* that apply to Rome Statute crimes—severely inhibit France's ability to contribute to the fight against impunity. Similarly, by granting the public prosecutor sole discretion to decide whether to prosecute Rome Statute crimes and allowing only administrative review of such decision, there is less scope for victims to influence the initiation of proceedings.

On the other hand, the creation of specialised units to investigate and prosecute cases involving serious international crimes has led to more cases being opened on the initiative of the *Pôle*. In particular, we welcome the opening of a structural investigation into torture in Syrian detention facilities and increased cooperation with Germany. We also commend France for ensuring systematic referral of cases by OFPRA where there are serious reasons to believe an individual seeking asylum has committed a serious international crime. Nonetheless, specialised NGOs continue to play a critical role in facilitating victims' access to justice through civil party complaint—including in a number of recent cases concerning Syria.³¹¹ In addition, the merging of the *Pôle* with the newly-established national anti-terrorism unit (the PNAT) could result in the dilution of resources available to serious international crimes cases.

On the whole, the implementation of the Directive does not appear to have had any measurable impact upon victims' rights in the context of international crimes cases in France. One notable exception is in the area of protection, where legislative amendments in 2016 brought in enhanced protection measures for victims who appear as witnesses (including confidentiality vis-à-vis the public during trial). Other improvements in practice are more likely a reflection of the ongoing professionalisation and increased resources dedicated to the units responsible for investigating and prosecuting such cases. For example, we are encouraged that the units have obtained specialised training and are developing practices to minimise secondary victimisation.

Nonetheless, a number of practical obstacles remain. These limit the extent to which victims of international crimes can benefit from the extensive procedural rights accorded by French law. **First**, victims continue to rely heavily on specialised NGOs to learn about their rights and to participate in proceedings. This has meant that very few victims have been able to participate in proceedings to date. Although we commend OFPRA for taking the initiative to develop a call for witnesses, this should be matched by greater efforts at awareness-raising on the part of the *Pôle* itself. Similarly, the *Pôle* has yet to develop a communications policy concerning updates on proceedings, meaning victims and affected communities rely almost entirely on lawyers, civil society and other external actors to follow proceedings.

Second, there is currently no practice of accompanying and supporting victims of serious international crimes on the part of the authorities or general victim support services (beyond that which is provided in direct connection with court hearings). As such, it generally falls to specialised NGOs to take charge of victims, particularly during the investigations phase. **Third**, very few measures are available to minimise the risk of secondary victimisation in court. In particular, those required by Article 23 of the Directive (for example, measures to avoid visual contact between the victim and the offender) are not sufficiently provided for under French procedural law. **Lastly**, most victims of international crimes are excluded from accessing compensation from the CIVI.

310 CPP, arts.706-15-1 to 2.

311 Interview with FIDH (5 July 2019).

VI. GERMANY



FRAMEWORK FOR INVESTIGATION AND PROSECUTION OF INTERNATIONAL CRIMES

Germany was one of the first countries to incorporate the Rome Statute domestically through its Code for Crimes against International Law (*Völkerstrafgesetzbuch* or VStGB). The VStGB provides for universal jurisdiction (*Weltrechtsprinzip*) over Rome Statute crimes, with effect from 30 June 2002.³¹² This means investigations and prosecutions can be initiated into war crimes, crimes against humanity and genocide committed outside Germany, regardless of the nationality of the victim or perpetrator.³¹³ Acts of genocide committed prior to 2002 remain punishable under the German Criminal Code (*Strafgesetzbuch* or StGB).³¹⁴

Under German law, neither torture nor enforced disappearance is a stand-alone crime; nor were war crimes or crimes against humanity criminalised as such prior to 2002. Nevertheless, Germany can exercise extra-territorial jurisdiction over ordinary crimes in the StGB (such as assault, rape or murder) where those crimes are punishable under binding international conventions.³¹⁵ German law does not currently provide for criminal liability of legal persons, however administrative liability does exist with respect to companies, including with respect to their activities abroad.³¹⁶

Germany has growing specialised units within its police and prosecution services to handle cases involving international crimes. Since 2003, the Federal Criminal Police (*Bundeskriminalamt* or BKA) has included a specialised war crimes unit. The unit was restructured

Germany can exercise universal jurisdiction, meaning it can investigate and prosecute war crimes, crimes against humanity and genocide committed by foreign perpetrators against foreign victims on foreign soil

and renamed the Central Unit for the Fight against War Crimes and Further Offenses pursuant to the Code of Crimes against International Law (*Zentralstelle für die Bekämpfung von Kriegsverbrechen* or ZBKV) in 2009.³¹⁷ As of August 2018, the ZBKV has had the status of an independent unit within the BKA.³¹⁸ The ZBKV investigates international crimes under the supervision of the Federal Prosecutor General (*Generalbundesanwalt* or GBA),³¹⁹ which has had a specialised unit for international crimes since 2009. While the GBA is bound by law to act objectively,³²⁰ it nevertheless forms part of the executive branch of government (rather than the judiciary) and is subordinate to the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz* or BMJV).³²¹

Investigations can be opened on the initiative of the GBA or following a criminal complaint made by a victim or third party.³²² Most investigations are opened on the basis of information provided by the German migration authority (*Bundesamt für Migration und Flüchtlinge* or BAMF). A specialised section of the BAMF shares information with the ZBKV and the State Criminal Police Offices (*Landeskriminalämter*) concerning potential perpetrators.³²³ However, it also shares information concerning possible witnesses, victims and general

312 The crime of aggression was introduced into the VStGB with effect from 1 January 2017. Law Amending the International Criminal Code (*Gesetz zur Änderung des Völkerstrafgesetzbuches*) of 22 December 2016. German courts can exercise extra-territorial jurisdiction over the crime of aggression only where the perpetrator is a German national or the crime is directed against Germany. VStGB, ss.1, 13.

313 There is no requirement that the accused be present on German territory before an investigation can take place. However, Germany does not permit trials *in absentia*, so the accused must be brought before the relevant court in order for criminal proceedings to commence.

314 StGB, s.220a (providing for extra-territorial jurisdiction with respect to acts committed on or after 22 February 1955).

315 StGB, s.6(9). See also s.7.

316 Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten*), s.30.

317 From 1993 onwards, a small team of specialised police investigated war crimes and genocide committed during the conflict in the former Yugoslavia. In 2003, the team's mandate was extended to include all grave international crimes and it was transformed into a full-fledged unit. However, it was only with the creation of the specialised prosecution unit in 2009 that Germany began actively pursuing cases based on universal jurisdiction.

318 Interview with ZBKV (26 September 2019).

319 The GBA may transfer less complex cases to one of the German states (*Bundesländer*). For example, the GBA has transferred cases involving accused posing for photos with bodies in Syria and Iraq. Federal Republic of Germany, *Universal Jurisdiction in the Federal Republic of Germany: Observations submitted pursuant to UN General Assembly Resolution 73/208 of 20 December 2018* (22 March 2019), p.9 available at https://www.un.org/en/ga/sixth/74/universal_jurisdiction/germany_e.pdf (Germany's UJ Observations).

320 Decision of the Federal Constitutional Court, BVerfGE 9, 223 (228).

321 Courts Constitution Act (*Gerichtsverfassungsgesetz* or GVG), s.147(1). The potential for political pressure on the GBA drew criticism from the UN Special Rapporteur on the Independence of Judges and Lawyers in 2007. The Rapporteur expressed concern regarding the GBA's decision to refrain from opening an investigation against then-Secretary of Defense Donald H. Rumsfeld and other US civilian and military officials with respect to alleged torture in Iraq. The decision had come just two days before Rumsfeld was due to attend a Security Conference in Munich. The Special Rapporteur "expressed deep concern that a decision by the prosecutor on a case involving such serious crimes has been taken in a context of strong political pressure exerted by the country of citizenship of the defendants". See UN Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy: Addendum*, UN Doc. A/HRC/4/25/Add.1 (5 April 2007), paras.154-160. For further information on the GBA's discretion not to investigate or prosecute, see below under "Role of the Victim in Criminal Proceedings in Germany".

322 German Criminal Procedure Code (*Strafprozessordnung* or StPO), ss.152, 158.

323 See Asylum Act (*Asylgesetz*), s.8(3); Refugees Convention, art.1F. Application of the art.1F exclusion clause is primarily handled by specialised case workers in the approximately 60 "outlet offices" across Germany. Where a potential perpetrator of an international crime is identified, that information is then shared by the BAMF's Unit 71B (*Referat 71B – Operative Zusammenarbeit mit den Sicherheitsbehörden des Bundes und der Länder*), which acts as a focal point for collaboration with the security authorities. There is also a centralised unit with specialised case workers who process more complex exclusion cases. Interview with BAMF (24 September 2019).

leads in a way that other countries do not.³²⁴ This information is used to support ongoing ZBKV investigations and may be shared with investigating authorities from other jurisdictions through mutual legal assistance frameworks.³²⁵

German authorities can conduct “structural investigations” which allow them to investigate an organisational structure allegedly responsible for largescale crimes

Before opening an investigation into international crimes, the authorities will conduct a preliminary examination (*Vorermittlungen*) to determine whether there is a sufficient basis to warrant a formal investigation.³²⁶ Formal investigations may be initiated into a specific case against known or unknown suspects. Alternatively, so-called structural investigations (*Strukturermittlungsverfahren*) can be opened to investigate an organisational structure allegedly responsible for largescale crimes. This enables authorities to gather and preserve evidence available in Germany in order to facilitate future proceedings before a German, foreign or international court. Such investigations have been used in Germany since 2011, most notably with regard to Syria, but are not yet regulated by law.³²⁷ Although the VStGB provides for universal jurisdiction, the GBA has broad discretion to decline to pursue investigations or prosecutions where there is no concrete link to Germany.³²⁸

Universal jurisdiction is tempered by broad prosecutorial discretion to decline to investigate where there is no concrete link to Germany

The criminal justice system in Germany is inquisitorial in nature. Cases concerning international crimes are governed by Germany’s Criminal Procedure Code (*Strafprozessordnung* or StPO). Investigating judges in Germany play a less important role than in other civil law systems such as France or Belgium, as most coercive powers can be exercised by the GBA during the investigation. Crimes under the VStGB are tried exclusively before the Higher Regional Courts which consist of a panel of three to five judges, depending on the complexity of the case.³²⁹

All evidence must in principle be presented orally or read onto the record, meaning trials concerning international crimes can last many years. For example, the **FDLR** trial involved 320 days of hearings over four years between 2011 and 2015.³³⁰ The **Rwabukombe** trial involved 121 days of hearings over three years between 2011 and 2014.³³¹ There is no appeal (*Berufung*) from decisions of Higher Regional Courts. The Federal Court of Justice (*Bundesgerichtshof*) may conduct a review (*Revision*), which is limited to matters of law. Constitutional appeals are heard by the Federal Constitutional Court (*Bundesverfassungsgericht*).

In Germany, all evidence must be presented orally, meaning trials before the Higher Regional Courts last several years

324 The current practice involves asylum applicants being asked during their personal interview whether they have witnessed or been a victim of an international crime. This question was introduced following consultation with the ZBKV and is applied primarily to those countries/conflicts of current interest to investigators (such as Syria/Iraq). The BAMF then passes this information on to the ZBKV who may invite the individual to meet with them. For the most part, information only flows in one direction. Interview with BAMF (24 September 2019); Interview with ZBKV (26 September 2019).

325 Interview with ZBKV (26 September 2019). For example, the ZBKV can connect a specialised unit from another EU Member State with potential witnesses who reside in Germany. This information is also shared with other national authorities via Europol’s Analysis Project for Core International Crimes (AP CIC).

326 StPO, s.152.

327 Interview with ECCHR (23 September 2019).

328 Section 153f of the StPO gives prosecutors discretion to decline to investigate or prosecute where the suspect is not present in Germany (and his/her presence is not anticipated), so long as neither the suspect nor the victim is a German citizen. The mere theoretical possibility of entry into Germany is insufficient. This provision also allows the GBA to terminate proceedings at any stage, without leave of the court.

329 GVG, ss.120(1)(8), 122(2).

330 See ECCHR, *Universal Jurisdiction in Germany? The Congo War Crimes Trial: First Case under the Code of Crimes against International Law: Executive Summary* (8 June 2016), available at <https://www.ecchr.eu> (ECCHR FDLR Report).

331 Interview with Victims’ Lawyer (7 October 2019).





Joint plaintiffs Feras Fayyad, Wafa Mustafa and Anwar al-Bunni with photos of victims of the Syrian regime outside the courthouse in Koblenz during the **Anwar R** trial © AFP/Thomas Lohnes 2020

GERMANY

OVERVIEW OF RECENT INTERNATIONAL CRIMES CASES IN GERMANY

Over a dozen cases concerning international crimes have been brought to trial in Germany on the basis of universal or extra-territorial jurisdiction in recent decades. Beginning in the late 1990s, German authorities prosecuted three cases arising out of the conflict in the **former Yugoslavia**. Two accused (Nikola Jorgić and Djuradj Kusljic) were convicted of genocide and sentenced to life imprisonment. The third (Maksim Sokolovic) was convicted of aiding and abetting genocide and war crimes and sentenced to nine years' imprisonment.

German authorities also prosecuted one case arising out of the 1994 Rwandan genocide. Onesphore **Rwabukombe** was initially convicted of complicity in genocide for his role in a church massacre in Kiziguro in 2014 and sentenced to 14 years' imprisonment. Four victims participated as joint plaintiffs, travelling to Germany to testify against the accused. Both the joint plaintiffs and GBA appealed the characterisation of Rwabukombe as a mere participant in the genocide. Following a retrial, he was convicted of committing genocide and sentenced to life imprisonment in 2015. His appeal was dismissed in 2016.

One case arose out of a structural investigation into crimes committed by the *Forces démocratiques de libération du Rwanda* (FDLR) in eastern DRC in 2008 and 2009, known as the **FDLR** case. One of the two accused (Ignace Murwanashyaka) was convicted at trial of aiding and abetting war crimes and terrorism offences in 2015. Six victims residing in eastern DRC testified anonymously during the trial, but no victims participated as joint plaintiffs. Murwanashyaka's conviction for war crimes was overturned on appeal and he died while awaiting retrial in 2019.

Several structural investigations into crimes committed in **Iraq and Syria** have resulted in a number of recent trials.³³² Only a few have involved the participation of victims. For instance, **Jennifer W** is a German national currently on trial for her alleged involvement in war crimes while she was a member of ISIL (including the death of a five-year-old Yazidi girl). Her former husband (**Taha al-J**) is currently standing trial on charges of war crimes, crimes against humanity and genocide. The child's mother testified at Jennifer W's trial and is participating as a joint plaintiff. Another trial concerning crimes against humanity commenced on 23 April 2020 against **Anwar R and Eyad A**—both members of the Syrian intelligence services. The charges against Anwar R encompass 4000 incidents of torture, 58 murders and two sexual assaults allegedly committed in the Al-Khatib facility in Damascus. Over a dozen victims are already participating as joint plaintiffs.

As of July 2020, there are more than 100 active investigations in Germany concerning VStGB crimes, with 16 indictments to date and four ongoing trials. In addition, there are several active investigations involving charges of both VStGB crimes and terrorism-related offences, with seven indictments to date and three ongoing trials. Structural investigations represent the status quo (at least 11 have been conducted, six of which are ongoing).³³³ One of those structural investigations—which is the object of a Joint Investigation Team with France—led to an arrest warrant being issued in June 2018 against Jamil Hassan, a **high-ranking member of the Syrian regime**.

³³² A number of those trials are discussed in Germany's UJ Observations.

³³³ German Bundestag, Reply to Parliamentary Inquiry, *Drucksache 19/12354* (19. Wahlperiode, 12 August 2019), pp.2-4 (**German Bundestag No.19/12354**).

FRAMEWORK FOR VICTIMS' RIGHTS

A series of reforms commencing in the 1970s had already made substantial improvements to the position of victims in criminal proceedings in Germany.³³⁴ The Directive itself reinforced those existing rights.³³⁵ And yet, despite enjoying extensive procedural rights under the law, victims of serious international crimes often face practical obstacles to the exercise of those rights.

Role of the Victim in Criminal Proceedings in Germany

Victims may report serious international crimes to the authorities in Germany, however they are dependent on the authorities to initiate criminal proceedings (*Offizialmaxime*). Once this has occurred, victims whose rights have been violated as the result of the offence can join proceedings as an **injured party** (*Verletzte*). Injured parties have the right to claim compensation from the offender,³³⁶ to be notified of certain steps in proceedings³³⁷ and to inspect the criminal file if they can demonstrate a legitimate interest in gaining access (in particular, in order to appeal against a decision not to prosecute).³³⁸

Victims can join proceedings as injured parties in order to claim compensation from the offender

In addition, a victim of a serious crime or family member of a victim who has been killed can actively participate in criminal proceedings as a **joint plaintiff** (*Nebenkläger*).³³⁹ Victims can apply to the court to become a joint plaintiff at any stage once criminal proceedings have commenced (including for the purposes of bringing an appeal).³⁴⁰ NGOs as such have no formal status during criminal proceedings and therefore cannot participate as joint plaintiffs.³⁴¹

Joint plaintiffs are considered formal parties to the criminal proceedings and therefore benefit from a **number of additional procedural rights**. They include

Victims of serious crimes can also actively participate in proceedings as joint plaintiffs

the right: to be present during the trial (even if the joint plaintiff is to be heard as a witness); to be represented by a lawyer; to challenge a judge or expert witness; to question witnesses; to object to orders or questions; to submit evidence; to be heard (including giving a closing statement); to be notified of decisions, including the outcome of proceedings; to appeal against decisions concerning the opening of main proceedings, the final judgment as well as the sentence; and to request that an interpreter be appointed insofar as this is necessary in order to exercise these rights.³⁴² In particular, joint plaintiffs are entitled to have a lawyer **inspect the criminal file** unless overriding interests warrant refusal (for example, where access may jeopardise the investigation or delay proceedings).³⁴³

Strict time limits, high evidentiary and legal thresholds and the broad discretionary power of the GBA means the conduct of investigations and decisions not to prosecute are only subject to very limited judicial review

Right to Review of Decisions Not to Prosecute

Victims have very limited possibilities to seek review of decisions not to investigate or prosecute due to strict time limits, high evidentiary and legal thresholds and

334 Victim Support Europe, *VOCIARE National Report: Germany* (2019), pp.10-11 (**VOCIARE Germany Report**).

335 Law to Strengthen the Rights of Victims in Criminal Proceedings (*Gesetz zur Stärkung der Opferrechte im Strafverfahren*) of 21 December 2015, also referred to as the Third Victims' Rights Reform Act (3. *Opferrechtsreformgesetz*).

336 StPO, ss.403-406c. See further below under "**Compensation**".

337 StPO, s.406d. See further below under "**Updates on Proceedings**".

338 StPO, s.406e. Victims regularly experience difficulties gaining access to the criminal file in investigations concerning international crimes due to claims that overriding interests warrant refusal (e.g. data protection or national security interests). Interview with ECCHR (23 September 2019).

339 StPO, s.395(1)-(2). VStGB crimes are not specifically referred to in this provision. Nevertheless, in most cases, the underlying act which constitutes a war crime, crime against humanity or genocide is specifically referred to in s.395(1) (e.g. murder, rape, assault). In addition, a catch-all provision (s.395(3)) applies to cases where, for specific reasons and in particular on account of the serious consequences of the act, allowing the victim to become a joint plaintiff is necessary to safeguard his or her interests. The English translation of the StPO uses the term "**accessory prosecutor**", however we have adopted the term "**joint plaintiff**" in this Report.

340 StPO, ss.395(4), 396(1). The court decides on a victim's application to join the proceedings and the victim can appeal against a refusal. StPO, s.304(1), but see s.396(2) (no appeal from decisions falling under the catch-all provision in s.395(3)).

341 Interview with ECCHR (23 September 2019).

342 StPO, ss.397, 397a, 400-401, 406d, 406e, 406i; GVG, s.187(4).

343 StPO, s.406e.

the broad discretionary power of the GBA.

German procedural law provides that if the GBA closes a case **due to lack of evidence**, it must inform any victim who has submitted a complaint of the decision (with reasons) and of the possibility to appeal.³⁴⁴ This involves an appeal to a Higher Regional Court within one month through an action to force criminal prosecution (*Klageerzwingungsverfahren*).³⁴⁵ If the Court finds that the threshold for an indictment has been met, it can order the GBA to initiate a prosecution.³⁴⁶ The appeal must be supported by facts and evidence and the victim may be required to furnish a security to cover the costs likely to be incurred.³⁴⁷ This evidentiary burden obliges victims to pursue their own investigations to substantiate the charges within this short time frame, effectively stripping victims of the only avenue open for judicial review of a decision not to prosecute.³⁴⁸

In addition to closing a case due to lack of evidence, for VStGB crimes the GBA can exercise its discretion to refrain from opening an investigation altogether or to terminate an active investigation/prosecution where there is **no concrete link to Germany**.³⁴⁹ If the victim has filed a complaint, they will be provided with a copy of the decision.³⁵⁰ Contrary to decisions to close a case due to lack of evidence, these discretionary decisions are not subject to an action to force criminal prosecution. Rather, the exercise of discretion is only subject to **very limited judicial review** by the Higher Regional Courts, with little prospect of success.³⁵¹ Moreover, even this limited possibility of judicial review is unavailable so long as a case remains in the (often lengthy) preliminary examination stage.³⁵² Not only

does this prevent any form of public scrutiny of the conduct of such investigations, but it also deprives victims of the right to access the file which only applies during a formal investigation. As such, the conduct of investigations by the GBA and its legal interpretation of the VStGB remain, in most cases, without any independent judicial review.³⁵³

Access to Information concerning Victims' Rights

The StPO requires that victims be informed “as early as possible” of their rights, including the right to file a criminal complaint, to join the proceedings as a joint plaintiff, to receive protection and to access support services.³⁵⁴ Yet inadequate information concerning their rights continues to be one of the greatest obstacles to victims of international crimes gaining access to justice in Germany.

Very little information is available to victims about the possibility to make a complaint concerning international crimes to German authorities. The BKA has a webpage dedicated to the ZBKV with information available in English and German, however it provides no information about how to contact the unit.³⁵⁵ Rather, the ZBKV prefers a more indirect approach to outreach. This involves using investigators' networks with other agencies and NGOs to identify potential witnesses and engaging with the media to inform the public more generally about their work.³⁵⁶

The BAMF does not currently inform potential victims of the possibility to report international crimes to German authorities or how to contact the ZBKV. Rather, the GBA is considered to have primary responsibility

“NGOs have a huge role to play in informing victims about the possibility to join the proceedings and actively participate as a joint plaintiff.”

Victims' Lawyer

344 StPO, ss.170-171.

345 StPO, s.172.

346 StPO, s.175.

347 StPO, ss.172(3), 176.

348 Interview with ECCHR (23 September 2019).

349 StPO, s.153f. Decisions of this type are generally several pages long and set out the considerations which formed the basis for the exercise of discretion. See Matthias Neuner, “German Preliminary Examinations of International Crimes” in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination* (vol.1, 2018), p.173.

350 Interview with ECCHR (23 September 2019).

351 See e.g. *Centre for Constitutional Rights v. Rumsfeld*, Higher Regional Court Stuttgart, 13 September 2005, 5 Ws 109/05, available in English in (2006) 45 *International Legal Materials* 115, p.126 (finding that beyond determining whether the discretion under s.153f was exercised at all and whether it was exercised arbitrarily, such decisions are not subject to judicial review). See also VOICARE Germany Report, p.41 (recommending that where victims are not expressly provided with a right to challenge decisions not to pursue a prosecution on public interest grounds, improvements need to be made in order to fully implement Article 11 of the Directive).

352 Prosecutors can keep an investigation or examination open for as long as they choose and can reopen an investigation at a later date if warranted. Interview with ECCHR (23 September 2019).

353 See Andreas Schüller and Chantal Meloni, “Quality Control in Preliminary Examinations of Civil Society Submissions” in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination* (vol.2, 2018) pp.530-531; Andreas Schüller, “The Role of National Investigations in the System of International Criminal Justice: Developments in Germany” in (2013) 31(4) *Sicherheit und Frieden* at p.230.

354 StPO, ss.406i, 406j, 406k.

355 See e.g. https://www.bka.de/DE/UnsereAufgaben/Aufgabenbereiche/Zentralstellen/ZBKV/zbkv_node.html (in German) and https://www.bka.de/EN/OurTasks/Remit/CentralAgency/ZBKV/zbkv_node.html (in English). Instead of providing contact information for the ZBKV or GBA, victims are advised to contact their local police station who will pass on their information. Interview with ZBKV (26 September 2019).

356 Interview with ZBKV (26 September 2019).

for informing victims of their rights.³⁵⁷ Nor does the BAMF inform potential victims of the reason they are questioned about international crimes during the asylum process (beyond stating in general terms that the information provided during their interview may be shared with other authorities).³⁵⁸

As a result, the first time victims receive general information on their rights will likely be when they are interviewed by the ZBKV during the course of a criminal investigation. ZBKV officers may provide victims with a leaflet developed by the BMJV at the end of an interview. This leaflet is available in 29 languages and briefly sets out victims' rights in the criminal justice process for all categories of victims.³⁵⁹ However, our interviews with practitioners and victims suggest that information concerning victims' rights is not being effectively communicated—particularly with respect to the role victims may play in proceedings and their right to legal assistance.³⁶⁰ Moreover, the information contained in the BMJV leaflets is not tailored to the specific circumstances of victims of international crimes. It is therefore of limited value if it is not accompanied by further explanation (which is challenging for ZBKV officers to provide).³⁶¹

Legal Representation, Reimbursement of Expenses and Interpretation

For serious crimes, victims who do not (yet) have the status of joint plaintiff may be assisted by a lawyer (*Verletztenbeistand*) appointed free of charge by the investigating judge or court.³⁶² In the case of certain serious crimes, those who wish to actively participate in proceedings as joint plaintiffs may have legal counsel (*Beiordnung*) appointed free of charge by the court.³⁶³ Where that is not possible, joint plaintiffs may nevertheless be entitled to legal aid (*Prozesskostenhilfe*) if they “cannot sufficiently safeguard [their] own interests or if this cannot reasonably be expected of [them].”³⁶⁴ However, as the authorities do not facilitate appointment of counsel, victims may have difficulty

identifying a lawyer willing or able to represent them.³⁶⁵

“It’s hard for us to know what is going on so we need legal counsel for victims and witnesses to help us gauge how they are faring.”

Federal Prosecutor with GBA

Following a recent amendment to the StPO, the court may now group joint plaintiffs together and assign a common legal representative.³⁶⁶ This provision has been applied, for example, in the ongoing **Anwar R** trial where victims detained and tortured in the same detention facility have been grouped together on the basis that they have suffered “the same kind of harm” and that their interests therefore align. While applying the provision in such circumstances may increase the efficiency of the trial, it can impact upon counsel’s ability to provide effective representation and therefore demands caution. That victims have suffered the same kind of harm does not rule out a conflict of interest. Moreover, grouping victims together in this manner does not reflect the differences in how they may have experienced that harm, nor does it allow for different priorities with respect to the criminal proceedings.³⁶⁷

“Participation of victims is much less active than in a purely domestic case. It is generally limited to their testimony. If a victim wants to be there every day, I’m not sure how we would get it organised, funded and interpreted.”

Victims’ Lawyer

German procedural law also provides for the court to appoint legal counsel to witnesses if it is necessary to enable them to exercise their rights during a police interview or questioning in court.³⁶⁸ For example, in the

357 Interview with BAMF (24 September 2019); Interview with BMJV (24 September 2019).

358 Interview with BAMF (24 September 2019).

359 Interview with ZBKV (26 September 2019); Interview with GBA (24 September 2019); Interview with ECCHR (23 September 2019); German Bundestag No.19/12354, p.18. The brochures are available at https://www.bmjbv.de/DE/Themen/OpferschutzUndGewaltpraevention/OpferhilfeundOpferschutz/Opferhilfe_node.html.

360 Interview with Syrian victims (23 September 2019); Interview with ECCHR (23 September 2019); Interview with Victims’ Lawyer (7 October 2019); Interview with Victims’ Lawyer (2 October 2019).

361 Interview with ZBKV (26 September 2019).

362 StPO, s.406h. This right applies to individuals entitled to join as a joint plaintiff even prior to the formal commencement of criminal proceedings, thus allowing victims to be represented during the investigations phase.

363 StPO, s.397a(1).

364 StPO, s.397a(2).

365 Interview with GBA (24 September 2019); Interview with ECCHR (23 September 2019).

366 StPO, s.397b. This new provision, which was introduced in December 2019, is directed in particular at situations where several relatives of a deceased individual wish to act as joint plaintiffs. In addition, the drafting history of the provision suggests it could be applied in cases involving largescale disasters (*Großschadensereignisse*). The provision has been criticised by victims’ rights advocates (including WEISSER RING e.V.) for unjustifiably eroding one of the important achievements in victims’ rights of recent years. Correspondence with WEISSER RING (20 July 2020); Interview with Academic (25 September 2019).

367 Interview with ECCHR (12 June 2020).

368 StPO, s.68b; Interview with Witness’ Lawyer (2 October 2019); Interview with GBA (24 September 2019).

FDLR trial, the court appointed a lawyer to represent the interests of a number of victims residing in eastern DRC who were expected to testify anonymously as witnesses.³⁶⁹ The lawyer was responsible for providing them with information about their rights, familiarising them with the court procedure and representing their interests during proceedings. This included travelling to eastern DRC to accompany them during their video-link testimony and assist them to assert their rights as witnesses.³⁷⁰ The appointment of witness counsel does not enable witnesses to exercise the full procedural rights of joint plaintiffs, but is rather intended to ensure that particularly vulnerable witnesses will have independent legal support. Furthermore, legal counsel receive very little remuneration to represent witnesses which often means counsel must work *pro bono* to provide effective support. This makes it difficult for witnesses to identify counsel willing to undertake such work.³⁷¹

Witnesses who are summonsed to appear in court will be reimbursed for their travel expenses and loss of income, including those who reside abroad. Payment in advance may occur if significant costs are expected.³⁷² In the **Rwabukombe** case, for example, the ZBKV made all the arrangements for witnesses to travel via Kigali to Frankfurt and to be accommodated in a secure location for the duration of their testimony (that is, approximately one week).³⁷³ More recently, in the **Jennifer W** case, the authorities arranged for the victim (who has joined the proceedings as a joint plaintiff and given evidence) to be relocated to Germany.³⁷⁴ There is no similar provision for reimbursement of expenses for victims or joint plaintiffs who are not called to appear as witnesses.³⁷⁵

Finally, while joint plaintiffs have a right to request that an interpreter be appointed in order to exercise their rights,³⁷⁶ language difficulties prevent victim communities from following proceedings. Interpretation is not provided to the public gallery, despite the considerable interest in such cases amongst victims as well as the broader international community. As

such, only individuals who are fluent in German are able to follow the entirety of the proceedings. For instance, in the ongoing **Anwar R** trial, the court only provides consecutive translation during testimony of Arabic-speaking witnesses; otherwise the proceedings are conducted in German.³⁷⁷

Updates on Proceedings

German authorities are obliged to provide victims with certain information (such as the date and time of the hearing and the outcome of proceedings).³⁷⁸ While this obligation applies to all victims (regardless of whether they have joined the proceedings), it only occurs “upon application”. Moreover, where victims are represented by counsel, the authorities are relieved of their obligation to inform the victims directly.³⁷⁹

“When we are dealing with places very removed from Germany and deeply underdeveloped, it's difficult to communicate what we are doing.”

Federal Prosecutor with GBA

When it comes to cases concerning international crimes, there are currently no mechanisms in place to provide information on the progress of proceedings to victims in an accessible manner or to engage more broadly with affected communities.³⁸⁰ Rather, the relevant authorities appear to work in silos, with each considering that broader outreach activities do not fall within their respective portfolios. In addition, during our consultations German authorities cited a number of practical challenges they face in conducting outreach to victims who reside abroad, including absence of cooperation from local authorities, lack of infrastructure and ongoing insecurity.³⁸¹ As a result, legal counsel and NGOs working on the ground frequently carry the burden of informing victims and the victim community of the outcome.

In the **FDLR** case, there was only infrequent contact

369 Interview with Witness' Lawyer (2 October 2019). See below under “Updates on Proceedings” for further information relating to role of witness counsel.

370 Interview with Witness' Lawyer (2 October 2019); Interview with GBA (24 September 2019).

371 Interview with Witness' Lawyer (2 October 2019); Interview with ECCHR (12 June 2020).

372 VOIARE Germany Report, pp.47-48.

373 Interview with Victims' Lawyer (7 October 2019).

374 Interview with Victims' Lawyer (2 October 2019); Interview with NGO (16 January 2020).

375 Interview with Academic (25 September 2019); ECCHR FDLR Report, p.26.

376 StPO, ss.397, 406i; GVG, s.187(4).

377 The preliminary injunction was made pending a final determination of the matter by the Federal Constitutional Court. Decision of the Federal Constitutional Court, BVerfGE, 1 BvR 1918/20 (18 August 2020); Correspondence with ECCHR (19 August 2020).

378 StPO, s.406d.

379 StPO, ss.145a, 406d(4).

380 Interview with GBA (24 September 2019); Interview with ECCHR (23 September 2019). There is generally no public outreach during preliminary examinations. Public versions of decisions to close preliminary examinations or investigations are not made available on the GBA's website. When a case proceeds to trial, the GBA publishes press releases or holds press conferences concerning key developments, however they are in German only.

381 Interview with GBA (24 September 2019).

“I travelled to the DRC and met my clients, but only two days before the video-link. It was a very short time to get to know them. A combination of security concerns and lack of funding meant I had limited contact with them before that. After the verdict, the court did not provide money to allow me to go there to explain what was going on.”

Witness' Counsel in the FDLR case

with victims who testified as witnesses and no direct communication with the victim community (despite the presence of a full-time BKA liaison officer in the region). The brief updates provided by the court's press office were published in German and related almost exclusively to organisational aspects of the trial. The failure on the part of the authorities to provide information in French or in any other local language meant that local organisations working with victims were entirely dependent on European partner organisations to provide them with information that they could disseminate locally.³⁸²

The victims who testified anonymously as witnesses in the **FDLR** case were represented by witness counsel, which went some way towards ensuring their right to information. Counsel was able to travel to eastern DRC and meet the victims in person immediately before their testimony to address their concerns and questions and provide support during proceedings. However, she struggled to obtain funding to return in order to inform them of the outcome of the trial because this is not foreseen by the law. After filing a complaint with the BMJV and the Foreign Office, she was provided with a mere EUR 1000 to cover her expenses. In February 2017, she travelled to the region (partly at her own expense and with the logistical support and protection of the BKA) to inform her clients of the convictions and check on their safety and well-being. She has not yet been able to obtain funding to allow her to inform her clients in person that the more senior of the two accused died in custody in 2019 while awaiting a retrial.³⁸³

Similarly, in the **Rwabukombe** case, the German authorities took no steps to inform the victims directly of developments in proceedings or to conduct any broader outreach. The judgment was not translated nor was any press release issued in a language understood by the victims. Instead, victims' counsel organised a translation of key passages from the judgment into Kinyarwanda. Nor did he receive funding from the German authorities to travel to Rwanda to inform his clients of the outcome. Rather, he provided updates to his clients by email or phone every few weeks.³⁸⁴

Support Services

A large number of NGOs throughout Germany provide victim support services of various kinds to victims of crime. One of the largest is WEISSER RING e.V., with more than 400 branches Germany-wide. WEISSER RING's volunteers provide generalised support (including practical and financial support, accompaniment and information) and can refer victims for more specialised support where needed.³⁸⁵

Since 2017, particularly vulnerable victims also have the right to receive **psychosocial trial support** before, during and after the criminal trial (*Psychosoziale Prozessbegleitung*).³⁸⁶ This is a form of psychosocial *accompaniment* linked to the criminal proceedings, not counselling or therapeutic intervention.³⁸⁷ In appropriate cases, it may be provided free of charge by a court-appointed professional and can include, for instance: explanations regarding the criminal justice process; familiarisation with the courtroom prior to the hearing; and close accompaniment during interviews and hearings (including remaining by the victim's side while travelling to/from court, inside the courtroom and during breaks).³⁸⁸ Psychosocial trial support can be appointed by a judge at the request of the victim, however it does not appear to be widely used in the investigation stage and availability varies across different parts of Germany. It was provided, for example, during the recent **Jennifer W** trial.³⁸⁹ The victim in that case has also received support both in Iraq and in Germany from a specialised NGO, including *pro bono* interpretation to facilitate contact with her lawyer.³⁹⁰

382 Interview with Witness' Lawyer (2 October 2019); Interview with Academic (23 September 2019); ECCHR FDLR Report, p.27.

383 Interview with Witness' Lawyer (2 October 2019).

384 Interview with Victims' Lawyer (7 October 2019).

385 Interview with WEISSER RING (26 September 2019).

386 StPO, s.406g; Law on Psychosocial Trial Support in Criminal Procedure (*Gesetz über die psychosoziale Prozessbegleitung im Strafverfahren* or **PsychPbG**).

387 Psychosocial trial support is not necessarily provided by a trained psychologist. Individuals with a university degree and professional experience in social work can also qualify for appointment. Moreover, psychosocial trial support cannot involve any discussion of the case or the content of the victim's testimony. PsychPbG, ss.2-3; Interview with WEISSER RING (26 September 2019); Interview with Victims' Lawyer (2 October 2019).

388 Psychosocial trial support is primarily intended for children who have been victims of violent or sexual offences. However, the court also has discretion to order such support be provided free of charge to particularly vulnerable adult victims (e.g. in cases involving sexual violence, human trafficking or the loss of a close relative). StPO, s.406g(3).

389 Interview with GBA (24 September 2019); Interview with Victims' Lawyer (2 October 2019).

390 Interview with Victims' Lawyer (2 October 2019); Interview with NGO (16 January 2020).

Access to rehabilitation measures—including medical and psychological treatment—is severely restricted for victims of crimes committed outside of Germany.³⁹¹ As a result, only a fraction of those in need of counselling or more long-term therapeutic intervention will receive treatment from regular health or social services.³⁹² Ineligible victims may turn to several **treatment centres for survivors** that offer holistic and specialised support (medical, psychological and social) irrespective of residence status, health insurance cover or German language ability. For instance, the Federal Association of Psychosocial Centres for Refugees and Victims of Torture (*Bundesweite Arbeitsgemeinschaft Psychosozialer Zentren für Flüchtlinge und Folteropfer* e.V. or BAfF) is an umbrella organisation of 42 psychosocial treatment centres for refugees and victims of torture across Germany.³⁹³ Unfortunately, the limited resources of such centres—in terms of funding, specialised psychotherapists and trained interpreters—mean victims face long waiting periods (the average is over seven months, but the wait is sometimes significantly longer) and up to 10 000 people in need of help are turned away every year.³⁹⁴

“A lot of victims don’t admit that they have trauma. For us, therapy is for crazy people. But to have a professional not produced as if they are a therapist but to talk about your feelings before the interview, that would be amazing.”

Syrian Victim

In contrast to the options available in Germany, authorities struggle to provide adequate psychosocial support for victims residing abroad. While there were attempts to provide psychological, medical and other forms of support to the victims who testified in the **FDLR** case, security concerns and the lack of any trusted partner on the ground in eastern DRC made this difficult.³⁹⁵ A psychologist was made available to the victims who travelled to Germany to testify during the **Rwabukombe** case, however she was only able to play a limited role. Other than the psychologist, these victims—who were separated from their families and other support structures while in Germany—were unable to turn to anyone for support.³⁹⁶

Our consultations revealed some reluctance on the part of criminal justice authorities to have victims engage in therapeutic intervention prior to their testimony, due to a fear that it may “taint” their evidence.³⁹⁷ Police and prosecutors therefore do not actively refer victims to such centres for treatment. This is particularly problematic in international crimes cases, where victims may have to wait years or even decades before their case reaches trial.

However, there are other ways in which specially trained psychotherapists and psychosocial counsellors can provide support to victims and to the criminal justice system more broadly. For example, BAfF’s treatment centres can also provide psychosocial support surrounding police interviews and court testimony. Center ÜBERLEBEN is one such centre, which works in cooperation with ECCHR to support victims engaged in extra-territorial proceedings. The Center’s psychologists educate ECCHR’s lawyers about the impact of trauma on memory and train them to identify and respond to early warning signs of secondary victimisation. In consultation with ECCHR’s lawyers, they can also

prepare victims for the process of being interviewed (including what to expect, how to identify when they need support, practical tools to help them cope) and provide post-interview support. This type of support—which is distinct from trauma-focused therapeutic treatment—does not include discussion of the content of a victim’s evidence. It therefore does not carry the same risk of influencing the victim’s memory or the narrative of the traumatic incident, but rather focuses on helping the victim gain sufficient stability to give evidence.³⁹⁸

391 For example, the strict eligibility requirements under the Crime Victims Compensation Act (*Opferentschädigungsgesetz* or OEG)—which regulates the medical and other benefits available to victims of crime—effectively excludes the vast majority of victims of international crimes. While this law is currently undergoing reform to improve access to rehabilitation measures, the majority of victims of international crimes will continue to be excluded (see further below under “Compensation”). Victims of international crimes may be able to obtain access to treatment under the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz*), but treatment in this context is restricted to “acute illness and pain” (s.4). Other benefits may be granted if they are “essential to ensure subsistence or health” (s.6), however the authorities have a wide margin of discretion in determining whether to grant such benefits. Even after asylum seekers obtain their residence permit and enter the health insurance system, they often continue to face difficulties in accessing such services. Interview with BAfF (16 October 2019).

392 The victim in the **Jennifer W** case has, however, received medical support. Interview with Victims’ Lawyer (2 October 2019).

393 Interview with BAfF (16 October 2019). Other organisations—such as Vivo International—provide Narrative Exposure Therapy to victims of torture, conflict or political persecution who seek asylum in Germany. Interview with Vivo International (15 October 2019).

394 Interview with BAfF (16 October 2019); Interview with Center ÜBERLEBEN (26 September 2019); Interview with ECCHR (23 September 2019).

395 Interview with Witness’ Lawyer (2 October 2019).

396 Interview with Victims’ Lawyer (7 October 2019).

397 Interview with Vivo International (15 October 2019); Interview with Academic (25 September 2019).

398 Interview with Center ÜBERLEBEN (26 September 2019); Interview with ECCHR (23 September 2019).



Children queue for school in Eastern DRC © UNHCR/Kate Holt 2015

Protection Measures

Victims who appear as witnesses can benefit from **witness protection measures** aimed at minimising the risk of retaliation.³⁹⁹ The application of such measures is within the discretionary power of the court. Protection measures may include: omission of a witness' personal identifying information (such as their place of residence);⁴⁰⁰ exclusion of the public from the hearing;⁴⁰¹ and, in very exceptional circumstances, removal of the defendant during the examination of the witness.⁴⁰² Witnesses may also testify by video-link from a separate location,⁴⁰³ however both judges and prosecutors are reluctant to use this measure because it will generally have an impact upon the evidentiary value of the testimony.⁴⁰⁴

“Protection measures can reduce the evidentiary value of the testimony. Of course the welfare of the victim is our priority, but what we have is a balancing act: weighing up evidentiary value against victim protection.”

Federal Prosecutor with the GBA

For instance, all of the victims in the **FDLR** trial were permitted to testify via video-link from eastern DRC due to concerns that travelling to Germany (particularly the need to obtain travel documents and the relatively long absence involved) would put them at risk.⁴⁰⁵ The introduction of pre-recorded testimony as a protective measure—as opposed to introducing pre-recorded testimony of an unavailable witness—is currently only permitted in very limited circumstances.⁴⁰⁶

Witnesses who face a real risk of retaliation due to their willingness to testify may be eligible to enter a witness protection program together with their families. Witnesses must satisfy a high threshold to warrant this level of protection and the program is only available to witnesses who reside in Germany.⁴⁰⁷ Where a witness under threat resides *outside* Germany, German authorities have very few means of ensuring their protection. Investigators will take steps to minimise or address the risk of retaliation, including: using (properly-vetted) local contacts to make initial contact with the witness or to identify a safe and discreet location for interview; devising an explanation for the witness' absence; and providing details for an emergency contact or safe house in case a witness is subsequently threatened.⁴⁰⁸ Where physical protection is considered necessary, German authorities may

399 See StPO, s.48(3).

400 StPO, s.68. For instance, witnesses were regularly exempted from the requirement to disclose their residential addresses in the **Rwabukombe** trial.

401 GVG, s.172. Exclusion of the public will be possible, for example, where there is a risk to a witness or another person's life, limb or liberty or during the examination of a person under 18 years of age.

402 StPO, s.247. The requirements differ depending on the age of the witness. For witnesses under 18 years of age, the accused can be removed during examination if his or her presence would cause considerable detriment to the witness' well-being. For witnesses over 18 years of age, the accused's presence must pose an imminent risk of serious detriment to the witness' health. The accused must be informed of the content of the testimony given during his/her absence.

403 StPO, ss.168e, 247a(1). This will be permitted where there is an imminent risk of serious detriment to the witness' well-being and the risk cannot be averted in any other way.

404 Interview with GBA (24 September 2019); Interview with Victims' Lawyer (2 October 2019); Interview with WEISSER RING (26 September 2019).

405 Interview with GBA (24 September 2019); Interview with Witness' Lawyer (2 October 2019).

406 StPO, ss.58a, 251, 255a. These provisions only apply with respect to certain categories of offences and to witnesses under the age of 18 at the time of their testimony or at the time the crime was committed. The accused and defence counsel must have been given the opportunity to participate in the pre-recorded examination and supplementary examination of the witness may be permitted.

407 Witness Protection Harmonization Act (*Zeugenschutz-Harmonisierungsgesetz* or ZSHG), s.1. The ZSHG sets a high threshold for eligibility based on the value of the witness' evidence to the criminal proceedings. The precise measures to be applied are determined by a witness protection service.

408 BKA, "Victim-Witnesses in International Crimes Cases: A Guide for Criminal Police" (*Opferzeugen in Völkerstrafrechtsverfahren: Kriminalpolizeilicher Leitfaden*) (May 2013), pp.56-60 (**BKA Guide for International Crimes Cases**); Interview with Witness' Lawyer (2 October 2019).

need to rely on international cooperation or arrange relocation to Germany or a third country. For example, the victim in the **Jennifer W** case was granted temporary residence in Germany.⁴⁰⁹

“In conflict or post-conflict environments, effective protection measures by local authorities cannot be guaranteed. If the perpetrators themselves—or groups close to them—are still active, there is an increased risk for potential witnesses or persons seen as such. This is where the limits of mutual legal assistance lie.”

Investigator with the ZBKV

German law allows for **anonymous testimony** where there is a well-founded fear that revealing a witness's identity may endanger the witness or another person.⁴¹⁰ However, such testimony can only be given limited weight.⁴¹¹ Guaranteeing anonymity has also proven to be very difficult in practice.⁴¹² Moreover, victims who wish to participate in proceedings as joint plaintiffs cannot remain anonymous. As such, anonymity is a measure of last resort and has only been employed infrequently in cases concerning international crimes. One example is the **FDLR** case, where the victims resided in ongoing insecurity in a remote area of eastern DRC and did not wish to be relocated.⁴¹³ In order to protect their identities from the accused, the victims were unable to participate actively in proceedings as joint plaintiffs—and exercise the procedural rights that entails—nor were they able to claim compensation from the offenders. Nevertheless, as discussed above, their particular vulnerability led the court to appoint witness counsel.⁴¹⁴

A number of additional measures are available to protect victims against **secondary victimisation** during questioning by authorities and when testifying in court.

“I was very nervous. The building was a bit suspicious—it was an old military building, very dark with almost the same atmosphere as the building where I was held in Damascus. I had a stomach ache when I went in. But the police were very nice, to be honest. It's hard to process that the police here are different.”

Syrian Victim

For example, ZBKV officers avoid repeated questioning during an investigation wherever possible.⁴¹⁵ In addition, victims may be accompanied by a lawyer or support person during questioning (provided the latter will not endanger the purposes of the investigation).⁴¹⁶ Our interviews with practitioners suggest the ZBKV takes no issue with victims being accompanied. However, victims are not informed of this right when they are summonsed to appear and therefore often attend interviews unaccompanied.⁴¹⁷ In some cases, the premises used for questioning victims have been significantly improved; for example, while initially some Syrian victims were interviewed in an old military compound in Berlin, subsequent interviews have taken place in a neutral office tower with fewer visible security measures.⁴¹⁸

The ZBKV ensures victims of sexual violence are given a choice as to the gender of the person conducting an interview. Female investigators (or *Frauen-Teams*) have been used in particular for interviews with Yazidi victims.⁴¹⁹ The ZBKV is also proactive in training its investigators in interviewing victims or witnesses suffering from trauma and draws on the expertise of clinical psychologists.⁴²⁰ Thus, rather than integrating psychologists into the interview process, the ZBKV prefers to train their investigators to be alert to warning signs and prepared to respond accordingly.⁴²¹ In 2019, the BKA also published an internal guide for police on working with victims and witnesses in international

409 Interview with Victims' Lawyer (2 October 2019); Interview with NGO (16 January 2020).

410 StPO, s.68(3).

411 Interview with Witness' Lawyer (2 October 2019); Interview with GBA (24 September 2019). See also Decision of the Federal Constitutional Court, 2 BvR 547/08 (8 October 2009).

412 See e.g. BKA Guide for International Crimes Cases, p.59.

413 Witnesses have also been permitted to testify anonymously in the recent **Anwar R** case.

414 Although they were relegated to the status of witnesses, this approach meant the victims' identities remained anonymous for the entirety of the proceedings, they testified from a confidential location by video-link and the court was closed during their testimony. Interview with Witness' Lawyer (2 October 2019).

415 Interview with ZBKV (26 September 2019). For example, the ZBKV will use mutual legal assistance to gain access to a witness' previous testimony or statements before other authorities and then restrict their interview to necessary follow-up questions. See also StPO, s.406f; Guidelines for Criminal and Administrative Fine Proceedings (*Richtlinien für das Strafverfahren und das Bußgeldverfahren* or RiStBV), s.19a(3).

416 StPO, ss.68b, 406f.

417 Interview with ZBKV (26 September 2019); Interview with ECCHR (23 September 2019).

418 Interview with ECCHR (23 September 2019).

419 Interview with ZBKV (26 September 2019); Interview with Academic (23 September 2019); Interview with ECCHR (23 September 2019).

420 Interview with ZBKV (26 September 2019); German Bundestag No.19/12354, p.9; Interview with Vivo International (15 October 2019). ZBKV investigators participate in external trainings (with, for example, Interpol or the Institute for International Criminal Investigations) as well as internal trainings that include experts from organisations such as Vivo International, Medica Mondiale, Center ÜBERLEBEN and the Psychology Department at the University of Konstanz.

421 Interview with ZBKV (26 September 2019).

crimes cases. This guide documents good practices developed by the BKA in order to prepare and sensitise investigators to some of the psychological, cultural, legal and security issues such cases raise.⁴²²

“I’m coming from a trial where the victim’s testimony lasted 11 days—five of which were cross-examination. This involved a mother being asked under what circumstances her child had died and what she would have experienced in the moments before her death. There are very limited ways to protect a victim in a situation like that, when they have an obligation to respond.”

Federal Prosecutor with the GBA

During court proceedings, the public prosecutor has a general obligation to keep the burden on the victim to a minimum, and more specifically to ensure the burden of questioning is warranted by the need to establish the truth.⁴²³ Specific in-court measures may include: exclusion of the public from the hearing;⁴²⁴ the possibility to give a coherent account of events, including the harm suffered, without interruption;⁴²⁵ and exclusion of unnecessary questions concerning a victim’s private life.⁴²⁶

However, our consultations suggest German courts are reluctant to place restrictions on the questioning of victims by defence counsel;⁴²⁷ and although victims are generally not required to testify under oath, they cannot refuse to answer questions.⁴²⁸ Moreover, there is no provision for use of physical screens to avoid visual contact with the accused during a witness’ testimony and the circumstances in which testimony can take place in the absence of the accused (either through the accused’s removal from the courtroom or use of a video-link) are very limited.⁴²⁹

The court may also appoint legal counsel to witnesses

if this is considered necessary to enable them to exercise their rights.⁴³⁰ This occurred in the **FDLR** case where victims of sexual violence and other crimes were accompanied by legal counsel during their testimony. She was able to prepare her clients for what to expect and enable them to communicate their wish not to answer certain questions or to speak directly with the accused. A combination of other circumstances also contributed to their sense of security: the presence of a trusted BKA official; being granted anonymity by the court; and the ability to testify remotely from the region (avoiding the need to travel for an extended period to Germany). During our consultations, their counsel explained that it was this combination of measures that gave her clients the confidence to testify (some for several days), despite the knowledge that the accused were present and listening in the courtroom: “My impression is that if these measures hadn’t been in place, they wouldn’t have felt secure enough to do that.”⁴³¹

As noted above, since 2017 a form of psychosocial accompaniment linked to criminal proceedings has also been available. This new measure was developed with the explicit aim of reducing the risk of secondary victimisation.⁴³²

Compensation

State-funded compensation is provided in Germany under the Crime Victims Compensation Act (*Opferentschädigungsgesetz* or OEG). Claims are administered by individual German states through a local compensation authority, under the umbrella of social security. Full compensation is only available where the crime was committed in Germany.⁴³³ Since 2009, partial compensation has been available with respect to crimes committed abroad, but only with respect to German citizens or victims whose habitual and lawful place of residence is Germany and who were temporarily residing abroad at the

422 BKA Guide for International Crimes Cases; German Bundestag No.19/12354, p.9. The guide includes practical advice in the form of *dos and don’ts*, covering issues such as creating a welcoming environment for witness interviews, establishing trust, providing information on victims’ rights, adaptation of questioning based on the witness’ background or individual circumstances, working with interpreters and minimising the risk of retaliation.

423 RiStBV, ss.4c, 19a.

424 GVG, s.171b.

425 StPO, s.69.

426 StPO, s.68a(1).

427 Interview with Witness’ Lawyer (2 October 2019); Interview with GBA (24 September 2019); Interview with Academic (23 September 2019); Interview with Academic (25 September 2019).

428 StPO, ss.48(1), 59. As an exception, the victims in the **FDLR** case were able to refuse to answer questions due to the fact that they were testifying from abroad by video-link and therefore could not be subject to any penalty. Several of the victims consistently refused to answer questions put to them by defence counsel that would have revealed their identities. The female victims also partially refused to answer lengthy and repetitive questioning by defence counsel about the sexual violence they had suffered and its consequences. The court rejected requests to force the victims to answer on the grounds that no coercive measures were available to the court in such circumstances. Interview with Witness’ Lawyer (2 October 2019).

429 See the discussion above concerning witness protection measures. See also Directive, art.23(3).

430 StPO, s.68b.

431 Interview with Witness’ Lawyer (2 October 2019).

432 PsychPbG, s.2. See further above under “Support Services”.

433 OEG, s.1(1), (4). While previously compensation only applied to EU nationals and lawful residents, as of 1 July 2018, all foreigners can receive the same benefits as German nationals with respect to crimes committed in Germany.



Frontline in the old city of Aleppo, Syria © ICRC/Hagop Vanesian 2013

time of the crime for no longer than six months.⁴³⁴ These limitations effectively rule out State-funded compensation for most victims of international crimes. The law governing State-funded compensation is currently undergoing reform.⁴³⁵ The new law, which will become fully effective from 2024, includes similar limitations on access to compensation for crimes committed abroad.⁴³⁶

Strict eligibility criteria effectively rule out State-funded compensation for most victims of international crimes

Without access to State-funded compensation, victims of international crimes must seek compensation directly from the offender. Germany adopts an adhesion model (*Adhäsionsverfahren*) whereby the victim may present a civil claim for compensation resulting from the crime during the criminal proceedings (whether or not they participate as a joint plaintiff). The claim can be made in writing or orally, right up until the moment of closing statements.⁴³⁷

The court may refrain from deciding on the claim where doing so would considerably protract the proceedings or where the claim is considered to be inadmissible or unfounded (in which case the victim will need to bring the claim before a civil court).⁴³⁸

In all other cases, the claim is consolidated with the prosecution of the offence and the court may make a compensation order in combination with penal sanctions if the accused is found guilty.⁴³⁹ The victim has no right to appeal the decision on compensation and risks bearing court costs if the claim is unsuccessful.⁴⁴⁰ The victim is entirely responsible for enforcing a decision awarding compensation.⁴⁴¹

None of the practitioners who were consulted for the purposes of this Report were able to cite an example of a victim being awarded compensation in a case concerning international crimes. Reasons for this may include: lack of awareness on the part of victims who do not have legal assistance of the possibility to actively participate in proceedings and seek compensation; the risk that the victim may have to bear the costs if the claim is unsuccessful; little prospect of ever receiving any compensation even if the claim is successful; and unease amongst criminal law judges in applying civil law (particularly since the availability of State-funded compensation has made the adhesion procedure less common).⁴⁴²

434 OEG, s.3a(1).

435 Social Compensation Code (*Sozialgesetzbuch Vierzehntes Buch* or SGB XIV) of 12 December 2019.

436 See SGB XIV, ss.15, 102.

437 StPO, s.404(1).

438 StPO, s.406(1), (3).

439 StPO, s.406(1).

440 StPO, ss.406a, 472a(2).

441 Some measures are available to encourage offenders to pay compensation. For example, compensation awards are given priority over the State's claim to fines and may be considered as a mitigating circumstance in sentencing. StGB, ss.42, 46(2); Interview with BMJV (24 September 2019).

442 See e.g. VOICARE Germany Report, p.52; Interview with BMJV (24 September 2019); Interview with Victims' Lawyer (2 October 2019).

CONCLUSION

FIDH, ECCHR and REDRESS commend Germany for its comprehensive implementation of the Rome Statute and the Victims' Rights Directive. We also commend Germany for establishing specialised units within its police and prosecution services to handle cases involving serious international crimes and for ensuring systematic referral of cases by the BAMF where there are serious reasons to believe an individual seeking asylum has committed a serious international crime. We welcome Germany's willingness to open structural investigations into largescale crimes and to pursue arrest warrants for high-level perpetrators. We are encouraged that the GBA has in recent years refrained from exercising discretion not to prosecute in cases where neither the victim nor suspect is a German citizen and for its willingness to collect evidence available in Germany for use before other jurisdictions. We are also encouraged by the efforts of the GBA and ZBKV to raise awareness surrounding their work, including by appearing on public panels and conducting media interviews.

Victims benefit from strong procedural rights in Germany. In particular, the role of joint plaintiff allows victims of international crimes to actively participate in criminal proceedings. There remain, however, a number of legal and practical obstacles that can prevent victims from exercising their rights. **First**, the subordination of the GBA to the executive branch of government combined with its wide discretion to decline to prosecute severely limit victims' access to justice. **Second**, there is a lack of awareness amongst victims of their rights (particularly the right to participate as a joint plaintiff and to obtain legal assistance). In addition, the authorities do not proactively refer victims to support services that might assist them in navigating the criminal justice system. As a result, very few victims have actively participated in trials to date.

Third, on the whole, joint plaintiffs are in a good position to participate actively in proceedings and lawyers representing them are sufficiently remunerated. However, a recent change to the law that allows the court to assign common legal representation may impact the right to access effective representation. In addition, the limited remuneration available for witness counsel can prevent them from providing adequate support. **Fourth**, limitations on interpretation, reimbursement of expenses and the lack of any accessible information on the progress of cases make it difficult for affected communities to follow proceedings. While acknowledging the resource constraints and practical difficulties faced by German

authorities in this respect, the example provided by Dutch prosecutors demonstrates that more can be done to communicate updates on proceedings to affected communities using existing channels. **Lastly**, access to State-funded rehabilitation measures and compensation is severely restricted for victims of international crimes committed abroad and victims carry the responsibility of enforcing compensation awards against offenders.

A number of good practices have emerged from our consultations which deserve commendation. For example, German authorities make all necessary arrangements for victims who testify as witnesses to travel to Germany to participate in proceedings. While the authorities encounter difficulties providing adequate protection for victims (particularly those who reside abroad), the ZBKV takes steps to minimise the risk of retaliation and has made use of its witness protection program to relocate a victim who testified as a witness in at least one case. Similarly, the court has been willing to allow victims to testify anonymously by video-link as a means of protection.

In particular, there have been important improvements in measures available to reduce the risk of secondary victimisation. At the level of the investigation, the ZBKV has taken a number of steps to protect victims during interviews, including increased training and availability of female investigators in sexual violence cases. In addition, ZBKV officers allow victims to exercise their right to be accompanied by a lawyer or support person. The development of an internal BKA guide for police working with victims and witnesses in international crimes cases represents best practice. Victims in Germany also have greater access to specialised treatment centres for survivors than in other countries under examination in this Report (although limited resources mean many victims must be turned away). The full range of in-court measures recommended by the Directive for victims with special protection needs (such as measures to avoid visual contact with the accused) are not yet available.⁴⁴³ Nevertheless, availability of psychosocial accompaniment linked to criminal proceedings is a novel measure for minimising the risk of secondary victimisation which could be replicated in other EU Member States.

443 See Directive, art.23(3).

VII. THE NETHERLANDS



Dutch courts can exercise extra-territorial jurisdiction over international crimes where the suspect is present on Dutch territory or where the crime was committed by or against a Dutch citizen

FRAMEWORK FOR INVESTIGATION AND PROSECUTION OF INTERNATIONAL CRIMES

Prior to 2003, the Netherlands had only limited extra-territorial jurisdiction over genocide, war crimes and torture as a stand-alone crime.⁴⁴⁴ In order to more fully implement its obligations under the Rome Statute,⁴⁴⁵ the Dutch legislature adopted the *Wet Internationale Misdrijven* or International Crimes Act (ICA). The ICA initially provided for extra-territorial jurisdiction over

genocide, crimes against humanity and war crimes as well as torture as a stand-alone crime.⁴⁴⁶ It has since been amended to include enforced disappearance as a stand-alone crime and the crime of aggression.⁴⁴⁷ Extra-territorial jurisdiction is limited to cases where: (i) the suspect is present on the territory of the Kingdom of the Netherlands; (ii) the crime was committed against a Dutch citizen; or (iii) the crime was committed by a Dutch citizen (including where a suspect becomes a Dutch citizen after committing the crime). Dutch criminal law also provides for criminal liability of legal persons such as companies, including with respect to their activities abroad.⁴⁴⁸ While there is nothing in the law to prevent structural investigations,⁴⁴⁹ Dutch authorities interpret “presence” strictly and only conduct “anticipatory” investigations in very limited circumstances (and even then, no coercive measures can be applied).⁴⁵⁰

The Netherlands has specialised units within its immigration, police and prosecution services to handle cases involving international crimes, as well as a specialised investigating judge and specialised trial and appellate judges. The International Crimes Team (*Team Internationale Misdrijven* or TIM) of the Dutch National Police (*Landelijke Eenheid*)⁴⁵¹ together with the International Crimes Unit at the National Office (*Landelijk Parket*) of the Public Prosecution Service (*Openbaar Ministerie*)⁴⁵² are responsible for investigating and prosecuting international crimes. Investigations are generally opened on the initiative of the Public Prosecution Service. This often occurs on the basis of information received from a special department of the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst* or IND)—the “1F Unit”⁴⁵³—which informs the Public Prosecution Service if it has serious reasons to believe that an individual seeking asylum, residence or naturalisation

444 See Wartime Offences Act (*Wet Oorlogsstrafrecht*) (applying to war crimes committed on or after 5 August 1952); Genocide Convention Implementation Act (*Uitvoeringswet Genocideverdrag*) (applying to acts of genocide committed on or after 24 October 1970); Torture Convention Implementation Act (*Uitvoeringswet folteringverdrag*) (applying to acts of torture committed on or after 20 January 1989). Extra-territorial jurisdiction over torture and war crimes was limited to cases where the defendant was present on Dutch territory or where the defendant and/or victim had Dutch citizenship. Extra-territorial jurisdiction over genocide was more strictly limited to cases where the defendant or victim had Dutch citizenship.

445 The Netherlands ratified the Rome Statute on 17 July 2001 and, as the host State of the ICC (Rome Statute, art.3), began the process of implementing the Statute into its domestic law in June 2002. The Hague, as the international city of peace and justice, is also host to numerous other international organisations, including the International Criminal Tribunal for the former Yugoslavia (ICTY) (now the United Nations International Residual Mechanism for Criminal Tribunals), the International Court of Justice and the Permanent Court of Arbitration. It is also host to Europol and Eurojust.

446 The ICA entered into force on 1 October 2003. It was later amended to extend jurisdiction over genocide to acts committed after 24 October 1970. Dutch courts continue to exercise extra-territorial jurisdiction over war crimes and torture committed prior to 1 October 2003 pursuant to the pre-2003 laws.

447 Dutch courts have jurisdiction over acts of aggression committed on or after 1 August 2018 and over enforced disappearance committed on or after 1 January 2011.

448 Criminal Code (*Wetboek van Strafrecht*), art.51.

449 Interview with Victims' Lawyer (13 March 2019).

450 See ICA, art.2; Instructions Regarding the Handling of Reports under the International Crimes Act (*Instructie afdoening aangiften wet internationale misdrijven*), 1 August 2018, para.2.2. Nevertheless, the authorities will collect and share evidence with Europol's Analysis Project for Core International Crimes (AP CIC) in order to facilitate prosecutions in other jurisdictions. Interview with TIM (25 February 2019).

451 After the establishment of the ICTY in 1993, the National Investigation Team for Yugoslavian War Crimes was formed in the Netherlands. In 1998, this team was given a broader mandate and renamed the National Investigation Team for War Crimes. In 2003, the team became the Dutch National Police's International Crimes Team. It currently comprises approximately 35 police officers, including experienced criminal investigators, historians, anthropologists, political scientists and open source intelligence experts. Correspondence with TIM (30 June 2020).

452 The National Office of the Public Prosecution Service has seven full-time staff (three prosecutors, an anthropologist, a legal advisor, policy officer and legal officers). Correspondence with Public Prosecution Service (20 July 2020).

453 See Refugees Convention, art.1F. The 1F Unit currently comprises 20 individuals (17 researchers, two support officers and one manager). They conduct approximately 150 investigations each year and apply art.1F of the Convention in approximately 20-30 of those cases. Correspondence with IND (24 February 2020).

has committed an international crime.⁴⁵⁴ Coordination amongst these actors is overseen by a Steering Committee on International Crimes (*Stuurgroep Internationale Misdrijven*).⁴⁵⁵

The Public Prosecution Service has wide discretion to decide whether to initiate an investigation or prosecution and international crimes cases are rarely opened on the basis of a complaint from a victim

Investigations can also be opened on the basis of a formal complaint from a victim or third party, however this occurs infrequently.⁴⁵⁶ Moreover, the Public Prosecution Service maintains the monopoly over decisions to initiate investigations or prosecutions and enjoys wide discretion. Authorisation of the Dutch Ministry of Justice and Security is not required prior to opening an investigation, however the Minister can give (non-binding) recommendations to the Public Prosecution Service concerning a specific case.⁴⁵⁷

Criminal trials in the Netherlands are conducted largely on the basis of evidence gathered by the police and the investigating judge—the Eshetu A trial in 2017 lasted just 10 days

the criminal file. Trials are conducted on the basis of the evidence contained in the criminal file, unless the judges or parties wish to hear further evidence.⁴⁶⁰ Moreover, trial and appellate courts are not permitted to hold court sessions outside the Netherlands. As a result, trial proceedings in the Netherlands are generally brief. For example, the 2017 trial of **Eshetu A** on war crimes charges lasted just 10 days.

Under the ICA, the District Court in The Hague (*Rechtbank 's-Gravenhage*) is the only court competent to hear first-instance trials concerning international crimes. The Court has one full-time specialised investigating judge who handles pre-trial investigations with the support of a legal officer and an administrative assistant. Trials are held before a panel of three trial judges supported by two legal officers specialised in international law. The case is re-tried on appeal before the Court of Appeals in The Hague (*Gerechtshof 's-Gravenhage*) which is supported by court clerks, with further investigations by the investigating judge if necessary.⁴⁶¹ Appeals to the Supreme Court (*Hoge Raad*) are limited to questions of law.

The criminal justice system in the Netherlands is inquisitorial in nature. As the ICA does not provide for procedural rules, investigations and prosecutions of international crimes are governed by the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering* or CCP).⁴⁵⁸ Evidence is compiled during a criminal investigation conducted by the TIM under the direction of the Public Prosecution Service, followed by a pre-trial investigation conducted by an investigating judge.⁴⁵⁹ The evidence collected—including transcripts of witness testimony prepared by the TIM and investigating judge—are transmitted to the trial court as part of

454 Aliens Act 2000 (*Vreemdelingenwet*), art.107. The IND asks applicants whether they have witnessed or have any information concerning international crimes as a standard question (although this is not mandatory and is not done during periods of high refugee flow due to increased workload). Applicants are also asked if they consent to this information being provided to the police. In such circumstances, the 1F Unit will notify the Public Prosecution Service and provide the applicant's contact details. This only occurs on an exceptional basis. Interview with IND (22 February 2019); Interview with TIM (25 February 2019); Interview with Syrian victim (19 February 2019).

455 See Annual Report International Crimes 2019 (*Rapportagebrief Internationale Misdrijven 2019*) (13 May 2020), p.2 available at <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/05/13/tk-rapportagebrief-internationale-misdrijven-2019> (Annual Report 2019).

456 See Annual Report 2019, p.3.

457 See Judiciary Organisation Act (*Wet op de Rechterlijk Organisatie*), arts.127-128.

458 The Dutch government is currently in the process of modernising the CCP. It remains unclear how this might affect victims' rights (particularly in the field of compensation, which remains under development). Interview with Ministry of Justice and Security (15 February 2019).

459 CCP, art.181. During the judicial investigation, the investigating judge may question suspects, witnesses and experts and apply coercive measures. Following the judicial investigation, the Public Prosecution Service will take a decision on whether to prosecute.

460 The Public Prosecution Service or court may refuse to call a witness (including the victim) requested by the defence where the health or welfare of the witness would be endangered. See CCP, arts.264(1)(b), 288(1)(b).

461 Correspondence with Investigating Judge (25 June 2020).



Demonstrators at the opening of the trial against Dutch businessman Frans van A in The Hague with photos of victims of deadly gas attacks on Kurdish villages © AFP/Ed Oudenaarden 2005

OVERVIEW OF RECENT INTERNATIONAL CRIMES CASES IN THE NETHERLANDS

The Netherlands has conducted a number of trials in recent decades involving serious international crimes committed in the DRC, Afghanistan, Ethiopia, Iran/Iraq, Liberia, Guinea, Rwanda and Syria. For example, it has secured convictions against: **Sébastien N** (a *Garde civile* commander in the DRC convicted of torture in 2004 and sentenced to two years and six months' imprisonment); **Joseph M** (a Rwandan businessman convicted of complicity in torture and war crimes in 2009, confirmed on appeal in 2013 with an increased sentence of life imprisonment); **Yvonne B** (a prominent extremist Hutu convicted of incitement to genocide in 2013 and sentenced to six years and eight months' imprisonment); **Hesamuddin H** and **Habibullah J** (convicted in 2005 of torture and war crimes committed while serving as generals in the military intelligence service in Afghanistan in the 1980s, confirmed on appeal in 2008 with sentences of twelve and nine years' imprisonment respectively).

The Netherlands has also tried **two Dutch businessmen** for complicity in war crimes: **Frans van A** (convicted in 2005 of complicity in war crimes for supplying large quantities of the key component of mustard gas to Saddam Hussein's government in the 1980s and ultimately sentenced to 17 years' imprisonment, confirmed on appeal in 2009); and **Guus K** (convicted in 2017 after lengthy appellate proceedings for complicity in war crimes in Guinea and Liberia as a result of his dealings with Charles Taylor's regime and sentenced to 19 years' imprisonment).

A number of additional cases concerning **Afghanistan** have failed to produce convictions. One individual accused of torture while serving in the military intelligence service in the 1980s was acquitted due to lack of evidence in 2007. Two investigations concerning war crimes were closed prior to reaching trial. The first—the so-called **Morotai** investigation—was prematurely terminated due to the death of the suspect. Nevertheless,

“We are dealing with situations of long-term impunity, so it seems like some sort of miracle that out of the blue there is justice somewhere, far away for some victims, in a place they have never heard of or visited.”

Victims' Lawyer

the Public Prosecution Service released documents discovered during the investigation that revealed the fate of thousands of Afghans who had been rounded up and killed. The second, which concerned the **Kerala massacre** in 1979, was closed in 2017 due to lack of evidence. A further case is under investigation with respect to a former prison commander (currently in pre-trial detention).

Appeal proceedings are ongoing against Ethiopian national **Eshetu A** who was allegedly involved in arbitrary detention, torture and killings during Ethiopia's Red Terror purges in the late 1970s. Eshetu A was convicted of war crimes and sentenced to life imprisonment by the District Court of The Hague in 2017. During the investigations, 15 victims and surviving relatives were interviewed by police in both the US and Canada. A number were interviewed again by the investigating judge. Six victims formally joined the proceedings as injured parties and claimed compensation for emotional suffering. Several travelled to the Netherlands to observe parts of the proceedings.

In July 2019, Dutch prosecutors obtained their first conviction relating to serious international crimes committed in Syria. **Oussama A** was convicted of war crimes for posing with the body of a man executed by ISIL (as well as terrorism offences) and sentenced to seven years and six months' imprisonment.

As of December 2019, Dutch authorities had 16 active criminal investigations concerning international crimes,⁴⁶² with five new investigations concerning crimes in Syria and Iraq. These include two cases of alleged war crimes committed by a commander of the Salafist militant group Ahrar al-Sham and a former member of Jabhat al-Nusra. Dutch authorities also receive a (comparably small) number of requests for mutual legal assistance.⁴⁶³

⁴⁶² Annual Report 2019, p.3.

⁴⁶³ Annual Report 2019, p.5.

FRAMEWORK FOR VICTIMS' RIGHTS

Victims' rights have long been a priority of the Dutch government, which has translated into generous funding and progressive victim policies.⁴⁶⁴ Moreover, a rich academic and applied research tradition with regard to victims has contributed to evidence-based policy and practice. As a result, victims' rights were increasingly recognised and protected in the Dutch criminal justice system well before implementation of the Victims' Rights Directive, in particular with amendments to the CCP in 2011. The position of victims was further strengthened by implementation of the Directive through amending legislation which came into force on 1 April 2017, together with soft law decrees and regulations providing instructions on how to apply victims' rights in practice.⁴⁶⁵

Nevertheless, victims in the Netherlands benefit from fewer procedural rights than those in other countries examined in this Report and rarely assume an active role in proceedings. Moreover, the rights guaranteed to victims under the law are often poorly implemented in practice, with the victim's ability to exercise his or her rights largely dependent on the individual attitude of the police, prosecutor or judge handling the case.⁴⁶⁶

Victims in the Netherlands benefit from fewer procedural rights than those in other countries, giving them far less scope to influence proceedings

Role of the Victim in Criminal Proceedings in the Netherlands

The term "victim" is defined broadly under Dutch criminal procedural law to include natural and legal persons who, as a direct result of a criminal offence, have suffered financial harm or other disadvantage, as well as family members of persons whose death was

"In the [Eshetu A] case, the victims finally had their proverbial day in court—nearly four decades after the crimes. One could hear a pin drop while they were narrating their dreadful ordeals. Each had their own story to tell or a photo of a missing loved one to show. Each statement had a profound impact on everyone in the courtroom."

Trial Observer

directly caused by a criminal offence.⁴⁶⁷ Victims may report international crimes to the Dutch authorities, however the right to prosecute is assigned exclusively to the Public Prosecution Service. Although victims have no formal role in investigations, the Netherlands follows an "adhesion model" whereby victims can pursue a civil claim for compensation against an offender as part of any subsequent criminal proceedings.⁴⁶⁸ The claim is subsidiary to the determination of the accused's guilt and is governed by civil law. Victims who claim compensation in this manner have the status of an **"injured party"** (*benadeelde partij*) with respect to their civil claim, however they are not considered full procedural parties to the criminal proceedings. As such, they benefit from limited procedural rights.⁴⁶⁹

Injured parties can exercise the following procedural rights linked to their civil claim: a limited right to inspect and obtain copies of documents of relevance to them;⁴⁷⁰ the right to present documents for the purpose of establishing the harm they have suffered; and the right to question witnesses and experts and to address the court concerning their claim.⁴⁷¹ Injured parties cannot independently call witnesses or experts. Nor is the injured party entitled to appeal against the judgment on guilt or sentence (only the decision relating to their claim for compensation).

Certain procedural rights are accorded to **victims** more generally, which reflect a policy aimed at ensuring their right to be heard. For example, victims may request that

464 Victim Support Europe, *VOCIARE National Report: The Netherlands* (2019), pp.79-80 (**VOCIARE Netherlands Report**). For example, the Council for the Judiciary (*Raad voor de rechtspraak*) has published a manual on victims and criminal justice. Justus Candido (ed), "Victim and Justice: Manual of Criminal Law Practice" (*Slachtoffer en de rechtspraak: Handleiding voor de strafrechtspraktijk*) (2nd ed, 2017) (**Victim Manual**) available at <https://www.rechtspraak.nl/SiteCollectionDocuments/Slachtoffer-en-de-Rechtspraak.pdf>. Similarly, the National Ombudsman has developed rules for dealing with victims which encourage criminal justice actors to "stand in the victim's shoes". National Ombudsman, "Rules for Dealing with Victims" (*Spelregels voor het omgaan met slachtoffers*) (December 2012) available at https://www.nationaleombudsman.nl/uploads/rapport_2012-200.pdf.

465 See Law of 8 March 2017 Implementing Directive 2012/29/EU (*Wet van 8 maart 2017 houdend implementatie van richtlijn 2012/29/EU*); Victims of Criminal Offences Decree (*Besluit slachtoffers van strafbare feiten*) (**Victims Decree**); VOCIARE Netherlands Report, pp.12-14.

466 VOCIARE Netherlands Report, pp.6, 85; Interview with Victims' Lawyer (30 April 2019).

467 CCP, art.51a.

468 CCP, art.51f; ICA, art.21a. The prosecutor will invite the victim to submit a claim for compensation in written form once a prosecution is initiated against the accused. The prosecutor will then be responsible for submitting the claim to the court. The victim may also make a claim for compensation verbally or in writing at any stage in the hearing before the closing statement of the prosecutor begins. CCP, art.51g. See further below under "Compensation".

469 See **Figure 1** on the Role of Victims in Criminal Proceedings.

470 CCP, art.51b. This right is exercised subject to the control of the prosecutor, investigating judge and/or court depending on the phase of proceedings. There remains some uncertainty as to how this right should be exercised in practice (e.g. when victims can access the file, how, to what extent, under what conditions). Interview with Victims' Lawyer (30 April 2019).

471 CCP, art.334.

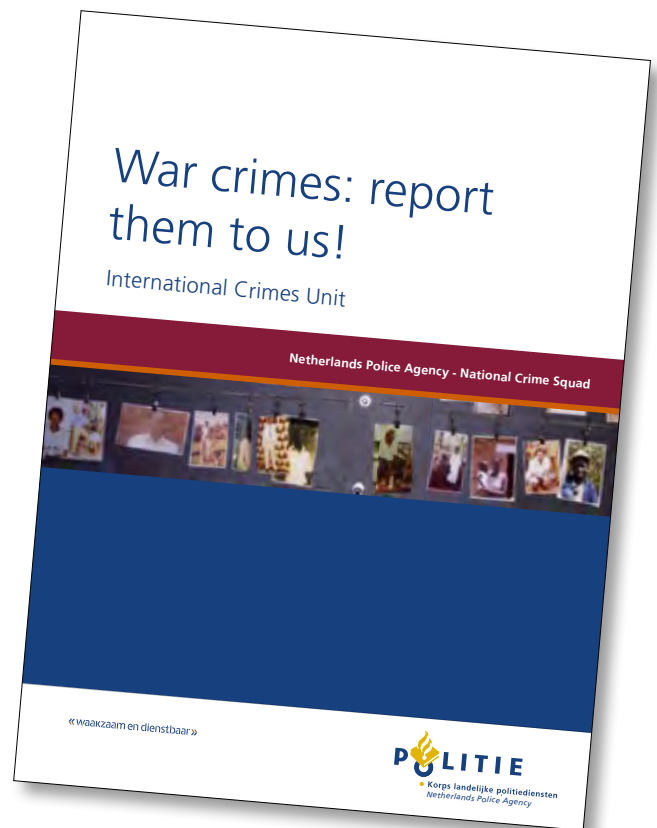
the prosecutor add relevant documents to the file⁴⁷² and benefit from a **right to speak** on any issue at stake in the criminal proceedings (including the evidence, the impact of the crime, the responsibility of the accused and the appropriate sentence).⁴⁷³ A number of victims exercised this right to speak in the **Eshetu A** case, either personally or through their lawyers. In practice, however, victims who do not appear as witnesses refrain from addressing issues of evidence in detail as this may result in them being sworn in and subjected to questioning.⁴⁷⁴ Unless this occurs, the victim's statement will not be used as evidence against the accused.⁴⁷⁵

Victims in the Netherlands benefit from a full right to judicial review of a decision not to prosecute

Victims benefit from a **full right to judicial review** of a decision not to prosecute before the Court of Appeal.⁴⁷⁶ The victim must be notified of the decision and provided with reasons in order to allow the exercise of this right, and the victim may meet with the prosecutor to discuss the decision in person in cases involving serious crimes.⁴⁷⁷ The victim may also inspect documents pertaining to the case and appear in court to be heard on the complaint. Organisations that promote interests that are *directly* affected by the decision may also seek such review, however this is narrowly construed by the courts. As such, NGOs and victims' associations play no formal role in such proceedings.⁴⁷⁸ The Court of Appeal may order the prosecutor to initiate a prosecution or to take other steps, such as opening a judicial investigation. The Court's decision is final and cannot be appealed. Victims also have the right to lodge a complaint with the Public Prosecution Service if unsatisfied with the investigation conducted by the TIM.⁴⁷⁹

Access to Information

Both the TIM and Public Prosecution Service engage in



2009 brochure of the Dutch specialised unit © TIM

outreach activities to raise public awareness about their work and encourage referral of victims and witnesses—including meeting with NGOs and staff working at reception centres for refugees.⁴⁸⁰ They also share information on a dedicated website and are active on social media.⁴⁸¹ In an effort to improve outreach to the Syrian diaspora, in 2017 the TIM participated in a three-part documentary series concerning their work which was translated into Arabic and made available online.⁴⁸²

In addition, information regarding the possibility to report serious international crimes to Dutch authorities has been made available since 2009 in a brochure prepared by the TIM and accessible online in 10 languages.⁴⁸³ A new brochure was released in

472 CCP, art.51b. The documents may be relevant either to the assessment of the case against the suspect or the compensation claim. The prosecutor may refuse to add documents to the file in certain circumstances. CCP, art.51b(3)-(4).

473 CCP, art.51e. Victims may submit a written victim impact statement (*Schriftelijke Slachtofferverklaring*) and/or address the court in person.

474 Victim Manual, p.40; Interview with Victims' Lawyer (8 February 2019); Interview with Victims' Lawyer (30 April 2019).

475 Victim Manual, pp.72-73.

476 CCP, art.12. This is done by filing a written complaint with the Court.

477 Instructions on Victim Care (*Aanwijzing slachtofferzorg*), para.5.3 (**Instructions on Victim Care**).

478 Interview with Syria Legal Network-NL (SLN) / Nuhanovic Foundation (6 February 2020).

479 Interview with Public Prosecution Service (5 February 2019).

480 Interview with TIM (25 February 2019); Interview with Public Prosecution Service (5 February 2019).

481 See <https://www.prosecutionservice.nl/topics/international-crimes>.

482 The documentary series was developed with *De Oorlogrecherche* in 2017 and is available at <https://www.bnnvara.nl/deoorlogrecherche>.

483 See House of Representatives, Adoption of the Budget of the Ministry of Justice (VI) for the Year 2010; General Consultation Report of 7 October 2009 on the Investigation and Prosecution of International Crimes 2008 (*Vaststelling van de begrotingsstaten van het Ministerie van Justitie (VI) voor het jaar 2010; Verslag algemeen overleg van 7 oktober 2009 over de opsporing en vervolging van internationale misdrijven 2008*) (32 123 VI, No.18, 11 November 2009), p.11.

February 2020 in six languages.⁴⁸⁴ The brochures briefly explain the role of the TIM and its interest in investigating international crimes, however they contain **no information on victims' rights**. Nor do they provide any information on where victims may turn for support. The TIM considers such issues to be too complex for a brochure and instead prefers to provide a fuller explanation of victims' rights and options for protection during a first meeting with a potential victim.⁴⁸⁵

General information on victims' rights (addressed to all categories of victims) is provided by the Dutch Ministry of Justice and Security in the form of a brochure available online in four languages.⁴⁸⁶ Our interviews with the TIM and Public Prosecution Service revealed some reluctance to make use of this brochure given that it is not tailored to the specific circumstances of victims of international crimes (particularly those who reside abroad). Rather, their practice is to withhold information about certain rights (for instance, the right to compensation) until a later stage in the proceedings in order to manage victims' expectations and to ensure victims' more immediate needs (such as protection against retaliation) are addressed first.⁴⁸⁷ The Directive acknowledges that the extent or detail of information to be provided to victims during their first contact with competent authorities may vary. However, a decision to withhold certain information must be based on "the specific needs and personal circumstances of the victim and the type or nature of the crime".⁴⁸⁸ While it is important for the authorities to be honest with victims about what they can expect, withholding information about their rights is not (in our view) an appropriate means to manage expectations.

Moreover, the TIM and Public Prosecution Service appear to take a **narrow reading** of their obligation to provide information on victims' rights. For instance, a distinction is made between "**complainants**" (that is, victims who make a *formal* complaint concerning a crime, of whom there are few),⁴⁸⁹ and victims who merely come to the attention of the authorities during the course of the investigation.⁴⁹⁰ The status of



2020 brochure of the Dutch specialised unit
"Don't let crimes of war go unpunished" © TIM

"complainant" is not one that is derived from Dutch criminal procedure law, but it nevertheless appears to guide the authorities in their interpretation of the legal obligation to provide information.

To the extent that this results in victims not being recognised as such and provided with information concerning victims' rights (as opposed to information concerning their role as witnesses), this would be **inconsistent with the object and purpose of the Directive**. Indeed, the obligation to share such information with *all* victims (together with a referral to appropriate support services) is precisely to enable victims to understand the role they may play in criminal proceedings and to place them in a position to make

484 The brochure is available in English, Dutch, Arabic, Farsi, French and Tigrinya at <https://www.prosecutionservice.nl/topics/international-crimes/documents/publications/international-crimes/alles/alles/brochures-in-6-languages>. While efforts have been made to make these brochures available during the asylum procedure and in reception centres for asylum seekers, few victims appear to have seen them. Correspondence with IND (30 July 2020); Interview with TIM (25 February 2019); Interview with Public Prosecution Service (5 February 2019); Interview with SLN / Nuhanovic Foundation (19 December 2018); Interview with Syrian victim (19 February 2019). See also <https://www.politie.nl/themas/internationale-misdrijven---oorlogsmisdrijven.html>.

485 Interview with TIM (25 February 2019); Interview with Syrian victim (19 February 2019).

486 The brochure is available in Dutch, English, French and German: Declaration on Victims' Rights, available at <https://www.rijksoverheid.nl/documenten/brochures/2017/04/03/verklaring-van-rechten-voor-slachtoffers-van-strafbare-feiten>. Language assistance must be provided if a victim does not speak one of these languages. The brochure was developed in accordance with a regulation containing rules for the general provision of information to victims (*Regeling algemene informatievoorziening slachtoffers*). This regulation imposes an obligation on authorities to provide victims with information concerning their rights upon first contact.

487 Interview with Public Prosecution Service (5 February 2019); Interview with TIM (25 February 2019).

488 See Directive, art.4(2) (emphasis added). See also Directive Guidance, p.15 (recommending that authorities take an individual approach based on a "relevance test" and personalised "needs-based evaluation").

489 As noted above, while investigations can be opened on the basis of a formal complaint from a victim, this occurs infrequently. See above under "**Framework for Investigation and Prosecution of International Crimes**".

490 Interview with Ministry for Justice and Security (15 February 2019); Interview with Public Prosecution Service (5 February 2019); Interview with TIM (25 February 2019).

“Being a victim is different to being a complainant. When you have an ongoing investigation, with possibly 90 victims, it’s impossible to inform them and give them the same rights as a complainant.”

Investigator with TIM

an informed choice as to whether to report a crime.⁴⁹¹ Moreover, “[b]eing denied victim status and forced into the role of a witness” is one of the more common sources of secondary victimisation, which is why the Directive places such an emphasis on victims being recognised.⁴⁹²

The Dutch authorities appear to have a similarly narrow reading of their obligation to provide victims with updates during investigations: only “complainants” must be informed of important procedural steps in the case and only if they “opt-in” to receiving such information.⁴⁹³ Given the length and complexity of international crimes investigations and the limits on Dutch jurisdiction, victims may therefore go lengthy periods without receiving any updates.⁴⁹⁴ For example, one victim reported that she has been waiting years for an update concerning her case and that this has made her feel “even more powerless and abandoned” than she felt prior to contacting the authorities.⁴⁹⁵ Again, this is **inconsistent with the object and purpose of the Directive**—that is, that victims receive sufficient information to enable them to exercise their rights. In particular, victims who are identified during the course of an investigation **must** be informed of a decision not to proceed with an investigation or prosecution and of their right to challenge such a decision.⁴⁹⁶

Both the TIM and Public Prosecution Service cited the confidentiality of investigations and the fear of “contaminating witnesses” as reasons for not sharing information during an investigation.⁴⁹⁷ While these are

valid concerns, the authorities nevertheless accepted that they do not justify leaving victims without any updates whatsoever. Even if investigators are unable to share confidential details about the investigation, it was agreed that simply reaching out to victims to let them know the investigation is ongoing can make a real difference. In any event, the primary cause for failing to keep victims properly informed appears to be a **lack of capacity**, particularly given the practical difficulties that inevitably arise when attempting to track down large numbers of victims who reside abroad (often in remote locations).⁴⁹⁸

For cases that go to trial, the authorities have been more effective at keeping victims informed of developments. For instance, Dutch authorities have provided advance funding to cover expenses associated with attending proceedings (such as flights and accommodation), thus avoiding the need to apply for reimbursement of expenses through the Court.⁴⁹⁹ Prosecutors will meet with victims upon request to inform them about the case and to discuss any special needs or wishes.⁵⁰⁰ In addition, simultaneous interpretation is arranged by the Court during hearings to ensure victims and/or the accused can follow proceedings in their own language.⁵⁰¹

Individual prosecutors have also taken extraordinary steps to inform victims and the broader victim community concerning the outcome of the investigation or proceedings. For example, in 2013 the Public Prosecution Service publicly released evidence obtained during the course of the **Morotai** investigation that revealed the fate of thousands of victims tortured and killed by Afghan security services in the 1970s.⁵⁰² Similarly, in 2017 Dutch prosecutors used a variety of means of communication to inform victims in Afghanistan of the closure of an investigation into the **Kerala massacre**. This included press releases translated into Dari and English and video-link meetings held at the Dutch embassy in Kabul to which members

491 In addition, certain rights set out in the Directive are not dependent on victims making a complaint. See Directive Guidance, p.16.

492 European Union Agency for Fundamental Rights, *Proceedings that Do Justice: Justice for Victims of Violent Crime Part II* (2019), pp.89-91. See also Directive, recitals 9, 19, art.1(1); Directive Guidance, p.10.

493 CCP, art.51a(3); Interview with Public Prosecution Service (22 February 2019). This is also the practice in non-international crimes cases, where “you need to have either filed a police report or sent a letter to the prosecutor or court stating that you are a victim and that you want to exercise your rights” in order to receive updates concerning the progress of a case. Interview with Victims’ Lawyer (30 April 2019).

494 Interview with NGO (6 February 2019); Interview with Victims’ Lawyer (13 March 2019).

495 Correspondence with victim (27 July 2020).

496 See e.g. Directive Guidance, p.31 (“To exercise the right to a review, victims must receive **sufficient information** to decide whether to request one”) (emphasis in original).

497 Interview with Public Prosecution Service (5 February 2019); Interview with TIM (25 February 2019).

498 Correspondence with Public Prosecution Service (20 July 2020).

499 Correspondence with Public Prosecution Service (10 March 2020).

500 Interview with Victims’ Lawyer (13 March 2019); Interview with Public Prosecution Service (5 February 2019). Prosecutors are expected to arrange such meetings in all cases prior to trial. The purpose of this meeting is to fully inform the victim so as to manage their expectations with respect to the possible outcome, and thus prevent secondary victimisation. In serious cases, the prosecutor may also arrange a meeting after the trial. See Instructions on Victim Care, para.5.6. See also VOICARE Netherlands Report, p.71.

501 Interview with District Court Judge (14 February 2019). See also CCP, arts.51c, 51ca.

502 Interview with Public Prosecution Service (22 February 2019). The so-called Death Lists contained almost 5000 names of people killed and Transfer Orders provided information about the transfer of detainees between prisons. See further Netherlands Public Prosecution Service, *Afghanistan Death Lists*, available at <https://www.prosecutionservice.nl/topics/international-crimes/afghanistan-death-lists>.

“The procedural obligation is limited to those victims who are actually ‘part of’ the charges. But we thought we had a broader obligation to inform the affected community.”

Dutch Prosecutor

of the broader victim community were invited.⁵⁰³

Press releases in multiple languages have become a standard practice of the Public Prosecution Service. For example, several press releases were issued during the recent **Eshetu A** trial, translated into English, French and Amharic, distributed via their embassy in Ethiopia and published in the local media.⁵⁰⁴ It is also standard practice for the Court to make English translations of final judgments available online. Prosecutors interviewed in the course of our consultations nevertheless noted that there were missed opportunities in terms of outreach to victims, which were largely a result of resource constraints. In particular, it was considered that more could be done after a case has concluded to inform victims of the outcome.⁵⁰⁵ Likewise, following the conviction of **Guus K** in 2017, the TIM attempted to contact witnesses to inform them of the result; however, given the passage of time (up to 13 years since initial contact with the witnesses), this naturally proved challenging.⁵⁰⁶

Legal Representation

Victims are entitled to be represented by a lawyer in order to enable the exercise of their rights and facilitate their participation in criminal proceedings.⁵⁰⁷ Both the TIM and Public Prosecution Service refer victims of international crimes to a list of lawyers eligible to represent victims in such cases who then act as a liaison between the victim and the authorities.⁵⁰⁸ Given their complexity, such cases require specialised legal representation and victims depend heavily on their lawyer to understand what is happening.⁵⁰⁹ While



Guus K before the District Court of 's-Hertogenbosch © ANP 2011

victims of serious crimes are normally entitled to (fully subsidised) legal aid, victims of international crimes committed abroad are technically ineligible under the current law.⁵¹⁰ The Legal Aid Board (*Raad voor Rechtsbijstand*) has, in previous cases, granted legal aid to lawyers representing victims on an exceptional basis.⁵¹¹ However, as legal aid is not guaranteed under the law, it is unlikely to be granted in circumstances where the authorities have not yet initiated criminal proceedings or where they decide not to proceed with an investigation or prosecution.⁵¹² As such, victims who engage with the authorities in the early stages of a case will be unrepresented, significantly hampering their ability to understand and to exercise their rights. Moreover, even with respect to cases that go to trial, there is no guarantee that victims will be granted legal aid in the future.⁵¹³

Victims of international crimes are ineligible to receive fully subsidised legal aid under the current law

503 Interview with Public Prosecution Service (22 February 2019).

504 Intervention by Public Prosecution Service at Practitioner Workshop (5 November 2019).

505 Interview with Public Prosecution Service (5 February 2019).

506 Correspondence with TIM (30 June 2020).

507 CCP, art.51c.

508 Interview with Victims' Lawyer (13 March 2019); Interview with Victims' Lawyer (8 February 2019).

509 Interview with Victims' Lawyer (13 March 2019).

510 Article 44(4) of the Legal Aid Act (*Wet op de rechtsbijstand*) links eligibility for (fully subsidised) legal aid to eligibility under art.3 of the Violent Offences Compensation Act (*Wet schadeloosstelling voor geweldsmisdrijven*), which is restricted to victims of violent crimes committed in the Netherlands, thereby excluding most victims of international crimes. Instead, depending on their income, victims of international crimes may have to make a contribution towards their legal fees: Legal Aid Act, arts.12, 34. See also Letter of the Minister for Legal Protection to the President of the House of Representatives concerning Implementation of the Multi-Year Victim Policy (*Brief van de Minister voor Rechtsbescherming Aan de Voorzitter van de Tweede Kamer der Staten-Generaal over de Uitvoering toezeggingen en Meerjarenagenda Slachtofferbeleid*) (22 June 2020), p.3 available at <https://www.tweedekamer.nl> (confirming that victims of serious international crimes do not currently qualify for fully subsidised legal aid where the crime was not committed on Dutch territory).

511 Interview with Ministry of Justice and Security (19 February 2019). The Dutch legal aid scheme is in the process of being remodelled, with a view to having an entirely new system of legal aid in place in 2024.

512 In cases where there is a more tenuous link to the Netherlands (e.g. where the accused is not present in the Netherlands or criminal proceedings have not been initiated by Dutch authorities), legal aid has been refused. Interview with Victims' Lawyer (13 March 2019).

513 Interview with Victims' Lawyer (13 March 2019); Interview with Victims' Lawyer (8 February 2019).

Support Services

In the Netherlands, one nationwide general victim support service exists: Victim Support Netherlands (*Slachtofferhulp Nederland*). It offers short-term psychosocial, practical and legal support to victims free of charge. Long-term or specialist support services such as counselling are provided on referral through social welfare or medical services. While this support structure appears to function well for most categories of victims,⁵¹⁴ providing support to victims of international crimes raises a number of unique challenges. First, even victims who reside in the Netherlands are often unaware of the existence of support services and are not actively referred to them by Dutch authorities.⁵¹⁵ Second, national victim support services such as Victim Support Netherlands were not intended to provide support to victims of largescale atrocities. As such, they have not been sufficiently equipped to deal with victims of such crimes, both on a practical level and in terms of expertise. For instance, Victim Support Netherlands has limited access to interpreters and will face difficulties maintaining contact with victims who reside outside the Netherlands or the EU.⁵¹⁶ Moreover, the complexity of such cases and the differences in the legal framework require specialised knowledge.⁵¹⁷

"It starts with our own attitude to the witness. There is scope to be creative and sometimes all that is needed are small changes."

Investigating Judge

Third, the type of support provided by national support services such as Victim Support Netherlands is not designed to meet the needs of such victims. For instance, Victim Support Netherlands' staff only provide basic moral or emotional support, meaning victims who have suffered severe trauma will need to be referred to specialist services.⁵¹⁸ Many such

services are dependent on the victim's residence status in the Netherlands.⁵¹⁹ For example, counselling and other specialist medical services are only available on referral from a doctor, and are usually only subsidised for those with Dutch health insurance. Moreover, only a small number of organisations (such as Stichting Centrum'45, Psychotraumacentrum Zuid Nederland and Trauma Centrum Nederland) specialise in providing mental health or psychosocial support to people affected by conflict or serious human rights violations.⁵²⁰ As a result, Victim Support Netherlands is not called upon to provide support to victims of serious international crimes. Instead, support is provided by victims' lawyers and on an ad hoc basis by the authorities (such as psychological support during interviews and accompaniment at trial).⁵²¹

Protection Measures

A range of measures are available during investigations and criminal proceedings to minimise the risk of secondary victimisation. During the investigation, the TIM tries to accommodate witness' needs as best it can with respect to the location of the interview, the gender of the interviewer and number of breaks.⁵²² Victims are entitled to be accompanied by a lawyer and/or a support person of their choice. Accompaniment by a support person may only be refused in the interests of the investigation or the victim and refusal must be justified.⁵²³ In practice, however, it is not standard for victims to be accompanied during interviews⁵²⁴ and police are hesitant to allow accompaniment by NGOs other than Victim Support Netherlands.⁵²⁵

Measures are employed to minimise the risk of secondary victimisation and to make court premises victim-friendly

Most victims who are heard as witnesses are heard by the police and investigating judge, rather than

⁵¹⁴ See generally VOCIARE Netherlands Report.

⁵¹⁵ While the usual practice is that victims will be referred to Victim Support Netherlands unless they indicate they do not wish to be contacted, this procedure is not followed with respect to victims of international crimes.

⁵¹⁶ Interview with Victim Support Netherlands (12 February 2019); Correspondence with TIM (30 June 2020).

⁵¹⁷ Interview with Victims' Lawyer (13 March 2019); Interview with Victims' Lawyer (8 February 2019); Interview with Public Prosecution Service (5 February 2019); Interview with TIM (25 February 2019).

⁵¹⁸ Interview with Victim Support Netherlands (12 February 2019). Certain services are provided by paid staff, while others (including emotional and practical assistance) are usually provided by volunteers who are not specifically trained in dealing with victims suffering from severe trauma. Interview with Victims' Lawyer (30 April 2019).

⁵¹⁹ Interview with Ministry of Justice and Security (15 February 2019).

⁵²⁰ Correspondence with Public Prosecution Service (10 March 2020); Correspondence with SLN / Nuhanovic Foundation (17 June 2020).

⁵²¹ Interview with Victims' Lawyer (8 February 2019); Interview with SLN / Nuhanovic Foundation (6 February 2020); Interview with TIM (25 February 2019); Correspondence with Public Prosecution Service (16 March 2020).

⁵²² Correspondence with TIM (30 June 2020). The Victims Decree provides that interviews with victims may be carried out in premises designed or adapted for that purpose and through trained professionals. Victims of sexual and gender-based violence may request that a person of the same gender conduct the interview. The number of interviews should be kept to a minimum. Victims Decree, arts.9, 11.

⁵²³ CCP, art.51c; Correspondence with Victims' Lawyer (31 July 2020).

⁵²⁴ Correspondence with TIM (30 June 2020).

⁵²⁵ Interview with SLN / Nuhanovic Foundation (19 December 2018); Correspondence with Victims' Lawyer (31 July 2020).

at trial. This usually occurs in the absence of the suspect (but in the presence of defence counsel).⁵²⁶ The specialised investigating judge, building on the practices of previous judges, has developed a **witness protocol** together with a psychologist specialising in trauma for use in such hearings.⁵²⁷ The protocol includes a number of measures designed to limit the impact of questioning on a witness' psychological well-being. These measures are also aimed at optimising the circumstances in which a witness is questioned to improve the quality of the evidence obtained. Some can be applied to all witnesses (such as sending the witness an invitation rather than a formal summons, asking short/simple questions, taking frequent breaks), while others are designed for vulnerable witnesses (for example, wearing informal clothing, having the judge conduct all questioning or limiting the number of people present).

The investigating judge may call upon the expertise of a **psychologist** to determine—in consultation with the victim—which measures may be appropriate.⁵²⁸ The psychologist will also assess factors such as cognitive function and literacy to ensure questioning is properly tailored to the witness. Similarly, the judge obtains advice from a cultural anthropologist in advance of all cases to ensure interactions with witnesses are culturally appropriate. The psychologist may be present during the hearing itself in order to provide support to the witness, as occurred with respect to one victim interviewed as a witness in the **Eshetu A** case.⁵²⁹ The presence of a psychologist to protect the witness' well-being means the lawyers and judge can question even a highly vulnerable witness without fear of causing severe secondary victimisation.

Several measures are available if the victim is required to testify again at trial or on appeal. For example, the

victim may testify or exercise the right to speak via video-link from a separate room or in closed session (although this rarely happens).⁵³⁰ The court may also arrange the courtroom in a manner to avoid eye-contact between the accused and the victim.⁵³¹ Harsh questioning by defence counsel almost never occurs and questioning may be put to the witness through the judge. While witnesses are obliged to answer, questioning concerning a victim's private life is permitted only to the extent necessary.⁵³² In addition, the Council for the Judiciary has developed its own protocol in order to prevent secondary victimisation within court premises. It provides, for example, for separate waiting areas for victims, reserved seating in the courtroom, accompaniment and correct treatment by court clerks.⁵³³

Victims may testify anonymously, however an accused cannot be convicted solely or to a decisive extent on the basis of anonymous testimony

Measures to protect victims against retaliation include omitting personal identifying information from the official report or permitting the victim to file a criminal complaint under a number (although this is rarely used in practice).⁵³⁴ Victims who are classified as “threatened witnesses” may testify anonymously before the investigating judge, however an accused cannot be

convicted solely or to a decisive extent on the basis of anonymous testimony.⁵³⁵ Victims who do not testify anonymously may nevertheless request that their name not be revealed in open court, and verdicts are always anonymised before publication.⁵³⁶ The Public Prosecution Service may also apply for a criminal behaviour order which may, for example, require the suspect to refrain from contacting the victim.⁵³⁷ A witness protection programme exists, however it has never been used in a case involving serious international crimes.⁵³⁸

For victims or witnesses residing abroad, Dutch authorities have very few means to provide protection.

526 While the suspect may be present (CCP, art.186a), this rarely occurs in practice. Interview with Investigating Judge (20 February 2019).

527 District Court of The Hague, *Witness Protocol* (February 2019) (**Witness Protocol**).

528 Any (perceived) risk that the psychologist might unduly influence the witness is addressed by ensuring the psychologist has no factual knowledge of the case and does not discuss the details of the witness' testimony. *Witness Protocol*, p.12.

529 Interview with Investigating Judge (20 February 2019).

530 Victims Decree, art.12; CCP, arts.131a, 269; Interview with Victims' Lawyer (30 April 2019).

531 Victim Manual, p.77; Victims Decree, art.12.

532 Victims Decree, art.9c; CCP, arts.215, 272(2). See also VOIARE Netherlands Report, p.59; Interview with Victims' Lawyer (13 March 2019).

533 Protocol for Dealing with Victims in Court (*Modelregeling inzake passende verblijfsomgeving slachtoffers*) available at <https://www.rechtspraak.nl/SiteCollectionDocuments/Modelregeling-inzake-passende-verblijfsomgeving-slachtoffers.pdf>. See also VOIARE Netherlands Report, pp.61-62; Interview with Public Prosecution Service (5 February 2019).

534 Instructions on Victim Care, paras.3.1-3.3. The personal information of the victim will be known to the police, prosecutor and judge but not disclosed to the suspect: VOIARE Netherlands Report, pp.22, 65.

535 CCP, arts.226a, 344a. The witness, prosecutor and suspect may be heard on the application to testify anonymously and the investigating judge must make a reasoned decision which is subject to appeal (CCP, arts.226a-b). If necessary, the suspect, defence counsel and prosecutor may be excluded from questioning, but will be given an opportunity to submit questions (CCP, art.226d). Victims cannot remain anonymous if they wish to claim compensation. Victim Manual, pp.44-45.

536 See CCP, art.190(3); VOIARE Netherlands Report, p.66.

537 CCP, art.509h; Instructions on Victim Care, para.6.2. See VOIARE Netherlands Report, p.58.

538 See Decree on Witness Protection (*Besluit getuigenbescherming*); Correspondence with TIM (30 June 2020).

Measures employed by investigators are more designed to *limit* the risk of retaliation, such as choosing locations for interviews that will minimise exposure and ensuring witnesses have a pretext to explain their absence during the interview. Investigators always provide witnesses with a phone number on which they can reach a member of the TIM if they are threatened, but are otherwise reliant on the protection services available in the person's country of residence.⁵³⁹

Compensation

Compensation from the Dutch State compensation fund—the Violent Offences Compensation Fund or *Schadefonds Geweldsmisdrijven*—is not available to victims of crimes committed *outside* the Netherlands.⁵⁴⁰ As such, the only option for victims of serious international crimes committed abroad is to obtain compensation directly from the offender.

Victims of crimes committed *outside* the Netherlands are not eligible for State-funded compensation

As explained above, a victim may submit a civil claim for compensation as part of the criminal proceedings.⁵⁴¹ The claim will only be admissible if the accused is found guilty. Awarding compensation is considered subsidiary to the determination of the accused's guilt, such that the court may refuse to entertain the claim—in whole or in part—if it would place a “disproportionate burden on the criminal proceedings” or interfere with the rights of the accused.⁵⁴² The claim may still be brought before a civil court (where the victim bears the burden of proof) but this can be time-consuming and expensive.

Given the nature of international crimes cases, which necessarily involve large numbers of victims, this can severely limit access to compensation. For example, in the **Frans van A** case, a representative sample of victims

of the chemical attacks joined the proceedings and submitted claims for compensation. Even though the number of victims was limited to avoid overburdening the court, the claims were nevertheless dismissed due to their complexity. The victims subsequently brought their claims before a civil court. After years of litigation at considerable expense, the court ultimately awarded 16 of the victims compensation in the amount of EUR 25 000 each.⁵⁴³

Where the claim is found admissible during criminal proceedings, the court's ruling on compensation will be issued simultaneously with the verdict and must be reasoned.⁵⁴⁴ Victims who are awarded compensation will automatically join the proceedings on appeal; where the parties do not appeal the verdict, victims nonetheless benefit from a civil right to appeal with respect to the compensation award.⁵⁴⁵

For crimes committed after 1995, measures exist to assist the victim enforce a compensation award against the offender

The Netherlands has put in place a number of measures that greatly facilitate the enforcement of compensation awards made in criminal proceedings. For example, when awarding a claim for compensation, the court can simultaneously impose a compensation measure (*schadevergoedingsmaatregel*), which is a penal sanction enforced by the State.⁵⁴⁶ This relieves the victim of the responsibility for recovering the award from the convicted person, representing a major practical advantage of seeking compensation through the adhesion procedure. There is also the possibility to obtain an advance payment (*Voorschotregeling*) from the State if the victim has not received the full amount from the offender within eight months of the decision.⁵⁴⁷

⁵³⁹ Interview with TIM (25 February 2019).

⁵⁴⁰ Article 3(1)(a)-(b) of the Violent Offences Compensation Act (*Wet schadefonds geweldsmisdrijven*) provides that compensation may be paid to any person who has suffered serious bodily or mental harm as a result of an intentional violent crime committed in the Netherlands or on board a Dutch vessel or aircraft. The Fund's Policy Manual further provides that in cases involving cross-border crimes, such as human-trafficking, compensation will only be payable with respect to injuries suffered as a result of conduct committed within the Netherlands. Policy Manual for Violent Offences Compensation Fund (*Beleidsbundel Schadefonds Geweldsmisdrijven*) (1 January 2019), p.13. Other than this territorial restriction, no restrictions based on the nationality or residence of the victim apply.

⁵⁴¹ See above under “Role of the Victim in Criminal Proceedings in the Netherlands”.

⁵⁴² See CCP, art.361(3). Where only part of the claim is ruled inadmissible due to its complexity, the more complex aspects of the claim can be pursued in a civil court leaving the criminal court to rule on the rest.

⁵⁴³ See Decision of 24 April 2013 (District Court of The Hague, Civil Division) (upheld on appeal in 2015).

⁵⁴⁴ CCP, arts.335, 361(4).

⁵⁴⁵ CCP, art.421. See also Victim Manual, p.83; VOIARE Netherlands Report, p.53.

⁵⁴⁶ Criminal Code (*Wetboek van Strafrecht*), art.36f. The compensation measure is enforced by the Central Fine Collection Agency (*Centraal Justitieel Incassobureau* or CJIB) on behalf of the victim: Correspondence with CJIB (4 February 2020); Correspondence with Public Prosecution Service (10 March 2020). The CJIB is reported to have been very successful in collecting compensation from offenders: Victim Manual, p.185.

⁵⁴⁷ CCP, art.6:4:2(7); VOIARE Netherlands Report, pp.52, 82. Advance payments do not depend on where the crime was committed or the residence of the victim and are thus available to victims of international crimes who are awarded compensation by a Dutch court: Correspondence with Public Prosecution Service (10 March 2020); Correspondence with Ministry for Justice and Security (25 February 2020); Correspondence with CJIB (4 February 2020).

Unfortunately, however, these measures are only applicable with respect to crimes committed after 1995; as such, to date, victims in international crimes cases have not benefited from such measures.⁵⁴⁸ Nevertheless, measures of this kind represent best practice and other EU Member States should consider similar ways to assume responsibility for enforcing compensation awards where the victim is unable to access State-funded compensation schemes.

CONCLUSION

FIDH, ECCHR and REDRESS commend the Netherlands for its comprehensive implementation of the Rome Statute and for its efforts to transpose and implement the Victims' Rights Directive into its domestic law and practice. We also commend the Netherlands for establishing specialised units within its police and prosecution services to handle cases involving serious international crimes and for ensuring systematic referral of cases by IND where there are serious reasons to believe an individual has committed a serious international crime.

While the Netherlands does not currently conduct structural investigations into largescale crimes, we welcome its openness to collecting evidence available in the Netherlands for use before other jurisdictions. We are encouraged that the TIM and Public Prosecution Service are working to increase public awareness about their work. We are also encouraged by the steps taken to facilitate victims' participation in proceedings (including arranging transport, accommodation and interpretation).

In light of the more limited procedural rights available in the Netherlands, victims of international crimes rarely play an active role in criminal proceedings. Neither victims, nor the lawyers or NGOs supporting them, are able to directly influence the course of an investigation or prosecution (beyond the victim's ability to seek judicial review of decisions not to investigate or prosecute). Rather, their participation is limited to seeking compensation from the offender and exercising a right to speak during proceedings.

The minimal changes required to implement the Victims' Rights Directive in the Netherlands did not directly affect the position of victims of international crimes. It did, however, trigger a specific examination by the Public Prosecution Service and Ministry of Justice and Security of measures to improve the situation of victims of international crimes. The Ministry takes the

position that where the Netherlands investigates or prosecutes international crimes under the ICA, victims should have access to all rights directly connected to the criminal proceedings. For this reason, the Public Prosecution Service and TIM are actively seeking to ensure victims' access to legal aid.⁵⁴⁹

However, according to the Ministry, for legal and practical reasons, rights that are not connected to the proceedings are not available.⁵⁵⁰ For example, the authorities do not proactively inform victims who are not "complainants" of victims' rights, nor do they consider themselves under an obligation to provide updates on the progress of investigations. In addition, while the authorities make efforts to ensure victims directly engaged in proceedings are supported, this is closely tied to their participation. The full range of needs presented by victims of international crimes are not accommodated within the existing victim support system.⁵⁵¹

As a result, victims of serious international crimes will face obstacles to exercising all minimum rights set out in the Directive (particularly their right to information). Nevertheless, some good practices have emerged in recent years which reflect a commitment on the part of individual police, prosecutors and judges to victims' rights. For instance, the development of a witness protocol by the specialised investigating judge represents best practice for assessing victims' specific protection needs and preventing secondary victimisation. Similarly, the creative approaches taken by Dutch authorities to informing victims and affected communities of the outcome of proceedings set an example to other authorities across Europe. In particular, it demonstrates how such cases—even where they do not proceed to trial—can have a profound impact upon those affected by the crimes.

548 Correspondence with Public Prosecution Service (20 July 2020).

549 Interview with Public Prosecution Service (5 February 2019).

550 Interview with Ministry for Justice and Security (15 February 2019).

551 Interview with Victim Support Netherlands (12 February 2019).

VIII. SWEDEN



FRAMEWORK FOR INVESTIGATION AND PROSECUTION OF INTERNATIONAL CRIMES

Sweden is one of the few countries in Europe that can exercise universal jurisdiction over genocide, crimes against humanity and war crimes

On 1 July 2014, the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes⁵⁵² entered into force in Sweden. It largely mirrors the Rome Statute and allows Swedish courts to exercise universal jurisdiction over core international crimes (that is, genocide, crimes against humanity and war crimes). Swedish courts can also exercise universal jurisdiction over war crimes committed on or after 1 January 1965, prosecuted as “crimes against international law” (*folkrättsbrott*) under the previous legal framework provided by the Swedish Criminal Code (*Brottsbalken* or BrB).⁵⁵³ Similarly, Swedish courts can exercise universal jurisdiction over acts of genocide committed after 1 July 1973 pursuant to the 1964 Act on Punishment for the Crime of Genocide.⁵⁵⁴

Sweden has no jurisdiction over crimes against humanity (as such) committed before 1 July 2014 and neither torture nor enforced disappearance is a stand-alone crime under Swedish law.⁵⁵⁵ Nevertheless, Sweden can exercise universal jurisdiction over any crime in the Swedish Criminal Code which carries a minimum sentence of four years’ imprisonment. This means that the underlying acts which constitute crimes against humanity, torture or enforced disappearance can be tried as ordinary crimes (for instance, aggravated assault, rape or murder).⁵⁵⁶ Swedish law does not provide for criminal liability of legal persons. Nevertheless, criminal liability may apply to representatives or employees of companies that are complicit in serious international crimes and

the company may, as a result, be subject to corporate fines (*företagsbot*).⁵⁵⁷

In principle, where there is a sufficient evidentiary basis, the Public Prosecution Authority has no discretion to decline to prosecute.⁵⁵⁸ However, authorisation of the government is required before a prosecution of a crime committed outside Sweden can take place.⁵⁵⁹

The Swedish police have a specialised War Crimes Unit (*Gruppen för utredning av krigsbrott*) which is exclusively tasked with investigating serious international crimes. The Unit was established in 2008 and as of July 2020 employs 15 investigators and two analysts. It cooperates closely with two officers from the intelligence division of the Swedish Police who work exclusively on serious international crimes.⁵⁶⁰ The Swedish Public Prosecution Authority also has a specialised war crimes prosecution team (the International Division) with offices in Stockholm, Gothenburg and Malmö comprising approximately 15 prosecutors in total.⁵⁶¹ The Swedish Migration Agency (*Migrationsverket*) which processes asylum applications in Sweden reports information on potential suspects to the War Crimes Unit via the Agency’s Department of Legal Affairs.⁵⁶² Broader cooperation with the Unit and Public Prosecution Authority is developing with a view to sharing information concerning potential victims or witnesses.⁵⁶³

The Swedish criminal justice system is made up of a mix of adversarial and inquisitorial elements. Cases involving international crimes are governed by Sweden’s comprehensive Code of Judicial Procedure (*Rättegångsbalk* or RB), which covers both criminal and civil procedure. The Public Prosecution Authority directs the preliminary investigations of the War Crimes Unit and generally does not need judicial authorisation to open a formal investigation. With no investigating judge, the prosecutor is obliged to consider both incriminating and exculpatory evidence.⁵⁶⁴ Sweden has a decentralised judicial system and serious international crimes cases could potentially be prosecuted in courts anywhere in the country. In practice, the Public Prosecution

552 Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (*Lag om straff för folkmord, brott mot mänskligheten och krigsförbrytelser*), SFS 2014:406.

553 Swedish Criminal Code (*Brottsbalken*), SFS 1962:700, ch.22, s.6 (BrB).

554 Act on Punishment for the Crime of Genocide (*Lag om straff för folkmord*), SFS 1964:169. See also SFS 1972:812 (amending BrB, ch.2, s.3).

555 With respect to the stand-alone crime of torture, see Committee against Torture, *Eighth Period Report submitted by Sweden*, UN Doc. CAT/C/SWE/8 (21 December 2018), paras.3-4.

556 See BrB, ch.2, s.3. See also BrB, ch.2, s.2 which provides for extra-territorial jurisdiction with respect to Swedish citizens and foreigners residing in Sweden (subject to double criminality).

557 BrB, ch.36, s.7.

558 Interview with Public Prosecution Authority (10 September 2019). See further Code of Judicial Procedure (*Rättegångsbalk*), SFS 1942:740, ch.20, s.6, ch.23, s.1 (RB).

559 See BrB, ch.2, s.5. To date, authorisation has never been refused. Interview with Public Prosecution Authority (10 September 2019).

560 Correspondence with War Crimes Unit (2 July 2020).

561 Interview with Public Prosecution Authority (10 September 2019).

562 Regulation with Instructions for the Swedish Migration Agency (*Förordning med instruktion för Migrationsverket*), SFS 2007:996 as amended by SFS 2018:404, s.2(18). The Migration Agency does not have a specialised unit for examining exclusion under art.1F of the Refugees Convention.

563 Interview with Public Prosecution Authority (10 September 2019); Interview with War Crimes Unit (10 September 2019).

564 RB, ch.23, s.4; Interview with Public Prosecution Authority (10 September 2019).



Tens of thousands of displaced persons pass through Mabrouka camp in Syria © UNHCR 2017

Authority normally requests that the Ministry of Justice refer any serious international crimes cases to the Stockholm District Court, which has developed some specialisation in handling such cases.

The District Court (*tingsrätt*) acts as a court of first instance, with cases being heard by one professional judge and a panel of three lay judges. Evidence is evaluated freely and there are no rules of admissibility. Court dress is informal and no titles are used. Courts of Appeal (*hovrätter*) have an appellate function and in certain cases also function as courts of first instance (the bench then consists of three professional judges and two lay judges). Appeals to the Supreme Court are heard by a panel of seven justices. Courts are permitted to sit outside of Sweden, and in the Rwanda cases both the District Court and Court of Appeal travelled to Rwanda to visit crime sites. The District Court heard some witnesses in Rwanda while others were heard remotely by video-link from Kigali.⁵⁶⁵ Trials of serious international crimes have generally lasted approximately 6 months before the District Court, with appeals similarly lasting approximately 6 months before the Court of Appeal.⁵⁶⁶

Swedish courts can sit outside Sweden, as such the District Court and Court of Appeal have travelled to Rwanda to hear witnesses or visit crime sites

⁵⁶⁵ Interview with Public Prosecution Authority (10 September 2019); Interview with Victims' Lawyer (20 September 2019); Interview with Victims' Lawyer (15 October 2019).

⁵⁶⁶ Interview with Victims' Lawyer (15 October 2019).



OVERVIEW OF RECENT INTERNATIONAL CRIMES CASES IN SWEDEN

Abdulnaser, Alaa and Mansour Omari filed a criminal complaint in February 2019 against senior officials in Bashar al-Assad's regime
© Civil Rights Defenders

Eleven cases concerning international crimes have been brought to trial in Sweden on the basis of universal jurisdiction in recent decades. Three trials concerned atrocities committed during the conflict in the **former Yugoslavia**. Swedish prosecutors secured their first conviction for crimes against international law in 2006 against **Jackie Arklöv**, a Swedish citizen involved in the mistreatment of detainees held by Croat forces. He was sentenced to 8 years' imprisonment by the Stockholm District Court and ordered to pay compensation to the 11 victims, with awards ranging from SEK 70 000 to SEK 425 000 (approximately EUR 7 000 to 41 000). In 2011, **Ahmet Makitan** was convicted and sentenced to five years' imprisonment in relation to crimes committed by Croat forces in Dretelj detention camp. Makitan was ordered to pay SEK 1 500 000 kronor (approximately EUR 145 000) in compensation to the victims. **Milić Martinović** was initially convicted in 2012 by the Stockholm District Court and sentenced to life imprisonment. Later that year, his convictions were overturned on appeal due to insufficient evidence. The case concerned a massacre in the village of Čuška by Serb forces in Kosovo in 1999. Several survivors of the incident had travelled to Sweden to testify and 14 victims had been awarded compensation totalling SEK 1 600 000 kronor (approximately EUR 155 000).

There have been three trials concerning the 1994 genocide in **Rwanda** in which a number of victims participated from abroad. In each case, the accused were convicted by the Stockholm District Court of genocide and crimes against international law and sentenced to life imprisonment. **Stanislas Mbanenande** was convicted in 2013 for his involvement in killings in Kibuye (confirmed on appeal in 2014); **Claver Berinkindi** was convicted in

2016 for participating in attacks and killings in Butare (confirmed on appeal in 2017); and **Théodore Rukeratabaro** (Tabaro) was convicted in 2018 for killings in the region of Winteko (confirmed on appeal in 2019). In the Mbanenande case, the victims' claims for compensation were dismissed on the basis that they were incorrectly brought under Swedish law rather than Rwandan law. In the Berinkindi case, the Court awarded compensation to 15 victims, with individual awards ranging from RWF 3 million to RWF 10 million (approximately EUR 3 000 to EUR 10 000). Rukeratabaro was ordered to pay compensation to 16 victims, with individual awards ranging from RWF 1 million to RWF 8 million (approximately EUR 1 000 to EUR 8 000).

There have been five trials relating to war crimes committed in **Iraq and Syria**. They have all been brought on the basis of videos or photos posted online. In one case, a journalist tracked down the victim who was then able to participate in a retrial. The accused—**Mouhannad Droubi**—was convicted of crimes against international law and sentenced to 8 years' imprisonment in 2016. Droubi was ordered to pay the victim SEK 268 000 (approximately EUR 26 000) in compensation. **Haisam Omar Sakhanh** was convicted in 2017 of crimes against international law before the Stockholm District Court for his involvement in the extra-judicial execution of seven Syrian army soldiers. He was sentenced to life imprisonment in February 2017. The three remaining accused were convicted of crimes against international law for posing with dead or injured people with sentences ranging between 6 and 15 months' imprisonment.

In 2018, the Swedish Government authorised the Public Prosecution Authority to proceed with an indictment against Alex Schneiter (a Swiss national) and Ian Lundin (a Swedish national) for aiding and abetting crimes against international law in **South Sudan** between 1997 and 2003. The accused are the CEO and Chairman of Swedish company **Lundin Petroleum**, which allegedly paid the South Sudanese army and non-state armed groups to forcibly displace the local population from oil-rich areas. The investigation was completed in June 2020 and the Public Prosecution Authority has announced its intention to take the matter to trial. Approximately 40 victims have been appointed legal counsel to enable them to participate in the proceedings. The trial is expected to commence in 2021.

As of July 2020, the War Crimes Unit has 81 active investigations and has been engaged in two structural investigations concerning Syria and Iraq since 2015. The vast majority of the Unit's investigations are commenced on the basis of referrals from the Migration Agency, while others come from the intelligence division, victims or members of the public. As part of its structural investigation concerning Syria, the War Crimes Unit is examining a complaint brought in 2019 by nine torture survivors against senior officials in Bashar al-Assad's regime. The complainants allege that they were detained in 15 different detention centres across Syria by Assad's intelligence services.

FRAMEWORK FOR VICTIMS' RIGHTS

Sweden has not adopted a unified legal framework regarding victims of crime; rather, provisions regarding victims' rights are scattered across various laws, both in relation to criminal justice and social services.⁵⁶⁷ Implementation of the EU Victims' Rights Directive resulted in only three minor legislative changes as Sweden did not conduct a more detailed review of victims' access to justice under Swedish law.⁵⁶⁸ Nevertheless, victims of international crimes—like victims of other categories of crime in Sweden—are generally placed in a good position to exercise their rights. In particular, the authorities interviewed for the purposes of this Report showed a genuine commitment to ensuring victims receive adequate information, support and protection (to the extent that this is within their control). As a result, a number of victims of international crimes have been able to participate actively in proceedings in Sweden.

Role of the Victim in Criminal Proceedings in Sweden

An individual against whom a crime is committed or who is injured or suffers a loss as a result of a crime is considered an “injured person” (*målsägare*).⁵⁶⁹ Victims who qualify as injured persons may become a formal party to the criminal proceedings in one of three ways. First, a victim may claim compensation from the offender (*skadestånd*).⁵⁷⁰ Second, a victim may support a prosecution initiated by the Public Prosecution Authority by stating his/her intention to do so in court.⁵⁷¹ Third, a victim may initiate a private prosecution where the Public Prosecution Authority has decided not to proceed with the case (however, given the complexity of international crimes cases and the financial risks involved, private prosecutions are not a realistic option for victims of serious international crimes).⁵⁷² Legal entities that have suffered a loss as a result of a crime can also be considered injured persons and can therefore access certain rights such as compensation.

However, NGOs that have not suffered harm cannot participate in criminal proceedings as injured parties; they may still be called as expert witnesses.⁵⁷³

Victims who qualify as “injured persons” may become formal parties to the criminal proceedings by claiming compensation or supporting the prosecution

Injured parties who support the prosecution are accorded several procedural rights, including the right: to obtain a copy of the “preliminary investigation protocol” (that is, the criminal file); to question witnesses and the accused; to make submissions on the guilt of the accused; and to appeal the decision on compensation, as well as the verdict and sentence imposed on the offender.⁵⁷⁴ These rights—in particular, access to the criminal file—only apply once the accused has been indicted (although in practice, prosecutors often provide legal counsel for injured parties with access to materials at an earlier stage to facilitate preparation for trial).⁵⁷⁵

Where the Public Prosecution Authority decides to terminate the preliminary investigation or not to prosecute, victims are informed through a standard letter and, in serious cases, may be contacted directly by the police or prosecutor who will explain the reasons for such a decision.⁵⁷⁶ Victims are also informed that they have a right to review by a higher-ranking authority.⁵⁷⁷ Victims may seek review through an online form or a letter to the Public Prosecution Authority requesting that they reconsider the case.⁵⁷⁸ The right to review is not regulated in any legislation; rather, it has been developed through practice and is governed by guidelines issued by the Prosecutor General.⁵⁷⁹ In practice, the review process is very straightforward (for example, victims are not required to identify which aspects of the decision they wish to contest), however it is rarely used.⁵⁸⁰

567 Victim Support Europe, *VOCIARE National Report: Sweden* (2019), pp.6, 103-105, 109 (**VOCIARE Sweden Report**).

568 VOCIARE Sweden Report, pp.5, 11-12. Those changes concerned the right to receive interpretation/translation and to be informed of the time and place of court hearings.

569 See RB, ch.20, ss.8, 13-14.

570 See generally RB, ch.22. See further below under “Compensation”.

571 RB, ch.20, s.8.

572 See RB, ch.20, s.9, ch.31, ss.3, 8, ch.47; Interview with Victims' Lawyer (20 September 2019).

573 Interview with Public Prosecution Authority (10 September 2019); Interview with CRD (9 September 2019).

574 RB, ch.20, s.8, ch.36, s.17, ch.37, s.1; Interview with CRD (9 September 2019). See also VOCIARE Sweden Report, p.49. Injured parties who claim compensation from the offender but do not support the prosecution have more limited procedural rights. Interview with Public Prosecution Authority (10 September 2019).

575 Interview with Public Prosecution Authority (10 September 2019).

576 Proclamation on Preliminary Investigations (*Förundersökningskungörelse*), SFS 1947:948, s.14.

577 VOCIARE Sweden Report, pp.27-29, 48.

578 See <https://www.aklagare.se/en/the-legal-process/the-role-of-the-prosecutor/decision-to-prosecute/review/>. See also VOCIARE Sweden Report, p.49.

579 Prosecutor General's Guidelines on Review (*Överprövning och annan prövningsverksamhet*), RÅR 2013:1; VOCIARE Sweden Report, p.48.

580 VOCIARE Sweden Report, pp.48-49; Interview with Public Prosecution Authority (10 September 2019).

Legal Representation and the Right to Information

Information regarding the possibility to report international crimes to the Swedish authorities is communicated on a poster as well as in a brochure prepared by the War Crimes Unit. Both have been made accessible online since 2017.⁵⁸¹ The brochure may be distributed by the Migration Agency, although they are not required to do so.⁵⁸² While the brochure itself does not contain any information on victims' rights, the online version provides links to such information in 13 languages.⁵⁸³

The War Crimes Unit has also attempted to use other channels to inform victims and witnesses of their work. For example, the Unit has visited the Swedish Red Cross' rehabilitation and treatment centres for victims of torture to brief their staff and they engage in ongoing dialogue on issues surrounding victims' needs.⁵⁸⁴ As a result, the Swedish Red Cross has prepared its own leaflet with information about possibilities for reporting international crimes to the Swedish authorities.⁵⁸⁵ It is made available in a number of different languages in their waiting rooms. The staff at the treatment centres are now increasingly acting as intermediaries for patients who wish to speak to the Unit.

"NGOs who have better contact with the diaspora can work as a bridge between us and the victim community in explaining how we work. But they can also be the gate from which victims and witnesses might dare to approach us."

Swedish Prosecutor

In addition, the War Crimes Unit reaches out to diaspora communities, civil society and other actors in regular contact with asylum seekers and conducts interviews with Swedish and non-Swedish media. It also promotes its work within the Swedish Police to ensure victims and witnesses are referred to the Unit in appropriate

Brochure of the Swedish War Crimes Unit © Swedish Police 2017



cases. In addition, the Unit places an emphasis on building up trust with victim communities which allows it to benefit from word-of-mouth.⁵⁸⁶ Similarly, the Public Prosecution Authority cooperates with various NGOs in Sweden.⁵⁸⁷

General information on victims' rights as well as the criminal justice system in Sweden is also made available in Swedish and English by the Swedish Crime Victim Authority (*Brottsoffermyndigheten*) (a governmental authority dedicated improving the position of victims).⁵⁸⁸ The information is provided in an accessible format (for example, diagrams and interactive videos) and is also available in the form of a brochure in 14 different languages.⁵⁸⁹ In international crimes cases, legal counsel for injured parties (*målsägandebiträde*) play a key role in providing information to victims and enabling them to participate actively in proceedings. Legal counsel can be appointed to act in the interests of victims in the early phases of the preliminary investigation. While the right to counsel is not universal,⁵⁹⁰ given the complexity of international crimes cases, legal counsel are generally appointed to all victims who qualify as injured persons.⁵⁹¹

581 The brochure is available online in Swedish, English, Arabic, French, Dari and Farsi at <https://polisen.se/en/victims-of-crime/war-crime---swedish-police-efforts/>. The poster is available in English and Arabic.

582 Interview with War Crimes Unit (10 September 2019).

583 See <https://polisen.se/en/victims-of-crime/>, providing information concerning the procedure for reporting crimes, support services, the judicial system, compensation and legal aid.

584 Interview with Swedish Red Cross (11 September 2019).

585 Swedish Red Cross, "Information on Genocide, Crimes against Humanity and War Crimes" (*Information om Folkmord, Brott mot Mänskligheten och Krigsförbrytelser*); Interview with Swedish Red Cross (11 September 2019).

586 Interview with War Crimes Unit (10 September 2019).

587 Interview with Public Prosecution Authority (10 September 2019).

588 Interview with Crime Victim Authority (10 September 2019).

589 See <https://www.brottsoffermyndigheten.se/eng/>. The brochure is available at <https://www.brottsoffermyndigheten.se/eng/publications>. In addition, the Crime Victim Authority has developed an interactive tool where victims can obtain information that is adapted to their individual situation, however it is currently only available in Swedish. Correspondence with Crime Victim Authority (10 July 2020). See further VOCIARE Sweden Report, p.24.

590 See Act concerning Counsel for the Injured Party (*Lag om målsägandebiträde*), SFS 1988:609; RB, ch.20, s.15. See further VOCIARE Sweden Report, pp.7, 45-46, 98.

591 In the South Sudan case which involves a large number of victims, the Public Prosecution Authority has been forced to limit the number of victims on whose behalf they will seek legal counsel. While these victims can themselves apply to support the prosecution and obtain legal counsel, in practice this is unlikely to occur. Interview with Victims' Lawyer (20 September 2019).

In practice, the Public Prosecution Authority will request that legal counsel be appointed for a victim during the preliminary investigation (often in advance of the police interview). Legal counsel will then be appointed by the court and paid by the State.⁵⁹² In cases involving multiple victims, the court—on the recommendation of the Public Prosecution Authority—will group victims together and assign common legal counsel, with one counsel often representing around 15 victims.⁵⁹³

“Without legal counsel’s help we would have to travel down weeks ahead to arrange meetings, transportation, documents, money...”

Investigator within the War Crimes Unit

Legal counsel provide victims with accurate information on their rights as well as general information regarding the criminal justice system and the different agencies involved.⁵⁹⁴ They are permitted to accompany their clients to police interviews, allowing the War Crimes Unit to conduct a more focused interview.⁵⁹⁵ Legal counsel will also accompany the authorities abroad to conduct interviews with victims,⁵⁹⁶ during which they provide logistical support (including organising victims’ travel, accommodation and reimbursement of expenses).⁵⁹⁷ Legal counsel continue to relieve some of the pressure on the authorities by keeping their clients continuously updated during these very lengthy investigations and proceedings.

As one investigator explained: “They can explain what is going on, why it is taking so long, reassure them that they haven’t been forgotten. They can also explain the role of the defence and what to expect from cross-

examination; it’s very hard for us to talk about those issues.”⁵⁹⁸ This is particularly important in Sweden, where the duty of objectivity means prosecutors have very little direct contact with victims or witnesses prior to their appearance in court.⁵⁹⁹ Finally, as discussed further below, legal counsel play a crucial role in ensuring victims are protected against retaliation and act as a general safeguard against secondary victimisation.⁶⁰⁰

Generally, legal counsel for injured parties have been provided with sufficient resources to allow them to represent their clients effectively (including funding to travel abroad for significant periods of time).⁶⁰¹ Legal counsel will usually travel to meet with their clients in person on several occasions and appear beside them during their video-link testimony. They also maintain contact via phone, email and WhatsApp.⁶⁰² However, funding to conduct necessary follow-up meetings with victims after a case has been concluded (for example, to explain the outcome upon appeal or to distribute compensation) has not always been available.⁶⁰³ Moreover, assigning upwards of 12 victims to one legal counsel puts significant strain on their ability to represent their clients’ interests.⁶⁰⁴

Interpretation and, if necessary, translation of documents is provided to victims free of charge during contact with agencies such as the police, prosecution, courts and social services.⁶⁰⁵ For example, in previous cases concerning international crimes, interpretation has been provided for injured parties on the days they have been heard by the District Court. The Court has also provided translations of final judgments upon request.⁶⁰⁶

592 While in the past legal counsel were sometimes appointed to injured parties late in the proceedings, now they are generally appointed at an early stage (often at the same time as defence counsel). The practice has been slightly different in the structural investigations concerning Syria/Iraq, where the focus is on gathering as much evidence as possible, rather than building a case against a specific suspect. The court chooses lawyers with substantial experience given the complexity of such cases. Interview with Public Prosecution Authority (10 September 2019); Interview with War Crimes Unit (10 September 2019); Interview with Stockholm District Court Judge (11 September 2019); Interview with Victims’ Lawyer (20 September 2019).

593 Interview with War Crimes Unit (10 September 2019); Interview with Stockholm District Court Judge (11 September 2019); Interview with Victims’ Lawyer (15 October 2019). In a current case concerning South Sudan, one legal counsel is representing 20 victims, but it is more common to represent 10 to 15 victims. Interview with Victims’ Lawyer (20 September 2019).

594 It was generally agreed that legal counsel are best placed to provide information concerning victims’ rights and have greater freedom to prepare their clients for what to expect, particularly in court. Interview with War Crimes Unit (10 September 2019); Interview with Victims’ Lawyer (20 September 2019).

595 The victim is entitled to be accompanied by their legal counsel (and/or a support person of their choice) during questioning by the police, as long as their presence is not detrimental to the investigation. See RB, ch.23, s.10. The War Crimes Unit welcomes the presence of legal counsel in police interviews as it is considered to facilitate their work. Interview with War Crimes Unit (10 September 2019); Interview with Victims’ Lawyer (20 September 2019).

596 For example, legal counsel for injured parties travelled with the Public Prosecution Authority and War Crimes Unit to Rwanda during the preliminary investigations. Interview with Public Prosecution Authority (10 September 2019); Interview with War Crimes Unit (10 September 2019); Interview with Victims’ Lawyer (20 September 2019); Interview with Victims’ Lawyer (15 October 2019).

597 Interview with Victims’ Lawyer (20 September 2019); Interview with Victims’ Lawyer (15 October 2019); Interview with War Crimes Unit (10 September 2019).

598 Interview with War Crimes Unit (10 September 2019).

599 Interview with Public Prosecution Authority (10 September 2019); Interview with Victims’ Lawyer (20 September 2019). See also VOIARE Sweden Report, p.45; RB, ch.23, s.4.

600 Interview with Public Prosecution Authority (10 September 2019); Interview with War Crimes Unit (10 September 2019). See below under “Protection Measures”.

601 Interview with Victims’ Lawyer (20 September 2019); Interview with Victims’ Lawyer (15 October 2019).

602 Interview with Victims’ Lawyer (20 September 2019).

603 Generally, the appointment of legal counsel for injured parties ends once there is a final determination. While some limited funding is available for necessary follow-up, for the most part legal counsel who wish to provide assistance after the final judgment must do it on a *pro bono* basis. Interview with Crime Victim Authority (10 September 2019); Interview with Victims’ Lawyer (20 September 2019); Interview with Victims’ Lawyer (15 October 2019).

604 Interview with Victims’ Lawyer (15 October 2019); Interview with War Crimes Unit (10 September 2019).

605 RB, ch.5, s.6, ch.33, s.9. See also VOIARE Sweden Report, pp.31, 99-100.

606 Correspondence with Victims’ Lawyer (9 July 2020).

“It is very important that the legal counsel can keep in contact with the victim and tell them what is happening. It’s very good for the victim and it facilitates the work of the prosecutor and police.”

Swedish Prosecutor

Support Services

Support services are provided by local municipalities under the framework of social services, in cooperation with Victim Support Sweden (*Brottsofferjouren Sverige*), which is a voluntary association of more than 100 local NGOs. As a result, there is no single, unified support structure delivered by the State and there are significant variations in access across different parts of Sweden.⁶⁰⁷ They take a holistic approach, providing practical, financial and emotional support in over 20 languages.⁶⁰⁸ They can also give general referrals to access more specialised support from social or health services, but the victim will need to identify a specific specialist themselves. This can be particularly difficult for refugees who are unfamiliar with the system and have not (yet) mastered the Swedish language. Moreover, social and health services function completely separately from the criminal justice system such that they are not specifically directed at victim support.⁶⁰⁹

As in other countries under examination in this Report, providing support to victims of international crimes raises a number of challenges. First, given support services are run through local NGOs and the municipalities, they are effectively only accessible to victims residing in Sweden.⁶¹⁰ Second, the type of support they provide is not specifically adapted to the needs of such victims (particularly those suffering from severe trauma). Rather, services tend to focus on more prevalent types of crimes, such as domestic violence. While they may be equipped to provide general information and to accompany victims in court, they would need to refer victims to specialist services for psychological support.⁶¹¹

The Swedish Red Cross runs treatment and rehabilitation centres for victims of torture, comprising psychotherapy and physical therapy as well as broader psychosocial

support.⁶¹² Referral to the Red Cross is usually provided by primary health care services rather than criminal justice authorities, and victims can sometimes approach the Red Cross directly. However, there are lengthy waiting lists which limits the number of victims who can access such treatment.⁶¹³ Victims who reside outside of Sweden receive no support beyond what can be provided by their legal counsel. As one legal counsel explained: “Sometimes I sit with them for hours after the hearing to take care of them. They have gone through something terrible. They’ve told the court about it, there is a defence lawyer who can be quite tough with them, but we have no resources for psychosocial support.”⁶¹⁴

Protection Measures

The principle of openness and transparency, including public access to documents, is fundamental to Swedish culture. As a result, members of the public are guaranteed access to “official documents” of public authorities and criminal trials are open to the public. For example, while the principle of secrecy of investigations (*förundersökningssekretess*) applies during the preliminary investigation,⁶¹⁵ once a suspect is indicted the “preliminary investigation protocol” (that is, the criminal file) becomes publicly available.⁶¹⁶ Accordingly, the general rule is that information concerning a victim’s participation in the investigation will be accessible not only to the accused, but also to the wider public. In addition, the personal information of victims who reside in Sweden (including their name, address and personal identity number) is contained in the civil registry and is normally publicly available. Companies have made a business of providing easy access to such information online.⁶¹⁷

Swedish law does not allow the use of anonymous testimony in criminal trials and generally a victim’s identity will not be withheld from the public

607 Interview with Crime Victim Authority (10 September 2019). Most NGOs cooperate with social services (including through formal cooperation agreements). All have different funding arrangements and therefore different capacities to deliver services. VOIARE Sweden Report, pp.14-15, 35-36, 42.

608 Interview with CRD (9 September 2019); VOIARE Sweden Report, pp.7-8, 100.

609 Interview with CRD (9 September 2019); Interview with Academic (11 September 2019); Interview with Swedish Red Cross (11 September 2019).

610 Interview with Victim Support Sweden (9 September 2019).

611 Interview with Victim Support Sweden (9 September 2019); Interview with CRD (9 September 2019).

612 Interview with Swedish Red Cross (11 September 2019).

613 Interview with Swedish Red Cross (11 September 2019); Interview with CRD (9 September 2019). The Swedish Red Cross has recently introduced remote appointments with patients. Correspondence with Swedish Red Cross (10 July 2020).

614 Interview with Victims’ Lawyer (20 September 2019).

615 Public Access to Information and Secrecy Act (*Offentlighets- och sekretesslag*), SFS 2009:400, ch.18, s.1, ch.35, s.1 (OSL); Interview with CRD (9 September 2019).

616 Act on Freedom of the Press (*Tryckfrihetsförordning*), SFS 1949:105, ch.2, s.2; OSL, ch.35, s.7; Interview with Public Prosecution Authority (10 September 2019).

617 Interview with CRD (9 September 2019).

While Swedish law does not allow victims or witnesses to benefit from full anonymity,⁶¹⁸ there are some more limited exceptions to the general principle of openness. For example, victims of sexual violence may have their identity kept confidential from the public.⁶¹⁹ Similarly, the identity of a witness may be kept confidential where they might be exposed to danger due to their connection to a foreign State or international organisation.⁶²⁰

However, it is ultimately for the court—and not the police or prosecutor—to decide whether confidentiality will apply.⁶²¹ Moreover, the identity of witnesses and victims must always be disclosed to the accused, who are entitled to make direct contact with them at any time.⁶²² Nevertheless, the law provides that personal information relating to the victim (for example, their age, occupation and residential address) that has no bearing on the case will not be provided to the accused.⁶²³ In addition, the public's access to such information through the civil registry can be prevented in circumstances where an individual is under threat.⁶²⁴ The prosecutor can also apply for a court order prohibiting the suspect or another individual from visiting, following or otherwise contacting the victim.⁶²⁵

“It is very important for us to be honest with them from the start and not make any false promises. We want them to talk of course, but not at any cost. We don't want to jeopardise them or their families.”

Investigator within the War Crimes Unit

Finally, victims can be referred to an internal police unit (*Brottsoffer och Personskydd* or BOPS) that can apply more rigorous physical protection measures following a structured risk assessment.⁶²⁶ The BOPS has been engaged with respect to international crimes cases in the past (although not frequently) and is involved in

protection both in Sweden and abroad.⁶²⁷

The authorities interviewed for the purposes of this Report acknowledged that protecting victims who reside abroad—particularly those in conflict zones, areas facing ongoing insecurity or in refugee/internally displaced person camps—can be quite delicate. As a Swedish prosecutor stated during our consultations: “this is probably one of the most important challenges when it comes to successfully prosecuting international crimes because if we cannot protect our victims and witnesses, we will not have any case to take to trial.”⁶²⁸

“We have to inform the country that we're coming and what we're doing. As soon as we decide to meet someone, we have to send the name ahead and that can create a threat. But that's how the system works.”

Investigator within the War Crimes Unit

Swedish authorities are generally limited to taking measures to reduce the risk of retaliation, such as undertaking risk assessments, carefully choosing the location of the interview and limiting those involved. For example, going through formal channels to contact victims or witnesses abroad may put them at risk of retaliation, in particular where State agents are somehow implicated in the crimes. The Unit may then need to find other ways to reach those individuals (often in collaboration with legal counsel who are able to interact with victims more freely and will also provide more general advice on how to avoid unnecessary risk).⁶²⁹ In some cases, the authorities and legal counsel have worked with UNHCR to arrange for victims who have been threatened to be relocated.⁶³⁰

Throughout the proceedings, including during the preliminary investigation, legal counsel for injured

618 In November 2019, the Swedish government began an inquiry into the possibility of permitting anonymous testimony in certain circumstances, amongst other measures to enhance protection of witnesses. While the focus of the inquiry is on responses to organised crime in Sweden, such measures may also be of benefit in cases concerning international crimes. The inquiry is expected to be completed in 2021. Interview with CRD (9 September 2019); Interview with Victim Support Sweden (9 September 2019); Correspondence with Academic (17 June 2020).

619 OSL, ch.35, s.12.

620 OSL, ch.21, s.5.

621 Interview with Public Prosecution Authority (10 September 2019).

622 Interview with Public Prosecution Authority (10 September 2019); Interview with War Crimes Unit (10 September 2019). Cf OSL, ch.35, s.2.

623 RB, ch.45, s.9.

624 For example, victims can apply to have their personal information marked confidential in the civil registry in order to limit its disclosure. OSL, ch.22, s.1. A victim who is forced to relocate as a result of threats or harassment can apply to have their new residential address withheld. Civil Registry Act (*Folkbokföringslag*), SFS 1991:481, s.16. As a last resort, a victim who is at serious risk may be provided with “fictitious personal data” (that is, a change of identity), together with members of their family. Act on Fictitious Personal Data (*Lag om fingerade personuppgifter*), SFS 1991:483, s.1.

625 Contact Ban Act (*Lag om kontaktförbud*), SFS 1988:688, s.1.

626 See Police Act (*Polislag*), SFS 1984:387, s.2a; VOIARE Sweden Report, pp.76-78.

627 Correspondence with War Crimes Unit (2 July 2020).

628 Interview with Public Prosecution Authority (10 September 2019).

629 Interview with War Crimes Unit (10 September 2019); Interview with Public Prosecution Authority (10 September 2019).

630 Interview with War Crimes Unit (10 September 2019); Interview with Victims' Lawyer (20 September 2019).



Internally displaced persons in South Sudan © UNHCR/Sebastian Rich 2013

parties act as a general safeguard against secondary victimisation.⁶³¹ Interviews with victims are conducted as early as possible and the number of interviews are generally kept to a minimum.⁶³² Sweden has no process of psychological screening embedded in its interview process in order to assess whether an individual is fit to be interviewed and what measures can be employed to minimise the risk of secondary victimisation.⁶³³ While there is nothing in the law to prevent it, it has not been made a priority in terms of resources.⁶³⁴ Both the Public Prosecution Authority and legal counsel expressed regret about this; while legal counsel are not professionally trained to provide psychosocial support to their clients, in the absence of anything else, they do the best they can.⁶³⁵

Almost every victim is required to give a statement in court, even if they have not joined the proceedings, and will be explicitly questioned about the extent of their injuries or damage in support of their claim for

compensation.⁶³⁶ A Witness Service of volunteers is available to assist victims in court (for example, meeting them in the lobby, using a separate entrance and providing an opportunity to visit the court in advance) and they may be accompanied by a support person.⁶³⁷ Harsh questioning generally does not occur and the court can dismiss questions which are irrelevant, confusing or otherwise inappropriate.⁶³⁸ Moreover, victims cannot be heard under oath⁶³⁹ and cannot be made to answer questions which make them uncomfortable.⁶⁴⁰ If a victim is particularly vulnerable, the court may impose limitations on visual contact between the victim and the accused (for example, through use of a video-link).⁶⁴¹ Individuals (including the accused) may be excluded from the courtroom if their presence is likely to impact upon the victim's ability to freely tell the truth.⁶⁴² However, in view of the strong interest in public access to court hearings, closed court is only permitted in very limited circumstances.⁶⁴³

631 Interview with Victims' Lawyer (15 October 2019).

632 VOCIARE Sweden Report, pp.71-72. See also RB, ch.23, s.4.

633 Interview with Public Prosecution Authority (10 September 2019).

634 Interview with Public Prosecution Authority (10 September 2019).

635 Interview with Public Prosecution Authority (10 September 2019); Interview with Victims' Lawyer (20 September 2019).

636 The victim is first questioned by the prosecutor (concerning the charges), then by his/her legal counsel (concerning the compensation claim), then by the defence. Judges may also pose questions. Witnesses (including victims) shall be allowed to give testimony in a continuous sequence by themselves or, if necessary, with the support of questions: RB, ch.36, s.17, ch.37, s.3.

637 VOCIARE Sweden Report, pp.69-70; RB, ch.20, s.15; Interview with War Crimes Unit (10 September 2019).

638 RB, ch.36, s.17, ch.37, s.3; Interview with Victims' Lawyer (20 September 2019); Interview with Victims' Lawyer (15 October 2019).

639 RB, ch.36, s.1.

640 VOCIARE Sweden Report, pp.68, 83.

641 RB, ch.5, s.10.

642 RB, ch.36, s.18, ch.37, s.3; Interview with Stockholm District Court Judge (11 September 2019). However, the excluded individual must be allowed to listen remotely and be offered the opportunity to ask questions of the victim/witness.

643 See generally RB, ch.5.

Compensation

Victims have a right to seek compensation from an offender (*skadestånd*), during the criminal proceedings.⁶⁴⁴ Sweden adopts an adhesion model whereby the claim is consolidated with the prosecution of the offence and the court may make a compensation order in combination with penal sanctions. Compensation may also be awarded where an accused is found not guilty.⁶⁴⁵ The prosecutor (or, where applicable, legal counsel for the injured party) will present the claim. Both the prosecutor and the court have the possibility to divert the compensation claim to a civil court if, for example, it would be too time-consuming to deal with it alongside the criminal case.⁶⁴⁶ However, this has never occurred in a case concerning international crimes.⁶⁴⁷ On the other hand, in a number of cases the court has applied the law of the country where the crime was committed, meaning legal counsel have had to invest significant resources to establishing the claim under foreign law.⁶⁴⁸

In principle, enforcement is the responsibility of the victim and the costs involved in enforcing awards and distributing compensation to the victims are not always covered by the State.⁶⁴⁹ In practice, however, the War Crimes Unit may seize the accused's assets as part of its investigation. For example, in the second Rwanda case (**Berinkindi**), the War Crimes Unit seized money from the accused at the time of his arrest which was later distributed to the victims pursuant to the District Court's compensation award.⁶⁵⁰ Victims can also apply to the Swedish Enforcement Authority (*Kronofogden*) for assistance in enforcing compensation awards against offenders, but they can only assist where the assets are located in Sweden.⁶⁵¹ This occurred in the third Rwanda case (**Rukeratabaro**), where the Enforcement Authority seized the offender's property in order to enforce the compensation award.⁶⁵²

In all other cases concerning international crimes, the offender has been indigent and therefore the victims have never received compensation.⁶⁵³ Normally, where the offender cannot compensate the victim for the harm suffered, the victim may apply for State compensation (*brottsskadeersättning*) from the Crime Victim Authority (*Brottsoffermyndigheten*). However, at present, State compensation is limited to cases where the crime was committed in Sweden or the victim was a Swedish resident at the time of the crime.⁶⁵⁴ As such, most victims of international crimes will not have access to State compensation.

The Swedish Enforcement Authority can assist victims in enforcing compensation awards where the offender holds assets in Sweden

644 See generally RB, ch.22.

645 RB, ch.22, s.7.

646 RB, ch.22, s.5; VOCIARE Sweden Report, pp.58-59.

647 Interview with Academic (11 September 2019).

648 Interview with Victims' Lawyer (20 September 2019); Interview with Academic (11 September 2019).

649 Interview with Victims' Lawyer (15 October 2019).

650 Interview with Victims' Lawyer (20 September 2019); Intervention by Victims' Lawyer at Practitioner Workshop (5 November 2019); Correspondence with War Crimes Unit (2 July 2020).

651 See Enforcement Code (*Utsökningsbalk*), SFS 1981:774. The Enforcement Authority will send a letter to the victim with an application form. There is no fee in such cases. Upon application, the Enforcement Authority will investigate whether the offender has assets that can be seized. Correspondence with Enforcement Authority (22 June 2020). See also <https://kronofogden.se>.

652 Interview with Victims' Lawyer (15 October 2019).

653 Interview with Academic (11 September 2019).

654 Interview with Crime Victim Authority (10 September 2019); Interview with Victims' Lawyer (20 September 2019); Criminal Injuries Compensation Act (*Brottsskadelag*), SFS 2014:322, s.2. See also s.3 (providing that compensation will not be paid if the crime and injured party have such a limited connection to Sweden that it is not reasonable for the damage to be compensated by the State).

CONCLUSION

FIDH, ECCHR and REDRESS commend Sweden for its efforts to implement the Rome Statute and the Victims' Rights Directive into its domestic law and practice. We also commend Sweden for establishing specialised units within its police and prosecution services to handle cases involving serious international crimes. Similarly, we support the systematic referral of cases by the Migration Agency where there are serious reasons to believe an individual seeking asylum has committed a serious international crime. We also welcome the opening of the War Crimes Unit's first structural investigations into largescale crimes in Syria and Iraq and its willingness to collect evidence available in Sweden for use before other jurisdictions.

Victims who join criminal proceedings in Sweden as injured parties benefit from a wide range of procedural rights. In addition, Swedish authorities are proactive in appointing legal counsel to act in the interests of the victim during the preliminary investigation and any eventual prosecution. These counsel—who are well-remunerated by the State—play a crucial role in keeping victims informed and enabling them to exercise their rights. As a result, a number of victims of international crimes have been able to participate actively in proceedings in Sweden. The positive attitude of the authorities towards victims' counsel has allowed for a collaborative approach to addressing victims' specific protection needs. Swedish authorities have also been proactive in their outreach strategies, experimenting with different methods of informing victims about their work and engaging in dialogue with other actors who may interact with victims. The willingness of Swedish courts to travel abroad to visit crime sites or hear witnesses and to permit victims to appear by video-link also facilitates the participation of victims and affected communities in proceedings.

The minimal changes required to implement the Victims' Rights Directive in Sweden did not directly affect the position of victims of international crimes. While victims of international crimes generally benefit from the same rights as other categories of victims, a few challenges to practical implementation of the Directive remain.

First, victims have difficulty accessing victim support services that are adapted to their needs. The Swedish Red Cross provides specialised rehabilitation services to victims of torture, however these services are not available to everyone. **Second**, while legal counsel are provided with adequate funding *during* investigations and criminal proceedings, the more limited funding provided after the final verdict may hamper counsel's efforts to engage in important follow-up. Similarly, requiring counsel to represent large numbers of victims can put strain on their ability to represent their clients' interests.

Third, the basic principles of openness and transparency make it difficult to protect victims' privacy. While there are some limited exceptions that allow a victim's or witness' identity to be protected from the public, their identity must always be disclosed to the accused.

Fourth, although legal counsel can act as a general safeguard against secondary victimisation, a process of psychological screening prior to police interviews of particularly vulnerable witnesses is warranted. **Finally**, victims can obtain a decision on compensation against the offender as part of the criminal proceedings. However, the Swedish Enforcement Authority can only assist victims to enforce awards where the offender holds assets in Sweden and victims of crimes committed abroad are currently excluded from accessing State compensation funds.

IX. COMMON CHALLENGES, EMERGING BEST PRACTICES AND RECOMMENDATIONS





War-damaged streets of Damascus, Syria © UNHCR/Bassam Diab 2016

WHILE THE focus of Member States’ efforts to transpose the Victims’ Rights Directive into their domestic laws and ensure effective implementation has been “ordinary” domestic crimes (in particular, violence against women and children), the Directive also has the potential to improve the position of victims of serious international crimes. And yet, victims of serious international crimes continue to face significant legal and practical barriers that prevent them from exercising their rights.

This final chapter evaluates emerging best practices in the five countries under review in this Report and examines common challenges to ensuring access to justice for victims of international crimes in Europe. Further information concerning the examples highlighted with respect to each country can be found in the **Country Chapters** of this Report (Chapters IV to VIII).

APPLICABILITY OF THE VICTIMS’ RIGHTS DIRECTIVE WITH RESPECT TO VICTIMS OF SERIOUS INTERNATIONAL CRIMES

As explained in **Chapter III**, the Victims’ Rights Directive primarily concerns victims of crimes committed in the EU. Nevertheless, it also confers rights on victims

of crimes committed *outside* the EU where criminal proceedings take place in a Member State. As such, the Directive applies to investigations of serious international crimes by national authorities and any subsequent prosecutions before domestic courts within the EU.

Whether a particular Member State can investigate and prosecute cases involving serious international crimes will depend on **two factors**:

- (i) whether that Member State has criminalised the relevant conduct in its domestic law in accordance with its obligations under international law; and
- (ii) whether it allows its courts to exercise extra-territorial jurisdiction over such crimes (that is, jurisdiction over crimes committed abroad).⁶⁵⁵

These two factors can therefore have a significant impact on access to justice for victims of international crimes and on their ability to exercise the rights set out in the Directive.

At the time of entry into force of the Rome Statute in 2002, each of the countries examined in this Report had criminalised serious international crimes and established jurisdiction over those crimes to varying degrees.⁶⁵⁶ Ratification of the Statute nevertheless prompted a review of domestic legislation to ensure all Rome Statute crimes were criminalised under their domestic laws and that their courts could exercise jurisdiction over such crimes. The adoption of new legislation or amendments to existing legislation

⁶⁵⁵ For a full explanation of the bases upon which States can exercise extra-territorial jurisdiction over serious international crimes, see “**Jurisdiction over Serious International Crimes**” in Chapter III.

⁶⁵⁶ As noted above, EU Member States have contributed to the investigation and prosecution of serious international crimes committed during WWII. Early efforts to bring accountability for international crimes are not, however, the focus of this Report. For more information on early practice, see e.g. REDRESS and FIDH, *Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units* (December 2010).

	Belgium	France	Germany	The Netherlands	Sweden
Genocide	Yes	Yes	Yes	Yes	Yes
Crimes against Humanity	Yes	Yes	Yes	Yes	Yes
War Crimes	Yes	Yes	Yes	Yes	Yes
Torture	Yes	Yes	No	Yes	No
Enforced Disappearance	No	Yes	No	Yes	No

Figure 4: Jurisdiction over Serious International Crimes

provided for jurisdiction over serious international crimes:⁶⁵⁷

- in **GERMANY** from 2002 under the Code for Crimes against International Law (*Völkerstrafgesetzbuch* or *VStGB*);
- in **THE NETHERLANDS** from 2003 under the International Crimes Act (*Wet Internationale Misdrijven*);
- in **FRANCE** from 2010 based on amendments to its Criminal Procedure Code (*Code de procédure pénale*) and its Criminal Code (*Code pénal*); and
- in **SWEDEN** from 2014 under its Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (*Lag om straff för folkmord, brott mot mänskligheten och krigsförbrytelser*).

For **BELGIUM**, universal jurisdiction over war crimes was already permitted pursuant to legislation passed in 1993, which was later expanded to include genocide and crimes against humanity. In 2003, however, the law on universal jurisdiction was repealed and replaced with a law of more limited scope: the Law on Serious Violations of International Humanitarian Law (*Loi relative aux violations graves du droit international humanitaire*).

In addition, a number of Member States now provide for investigations and prosecutions of companies for complicity in serious international crimes, including with respect to their activities abroad (such as **FRANCE**, **BELGIUM** and **THE NETHERLANDS**).

Not all the countries examined in this Report have

criminalised **torture** and **enforced disappearance** as **stand-alone crimes** in accordance with their obligations under international law (see Figure 4). While the relevant conduct may still be prosecuted as the underlying acts of war crimes or crimes against humanity or as ordinary crimes (such as assault or murder), this is insufficient as it fails to reflect their inherent gravity. In particular, prosecuting such crimes as assault or murder fails to capture the specific character of torture and enforced disappearance. Moreover, investigations and prosecutions (as well as a Member State's ability to respond effectively to mutual legal assistance requests) may be restricted for ordinary crimes by obstacles such as statutes of limitations or lack of extra-territorial jurisdiction.

The circumstances in which domestic courts can exercise extra-territorial jurisdiction over these crimes vary widely. For example, **SWEDEN** and **GERMANY** can exercise universal jurisdiction over international crimes, meaning they can investigate and prosecute such crimes wherever they are committed and regardless of the nationality of the perpetrator or victim. **FRANCE**, **BELGIUM** and **THE NETHERLANDS** each exercise a more limited form of universal jurisdiction over serious international crimes where the accused is present on their territory. They also exercise extra-territorial jurisdiction where there is a specific nexus to the crime (for example, based on the nationality of the perpetrator or victim).

In addition to these restrictions on jurisdiction, a number of other legal requirements may limit victims' access to justice within the EU and therefore affect the extent to which they can benefit from rights set out in

657 In addition to the Country Chapters in this Report, see OSJI and TRIAL International's *Universal Jurisdiction: Law and Practice* series, available at <https://trialinternational.org/latest-post/prosecuting-international-crimes-a-matter-of-willingness/>.

the Directive. Failure to dedicate sufficient resources to the investigation and prosecution of serious international crimes often requires that difficult choices be made as to which cases should be prioritised. The recent focus on terrorism-related investigations has put further strain on those resources. This has occurred, for example, as a result of the coordinated terrorist attacks in France and Belgium, the downing of Malaysia Airlines Flight MH17 and the return of foreign fighters from conflicts in Syria and Iraq.

In light of the limited resources at their disposal, specialised units established to investigate and prosecute serious international crimes generally benefit from wide discretion to decide whether or not to investigate or prosecute in a particular case. For example, in **FRANCE** and **BELGIUM**, the prosecutor generally has a monopoly over the initiation of criminal proceedings. In **GERMANY** and **THE NETHERLANDS**, prosecutors enjoy broad discretion to decline to pursue investigations or prosecutions. **SWEDEN** represents an exception, where the prosecutor has no discretion to decline to prosecute. However, authorisation of the government is required before a prosecution of a crime committed outside Sweden can take place.⁶⁵⁸

On the other hand, increased cooperation at the regional and international level has led countries to refrain from exercising such discretion and instead gather evidence available to them with a view to its eventual use before other jurisdictions. For instance, **FRANCE**, **GERMANY** and **SWEDEN** have each opened structural investigations into crimes committed in Syria and/or Iraq (with **FRANCE** and **GERMANY** establishing a Joint Investigation Team to pool resources and coordinate their investigative efforts into crimes committed by the Syrian regime). In addition, many Member States are now sharing information with Europol's Analysis Project for Core International Crimes (AP CIC) which is designed to identify perpetrators of serious international crimes and facilitate the exchange of information between investigating authorities.

Finally, EU Member States are increasingly investigating and prosecuting returning foreign fighters for serious international crimes alongside terrorism-related offences.⁶⁵⁹ This not only ensures the crimes are prosecuted for what they are, but also opens up the possibility for victims to exercise their rights and participate in proceedings. Finally, **all five countries under review** allow for referral of cases by immigration or asylum authorities to the specialised units where there are serious reasons for considering that a person has committed an international crime.⁶⁶⁰

⁶⁵⁸ While government authorisation is not required in **THE NETHERLANDS**, the Minister of Justice and Security can issue recommendations to initiate or discontinue an investigation or prosecution. In **BELGIUM**, the Minister of Justice can order the initiation of an investigation through the power of positive injunction. Similarly, in **FRANCE**, no political approval is required, however the Prosecutor General may order the prosecutor to initiate proceedings in certain cases. Political approval is not required for investigations or prosecutions in **GERMANY**, however the Federal Prosecutor General forms part of the executive branch of government and is subordinate to the Federal Ministry of Justice and Consumer Protection.

⁶⁵⁹ See e.g. EU Genocide Network, *Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences* (May 2020), available at <http://eurojust.europa.eu/press/PressReleases/Pages/2020/2020-05-20.aspx>.

⁶⁶⁰ Council Decision on International Crimes, art.2; Refugees Convention, art.1F; EU Qualification Directive, Most immigration and asylum authorities are now permitted to inform the police or prosecution where they identify a potential perpetrator of a serious international crime. See further below under "Access to Information to Enable the Exercise of Victims' Rights".

RECOMMENDATIONS

In order to ensure victims of serious international crimes can access justice in Europe and thereby benefit from the rights set out in the Directive:

1. We recommend that all EU Member States criminalise serious international crimes in conformity with their obligations under international treaties and customary international law, **including torture and enforced disappearance as stand-alone crimes**.
2. We recommend that Member States **establish specialised units** within their police and prosecution services to investigate and prosecute serious international crimes. Experienced members of those units should be nominated as contact points to the **EU Genocide Network**.
3. We recommend that Member States establish specialised units within their immigration or asylum authorities to ensure **proper application of the Article 1F exclusion clause in the Refugees Convention and the EU Qualification Directive (2011/95/EU) as well as systematic referral of such cases** to criminal justice authorities. Where they have not already done so, we recommend that Member States enact laws to enable such referrals. Experienced members of these units should participate actively in meetings of the **European Asylum Support Office (EASO) Exclusion Network**.
4. We recommend that Member States ensure the specialised units within their police, prosecution and immigration or asylum services, as well as their courts, have access to **adequate staff, resources, training and expertise** to pursue investigations and prosecutions of serious international crimes and to ensure victims of such crimes can exercise their rights.
5. We recommend that Member States prosecute individuals (particularly **foreign fighters**) for serious international crimes where there is evidence to support such charges. In particular, we recommend that Member States ensure **effective coordination and cooperation** between investigating authorities responsible for serious international crimes and **other cross-border crimes** (such as white collar crimes and terrorism-related offences) to enable cumulative charging of serious international crimes in appropriate cases.
6. In addition, we recommend that Member States ensure charges are representative of the crimes committed and properly reflect the totality of the accused's conduct. Further, specialised units should pay particular attention to gathering evidence of **sexual and gender-based violence, crimes against children and destruction of cultural property**.
7. We recommend that Member States provide for criminal responsibility of **legal persons** in their domestic laws and that they investigate and prosecute legal persons operating from or within their jurisdictions for their participation in serious international crimes (in particular, for pillaging and for complicity in crimes resulting from the supply of technology and/or arms).
8. We recommend that Member States ensure a legal basis exists to enable the specialised units to open **structural investigations** into largescale crimes and to ensure that such investigations are conducted in accordance with fair trial standards.
9. We recommend that Member States adopt a **broad interpretation of presence** (where presence is required to open an investigation) in order to allow **anticipatory investigations** with respect to perpetrators who are likely to travel or return to the EU.
10. We recommend that Member States **collect and preserve all evidence available to them** concerning serious international crimes (even in the absence of jurisdiction to prosecute) and **cooperate closely** with other jurisdictions as well as civil society and regional and international bodies in their efforts to fight impunity, in accordance with internationally recognised human rights. In particular, we recommend that Member States:
 - (a) consider establishing Joint Investigation Teams with the support of Eurojust in order to pool resources, coordinate investigative activities and exchange information;
 - (b) actively collaborate with Europol's Analysis Project for Core International Crimes (AP CIC) to ensure the identification of perpetrators of international crimes seeking to evade justice;
 - (c) actively collaborate with international mechanisms established to assist in the investigation and prosecution of persons responsible for serious international crimes (for example, with respect to Syria and Myanmar);
 - (d) engage regularly with specialised NGOs involved in documenting serious international crimes or supporting victims of such crimes; and
 - (e) support the adoption of a new treaty on international cooperation in the domestic prosecution of serious international crimes (the so-called Mutual Legal Assistance (MLA) Initiative).

RIGHT TO REVIEW OF DECISIONS NOT TO PROSECUTE

Where a decision is made not to prosecute in a particular case, Article 11 of the Victims' Rights Directive requires that victims have the right to review of such decisions. This right must be afforded to all victims of serious crimes. The procedural rules governing review are to be determined by national law and the process need not constitute judicial review. However, the European Commission's Directive Guidance emphasises that it should be "clear and transparent and not overly bureaucratic", and that review be carried out impartially.⁶⁶¹

The procedural rules governing review of decisions not to prosecute vary widely across the countries examined in this Report. Only **THE NETHERLANDS** provides for a **full right to judicial review** of such decisions, following which the Court of Appeal may order the prosecutor to initiate a prosecution or take other steps. No distinction is made between victims of serious international crimes and other categories of victims in terms of access to this review process. Similarly, no such distinction is made in **SWEDEN**, but the process is merely administrative.

In other countries examined in this Report, victims of serious international crimes are in a different position to other categories of victims. For example, in both **FRANCE** and **BELGIUM**, victims of serious crimes ordinarily benefit from a right to initiate criminal proceedings against an offender as a civil party. In both cases, this is done by lodging a civil party complaint directly with an investigating judge, which triggers the opening of a judicial investigation.

However, both **BELGIUM** and **FRANCE** have **severely restricted this traditional right to initiate criminal proceedings by civil party complaint with respect to serious international crimes**:

- In **BELGIUM**, initiating criminal proceedings by civil party complaint is **only** permitted in cases where there is a strong link to Belgium (that is, where the crime is committed wholly or partly in Belgium or where the perpetrator is a Belgian company, citizen or resident).⁶⁶² In all other cases, victims have **no possibility for review of a decision not to prosecute**. This appears to constitute a **violation of Article 11 of the Directive**.



Demonstration against Total Oil's gas project in Myanmar © AFP/Odd Anderson 2006

- In **FRANCE**, initiating criminal proceedings by civil party complaint is **excluded** in cases to which the so-called *quatre verrous* apply.⁶⁶³ In such cases, France provides for internal administrative review of decisions not to prosecute, however this process was described by practitioners as being **ineffective**.

Victims of serious international crimes have very limited possibilities to seek review of decisions not to prosecute in **GERMANY** as well. Where a case is closed due to lack of evidence, strict time limits and high evidentiary thresholds for judicial review effectively strip victims of the only avenue open to challenge such a decision. Where a case is closed in the exercise of the prosecutor's discretion, the exercise of that discretion is only subject to limited judicial review, with very little prospect of success. In light of the **difficulties in accessing review** in **GERMANY**, we consider that this also appears to **violate Article 11 of the Directive**.

RECOMMENDATIONS

11. We recommend greater **transparency** surrounding the opening and closing of investigations and around the exercise of discretion not to prosecute.
12. We recommend that Member States (in particular, **BELGIUM**, **FRANCE** and **GERMANY**) establish an **impartial and effective mechanism for review** of such decisions.

⁶⁶¹ Directive Guidance, pp.30-31.

⁶⁶² See **Figure 2** in Chapter IV (Belgium).

⁶⁶³ See **Figure 3** in Chapter V (France).

ROLE OF THE VICTIM IN CRIMINAL PROCEEDINGS

Article 2 of the Directive defines “**victim**” as a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence. The definition also includes family members of victims whose death was caused by a criminal offence and who have suffered harm as a result.⁶⁶⁴ This definition must be applied without distinction based on residence, citizenship or nationality and without discrimination of any kind.⁶⁶⁵

A number of the rights set out in the Directive are dependent on **the role victims play** in the relevant criminal justice system.⁶⁶⁶ This results from a “compromise between the endeavour to establish common minimum standards of victims’ participation rights and acceptance of the reality of diverging national systems”.⁶⁶⁷

“A victim falling within this definition is a victim notwithstanding his/her ‘role’ in the national criminal justice system”

Directive Guidance, p.10

However, **the role of the victim in the criminal justice system should not be confused with the definition of victim**: a number of the rights set out in the Directive apply to *all* victims who satisfy the definition in Article 2, independently of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of whether the victim chooses to make a complaint or play a role in the criminal proceedings.⁶⁶⁸

For example, *all* victims must be provided with information from their first contact with a competent authority about victims’ rights. Similarly, *all* victims should have access to victim support services, regardless of whether they have made a formal complaint.

The role of victims in the criminal justice system varies significantly across the countries under examination in this Report.⁶⁶⁹ In **GERMANY** and **SWEDEN**, victims have the possibility to participate as **full procedural parties** to the criminal proceedings (as a joint plaintiff or *Nebenkläger* in Germany and as an injured party or

målsägare in Sweden). This allows them to exercise important procedural rights, including the right to appeal against both the verdict and sentence. In **FRANCE** and **BELGIUM**, victims may choose to participate actively in criminal proceedings as **civil parties** (*parties civiles*). While they are not considered full procedural parties for the purposes of appealing against a verdict or sentence, they nonetheless benefit from considerable procedural rights that allow them to influence the course of an investigation or prosecution. This includes the right to request access to the criminal file, to request additional investigative acts, to appeal decisions concerning the conduct of the investigation or referral for trial, to question witnesses, to produce evidence and to make submissions.

In **THE NETHERLANDS**, victims benefit from fewer procedural rights and play a less active role in proceedings (for example, by exercising their right to speak through a victim impact statement or *Schriftelijke Slachtofferverklaring*). However, when it comes to the way victims *experience* criminal proceedings in a particular criminal justice system, the role that they are accorded is not necessarily decisive. Rather, victims’ experiences tend to reflect broader conceptions of the value of victims’ participation in criminal proceedings and the manner in which they are treated by practitioners.⁶⁷⁰

RECOMMENDATIONS

13. We recommend that Member States adopt an **inclusive definition of victim** for the purposes of criminal proceedings and properly **recognise all victims as such**, regardless of factors such as the victims’ residence or citizenship, whether the victim chooses to make a complaint or play a role in criminal proceedings, and whether the perpetrator is identified, apprehended, prosecuted or convicted.

In particular, with respect to **GERMANY**, we recommend that **section 395(1) of the Criminal Procedure Code (*Strafprozessordnung* or *StPO*) be amended** to make explicit reference to serious international crimes under the VStGB, in recognition that such crimes should always entail a right to join as a joint plaintiff (*Nebenklage*) and a right to have legal counsel appointed by the State under section 397a of the StPO.

664 Directive, art.2(1)(a).

665 See Directive, recitals 9-10.

666 See Directive, recitals 20, 37, arts.6, 7, 11, 13, 14, 16, 24.

667 Dearing and Huxtable, p.3.

668 See especially Directive, recital 19, arts.4, 8, 9. See also Directive Guidance, p.10.

669 For a comparison of the role of victims in the criminal justice systems of the five countries under examination in this Report, see **Figure 1** at p.24.

670 For example, studies conducted by FRA suggest victims’ experiences reflect how practitioners understand the functions of criminal justice and the tasks and proper roles of those involved in proceedings (including whether they view serious crimes as solely a matter between the State and the offender and whether they “fear that strengthening the position of victims risks disturbing the subtle balance between prosecution rights and defence rights”). See generally FRA Victims of Violent Crime Report.

ACCESS TO INFORMATION TO ENABLE THE EXERCISE OF VICTIMS' RIGHTS

The Directive aims to ensure victims have sufficient information to exercise their rights and participate in proceedings.⁶⁷¹ As such, Article 4 requires that victims be offered information, without unnecessary delay, from their first contact with a competent authority. This information should include: the type of **support** they can obtain and from whom; how to go about **reporting a crime**; the victim's **role in criminal proceedings**; how they can access **legal advice**; how they can access **compensation**; and under what conditions they are entitled to **interpretation and translation**.

The Directive acknowledges that the **extent or detail** of information provided on first contact **may vary** depending on the specific needs and personal circumstances of the victim and the type or nature of the crime. Additional details can be provided at a later stage, in accordance with the victim's needs and the relevance of the information to each stage of the proceedings. This therefore requires that authorities carry out a "relevance test" and personalised "needs-based evaluation" when determining what information should be provided at different points in time.⁶⁷²

Member States are required to provide this information in **simple and accessible language** and in a manner that is **adapted to the victim's needs** (based on any personal characteristics of the victim which may affect their ability to understand, including their age, native language and level of literacy).⁶⁷³ Information may be provided by various means, both orally and in writing, including by distributing information booklets and leaflets.

This information should be made available to **all victims** identified during the course of an investigation, whether or not they have chosen to report a crime and regardless of where they reside. Indeed, the very reason for providing this information on first contact—together with a referral to victim support services—is to enable victims to understand the role they may play in criminal proceedings and thereby make an informed choice as to whether to report a crime.⁶⁷⁴ Moreover, only by ensuring *all* victims (including those still residing where the crimes were committed) are aware of their rights and the possibility to participate in proceedings can extra-territorial trials be made meaningful to affected communities.



Poster of the Swedish War Crimes Unit © Swedish Police 2017

General Communication and Outreach concerning the Work of the Specialised Units

Some of the specialised units have engaged in outreach activities to raise awareness about their work and the possibility to report international crimes to national authorities. For example, the specialised unit attached to the national gendarmerie in **FRANCE** has developed a video which provides general information about their mandate. In **SWEDEN**, the specialised unit within the police has made a poster and brochure providing information about how to report international crimes. The unit also uses the media to reach potential witnesses, including Arabic language newspapers and radio.

The specialised units within the police and prosecution services in **GERMANY** have similarly engaged with civil society and the media to inform the public about their work. In **THE NETHERLANDS**, the specialised units share information on a dedicated website and are active on social media. In an effort to improve outreach

671 See Directive, arts.3-7.

672 See Directive, art.4(2); Directive Guidance, p.15.

673 See Directive, art.3(2).

674 For this reason, the European Commission recommends that Member States ensure there are general awareness-raising campaigns and that information is available to the general public and in places where victims are likely to go as a result of a crime. Directive Guidance, pp.16, 24. See also Directive, art.26(2).

to the Syrian diaspora, the specialised unit within the police participated in a three-part documentary series concerning their work which was translated into Arabic and made available online. By contrast, in **BELGIUM**, very little information about the work of the specialised units is publicly available.

“One way to get people to come to the police is through survivors. If I get another survivor telling me, I’ll trust him more.”

Syrian victim

Recognising that victims are more likely to trust those within their own community, some specialised units have also involved victims in their outreach activities. For instance, the specialised unit in **SWEDEN** has found that “word goes around that our unit is helpful, that it is ok to come to us”.⁶⁷⁵ Similarly, increased awareness amongst individuals and organisations that may come into contact with victims has proven beneficial. The specialised unit in **SWEDEN** has visited the Swedish Red Cross’ rehabilitation and treatment centres for victims of torture and has engaged them in ongoing dialogue surrounding victims’ needs. As a result, the Swedish Red Cross has prepared its own leaflet with information about the possibilities for reporting international crimes to Swedish authorities. Similarly, in **THE NETHERLANDS**, the specialised units meet regularly with staff working at reception centres for refugees, human rights organisations and diaspora communities.

Nonetheless, our consultations suggest that Member States have not fully harnessed the potential of their existing networks, particularly with respect to outreach to affected communities outside the EU. For example, we encourage greater use of Member States’ diplomatic missions, development aid agencies as well as the European External Action Service (EEAS) to ensure information about their work reaches the affected communities concerned.

Information Provided during First Contact with Victims of International Crimes

While we are encouraged by efforts to increase awareness surrounding the work of the specialised units, greater attention must be given to providing information concerning victims’ rights in accordance with Article 4 of the Directive.

“Informing victims about the possibility to receive compensation doesn’t fit our approach to expectation management. We don’t know whether there will be a case somewhere, sometime.”

Dutch Investigator

The Directive leaves it to national law to define “competent authorities” for the purposes of Article 4. While hospitals, employment centres and similar facilities should not be deemed competent authorities in criminal proceedings, the European Commission has not ruled out customs or border agencies falling within the scope of this Article “if they have the status of law enforcement authorities under national law”.⁶⁷⁶

Nonetheless, government representatives interviewed for the purposes of this Report generally did not consider immigration or asylum authorities to constitute competent authorities and therefore information on victims’ rights is generally not shared during the asylum procedure.⁶⁷⁷ Moreover, where immigration or asylum authorities refer victims to legal or other support services, this is not done pursuant to the Victims’ Rights Directive. Rather, such referrals are made pursuant to the specific legal framework governing the asylum process or other relevant EU regulations.⁶⁷⁸

There are legitimate concerns about compromising the integrity of the asylum procedure and even creating a perception that immigration or asylum authorities are acting as a proxy for law enforcement. Concerns about the efficacy of providing information on victims’ rights during the asylum procedure were also raised during our consultations. For example, the Dutch specialised unit considered asylum seekers “can be hesitant

675 Interview with Swedish War Crimes Unit (10 September 2019).

676 Directive Guidance, p.13.

677 Although immigration or asylum authorities are often the first “competent authority” to identify potential victims of international crimes, they are generally prevented from sharing that information with investigating authorities due to strict rules concerning the confidentiality of the asylum procedure. For example, in **THE NETHERLANDS**, the immigration service (IND) may ask applicants if they have any information concerning international crimes, but they obtain the applicant’s informed consent before providing this information to the police. In **GERMANY**, however, the migration authority (BAMF) shares information more actively. For example, it shares information concerning potential witnesses, victims and general leads with the German specialised unit to support ongoing investigations in Germany or before other jurisdictions. However, victims are not specifically informed as to how the information they share during their asylum interview will be used, nor are they informed of their rights as victims. Rather, victims are told in general terms that the information provided during their interview may be shared with other authorities.

678 For example, victims of torture, rape or other serious forms of psychological, physical or sexual violence are to be provided with adequate support during the asylum procedure. See Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection. In addition, victims of human trafficking are to be referred to a specialised centre for counselling and support. See Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

because they think talking to us might interfere with their asylum procedure”.⁶⁷⁹ Similarly, as a Swedish prosecutor stated, “at the point when you have just arrived in Sweden and you are applying for asylum after experiencing a rather horrible journey, making contact with the war crimes unit might not be the first priority. So we consider it important to find these people at a later stage.”⁶⁸⁰

This was borne out in interviews with victims. As one explained: “Refugees get advice not to talk about the regime and torture because it would eliminate us from getting asylum”.⁶⁸¹ And another: “You have a hundred million thoughts in your head, you are tired from a long trip ... we need this information after one year.”⁶⁸² Similar views were held by organisations who support asylum seekers. For example, as the German Federal Association of Psychosocial Centres for Refugees and Victims of Torture (BAfF) explained: “Refugees arriving in Germany are often overwhelmed and confused by the bureaucratic procedures they have to go through. Many asylum seekers face difficulties in making a distinction between their obligations and their rights. This is why the wording should be clear that the decision of whether to make a complaint will not have any impact on the outcome of the asylum proceedings”.⁶⁸³

Instead, it may be more beneficial to focus on providing information concerning victims’ rights (including the possibility to report international crimes to the specialised units) *outside* the framework of the asylum procedure. However, in order to ensure victims can access such information, the authorities must **integrate information about victims’ rights into all outreach activities**.

General victim support services or government authorities in each of the countries under examination in this Report have produced brochures or guides as a means of implementing their obligations under Article 4 of the Directive. Some of the specialised units hand them out to victims they interview. However, these general guides to victims’ rights are not adapted to the circumstances of victims of serious international crimes. In particular, they do not account for potential restrictions on victims of serious international crimes accessing legal aid, specialist support services

or compensation. As such, they are often of little value. Yet **none of the countries under examination** has prepared a brochure on victims’ rights that is specifically tailored to victims of international crimes.

We therefore encourage the specialised units to work together with general victim support services and other relevant authorities to develop a **brochure on victims’ rights** that is targeted specifically at this category of victims. The brochure should be made available online and in locations likely to be frequented by victims of international crimes. It should also be distributed widely to individuals and organisations likely to come into contact with such victims—both within the EU and within affected communities and diasporas living *outside* the EU.

In addition, Member States could consider providing this information directly to victims identified during the asylum procedure after refugee status has been granted (however, certain information—particularly referrals to **victim support services**—should be provided to *all* victims of crime from the moment they are identified by immigration or asylum authorities). It would then be for the victim decide whether to contact the

authorities. This is the approach in **FRANCE**, where the French asylum authority (OFPRA) has developed a call for witnesses (*appel à témoins*) that provides the contact details of the specialised unit. This call for witnesses is shared with refugees by mail together with the decision granting them asylum. However, **any call for witnesses must be accompanied by information about victims’ rights in accordance with Article 4 of the Directive**.

Finally, while providing information on victims’ rights in the form of a brochure is an important first step, it is not (in itself) sufficient. Even well-educated professionals with a good mastery of the language in which proceedings are conducted may find it difficult to understand what certain rights mean for them personally. **Written information will therefore only be understood if it is accompanied by (often multiple) explanations and the opportunity to ask questions**. We acknowledge that the specialised units will not necessarily have the capacity to provide such explanations. It is for this reason that referring victims to support services and ensuring they can access legal representation is so important.

“Just translating a brochure into Arabic isn’t enough, it won’t mean I can understand it.”

Syrian victim

679 Interview with Dutch TIM (25 February 2019).

680 Interview with Swedish Public Prosecution Authority (10 September 2019).

681 Interview with Syrian victim (23 September 2019).

682 Interview with Syrian victims (9 September 2019).

683 Interview with BAfF (16 October 2019).

RECOMMENDATIONS

General Communication and Outreach concerning the Work of the Specialised Units

14. We recommend that Member States' specialised units be creative in their approach to **informing victims, witnesses and the broader public about their work** and the possibility to report serious international crimes to national authorities. In particular, we recommend that the specialised units:
 - (a) use a variety of forms of communication and draw upon existing networks to reach affected communities (including social media, local radio or newspapers, civil society, diplomatic missions, development aid agencies and the EEAS);
 - (b) involve affected communities and diasporas in their outreach activities (particularly human rights defenders, lawyers, journalists, political activists and religious and community leaders);
 - (c) engage with individuals and organisations that may come into contact with victims within their jurisdictions, particularly those working with asylum seekers and refugees (such as reception centres, migration lawyers, legal aid services or clinics, local/municipal authorities, social workers, employment agencies, trauma centres, schools and universities); and
 - (d) educate the wider police force, border control and immigration or asylum authorities about the existence of the specialised units to ensure victims, witnesses and evidence are properly referred to them.

Information Provided during First Contact with Victims of International Crimes

15. We recommend that personal identifying information concerning potential victims be provided by immigration and asylum authorities to the specialised units only after obtaining the victim's **informed consent or pursuant to a court order**.
16. We recommend that **immigration and asylum authorities receive training** on the Victims' Rights Directive to ensure *all* categories of victims are referred to victim support services (including specialist support services).
17. We recommend that Member States' specialised units cooperate with relevant authorities (such as immigration and asylum authorities, victim support services and ministries) to **develop brochures on victims' rights that are targeted specifically at victims of international crimes and that are adapted to their needs**.

The brochures should provide basic information on: the role of victims and general functioning of the relevant criminal justice system; the work of the specialised units (such as the sorts of cases they can investigate with concrete examples); how victims can report international crimes to those units; victims' rights (in particular, how they can access legal advice, support and protection); and organisations to which victims can turn for support (including trauma centres and victim support services). The brochures should use **accessible language** and be **translated** into multiple languages.

At a minimum, the brochures should be **provided together with an invitation or summons** to be interviewed by law enforcement or to testify before a judge or court and should be made available in hard copy at the commencement of the interview or hearing.

The brochure should also be **made available online** and in locations likely to be frequented by victims of international crimes and be **distributed widely** to individuals and organisations likely to come into contact with such victims. In addition, Member States should consider **distributing the brochure to refugees** together with or following the decision granting asylum.

18. We recommend that information concerning victims' rights be provided by the specialised units to **all victims** identified during the course of investigations, regardless of whether they have made a formal complaint and regardless of where they reside. Such information should be provided **from their first contact with victims**. Details with respect to certain rights must only be withheld where a relevance test or personalised needs-based evaluation justifies providing that information at a later stage of the proceedings.

In particular:

- (a) With respect to **BELGIUM**, we recommend that the Federal Prosecutor's Office and Federal Judicial Police ensure *all* victims of serious international crimes who come to their attention during the course of an investigation—regardless of where they reside—receive full information about their rights (including the possibility to participate as a civil party) **from their first contact**.
- (b) With respect to **THE NETHERLANDS**, we recommend that the TIM and Public Prosecution Service ensure *all* victims of serious international crimes who come to their attention during the course of an investigation—whether or not they are viewed as a "complainant"—receive full information about their rights.

PROVIDING UPDATES ON PROCEEDINGS AND FACILITATING EFFECTIVE PARTICIPATION

The Directive sets out a number of rights aimed at ensuring victims receive updates on the progress of criminal proceedings and at facilitating their effective participation. For example, Article 10 requires that Member States ensure victims may be heard during criminal proceedings and may provide evidence. Where victims do not understand or speak the language in which criminal proceedings are conducted, Article 7 provides a limited right to interpretation and translation. In addition, Articles 13 and 14 provide for limited access to legal aid and for reimbursement of expenses incurred as a result of a victim's active participation. Finally, Article 6 sets out minimum standards with respect to keeping victims informed of key developments in criminal proceedings.



A mural painting in the streets of Santiago, Chile reads "Where are they!"

Some of these rights depend on the victim's role in the relevant criminal justice system and Member States are given considerable scope to determine the conditions under which victims can benefit from them. However, victims also benefit from fair trial rights and rights to information under EU and international law.⁶⁸⁴ In particular, victims have a well-established right under international law to learn the truth concerning gross violations of human rights and international humanitarian law, including the fate of victims.⁶⁸⁵ As such, Member States are under a broader obligation pursuant to human rights law to share information concerning the results of their investigations and to

"The rationale for giving these rights to all victims is that too often, they are forgotten in the administration of justice ..."

Directive Guidance, p.18

facilitate victims' effective participation in criminal proceedings.

Legal Aid and Reimbursement of Expenses

Legal costs associated with international crimes cases can act as a barrier to victims participating in criminal proceedings. Strict eligibility requirements can in many cases limit access to legal aid for victims of crimes committed abroad, as is the case in **THE NETHERLANDS**. Even where legal aid is available, the amounts allocated are often incommensurate with the complexity of international crimes cases, as is the case in both **BELGIUM** and **FRANCE** (particularly in the pre-trial phase). As a result, lawyers may act *pro bono* or with the support of an NGO in order to alleviate some of the financial burden on victims, at least until the matter reaches trial.

In both **GERMANY** and **SWEDEN**, the court may appoint legal counsel to represent groups of victims who wish to join proceedings. While this may reduce costs associated with legal representation and increase the efficiency of criminal proceedings, it may also impact upon the right of victims to access effective representation. In addition, lawyers appointed to represent the interests of witnesses in **GERMANY** receive very little remuneration which often means they must work *pro bono* to provide effective support.

Moreover, victims who appear as witnesses can experience significant delays in obtaining reimbursement for expenses incurred during participation in investigations, representing yet another practical impediment to them being heard (as is the case in **FRANCE**). In **BELGIUM** there are often significant financial risks associated with joining proceedings. For example, victims who initiate proceedings as a civil party in **BELGIUM** are required to pay a guarantee, may be liable to cover the costs of the State and the accused if the complaint is dismissed, and may even be required to advance significant sums to cover the costs of investigative acts.

⁶⁸⁴ See above Chapter III.

⁶⁸⁵ See e.g. UN Basic Principles and Guidelines, para.24; UN Principles to Combat Impunity, Principle 4; CED, art.24(2).

Information on the Progress of Investigations

In some countries, such as **BELGIUM**, **FRANCE** and **GERMANY**, victims can benefit from procedural rights during the investigation. This enables them to receive updates by virtue of their access to the criminal file. However, victims who are unaware of their rights and who are not represented by legal counsel will have difficulty obtaining access to or understanding the contents of the file. In **SWEDEN**, victims can generally only gain access to the criminal file once the accused has been indicted. Nevertheless, early appointment of legal counsel to victims ensures continuous updates during lengthy investigations. By contrast, victims in **THE NETHERLANDS** have no formal status during investigations and are therefore entirely dependent on Dutch authorities to keep them informed. Moreover, Dutch authorities appear to take an unnecessarily restrictive view of their obligation to provide victims with updates during investigations, such that victims may go lengthy periods without receiving any information.

Authorities cited a number of reasons for failing to keep victims informed of progress of investigations, from practical difficulties in reaching large numbers of victims to fears of contaminating witnesses or otherwise jeopardising ongoing investigations. While these may be valid concerns, they do not justify leaving victims without any updates whatsoever. Authorities should conduct regular assessments of what information can be released at different stages of an investigation in order to enable victims to exercise their rights and contribute information. Even if the authorities are unable to share confidential details about the case, simply reaching out to victims to let them know the investigation is ongoing can make a real difference.

Participation in Court Proceedings

SWEDEN's legal framework permits in-situ proceedings. As a result, the Stockholm District Court travelled to Rwanda for part of the proceedings in each of the three trials relating to the 1994 genocide. Victims were also permitted to testify remotely by video-link from Kigali which avoided the need to travel to Europe for extended periods. However, few countries benefit from this flexibility; instead, the principle of orality generally requires that witnesses travel to Europe to appear in person and testify again at trial.

For this reason, national authorities have had to devote significant resources to bringing witnesses (many of whom are also victims) from abroad. For example, in all five trials concerning the 1994 Rwandan genocide in **BELGIUM**, the authorities arranged for witnesses to travel to Brussels to testify before the *cour d'assises* (organising passports and visas; paying for local transport and flights; providing clothing where necessary; and arranging collective accommodation in military/police compounds or hotels). Similar arrangements were made to facilitate the appearance of witnesses before the *cour d'assises* in **FRANCE**, the Higher Regional Courts in **GERMANY** and the District Courts in **THE NETHERLANDS**.

However, this is usually only done for victims who appear as witnesses and only for the duration of their testimony (in part due to the inability of witnesses to remain away from home for lengthy periods of time). Most national authorities would struggle to provide for victims and victim communities to follow proceedings continuously from abroad. Moreover, even where victims are able to physically attend proceedings or observe hearings remotely, the language in which they are conducted can act as a further obstacle. For example, in **GERMANY**, interpretation is not

provided to the public gallery during court hearings, despite the considerable interest in such cases from within the affected community and the international community at large. As such, only individuals who are fluent in German are able to follow the entirety of the proceedings. By contrast, **THE NETHERLANDS** and **SWEDEN** have arranged simultaneous or consecutive interpretation to allow victims to follow proceedings in their own language (but only during hearings involving their active participation).

Informing Victims and Affected Communities of the Outcome of Proceedings

Beyond participation in court hearings, States may use other means to bring extra-territorial proceedings closer to those affected. These include the translation of judgments, providing easy-to-understand case summaries or issuing press releases in a language victims understand. However, relevant authorities—investigators, prosecutors, courts—often consider such outreach activities as falling outside their respective portfolios. Moreover, government authorities indicated during our consultations that they face various practical obstacles to providing

“Victims feel very far away from extra-territorial proceedings. Challenges surrounding outreach need to be addressed for these proceedings to be meaningful.”

Victims' Lawyer



Graves of unidentified casualties of war in Basra, Iraq © ICRC 2011

information, including: absence of cooperation from local authorities; lack of infrastructure; insufficient funds; and ongoing insecurity.

For example, **GERMANY** currently has no mechanisms in place to inform victims of the outcome of proceedings. The brief updates provided by the courts' press offices are published in German and relate almost exclusively to organisational aspects of the trials. Neither judgments nor summaries of findings are translated from German. Accessible information concerning proceedings is therefore provided almost exclusively by lawyers, NGOs, trial observers and the media. Similarly, the authorities in **FRANCE** rely on victims' legal counsel to inform them of the outcome of proceedings and make no effort to inform the broader victim community by press release or any other means.

While authorities in **BELGIUM** also engage in minimal outreach to affected communities, the trials that have taken place to date involved a large number of civil parties who were relatively well organised in collectives and maintained close contact with established networks in Rwanda. Many also spoke French in addition to Kinyarwanda, which helped to overcome any language issues. Moreover, media coverage of the trials allowed both victims and affected communities to learn about the proceedings. By contrast, in other cases, victims who reside abroad and affected communities in general are more reliant on lawyers and NGOs to remain informed.

In **SWEDEN**, early appointment of legal counsel to victims has overcome many of the issues associated with keeping victims continuously informed of updates.

These counsel are paid by the State and have generally been provided with sufficient resources to represent their clients effectively. This includes funding to travel abroad for significant periods of time. However, the more limited funding available after cases are concluded can affect counsel's ability to inform victims of the final outcome. Similarly, lawyers representing victims in proceedings in **GERMANY** have struggled to obtain adequate funding to travel to where their clients reside to inform them of the outcome of proceedings.

By way of comparison, prosecutorial strategies in a number of cases in **THE NETHERLANDS** have prioritised outreach to affected communities. For instance, in 2013 the specialised unit within the prosecution service publicly released evidence that revealed the fate of thousands of victims tortured and killed by Afghan security forces in the 1970s. Similarly, in 2017 Dutch prosecutors used a variety of means of communication to inform victims in Afghanistan of the closure of an investigation into the Kerala massacre (including a detailed explanation of the reasons for their decision translated into Dari and English and video-link meetings held at the Dutch embassy in Kabul to which members of the broader victim community were invited).

As a matter of general practice, Dutch authorities now issue press releases providing updates on the international crimes trials which are translated into multiple languages. In the most recent trial before the District Court of The Hague in 2017, the press releases were distributed via their embassy in Ethiopia and published in the local media. Final judgments are also translated into English by the courts and made

RECOMMENDATIONS

19. We recommend that the specialised units facilitate contact between victims (particularly those who reside abroad) and bar associations, legal aid boards, victim support services or other relevant authorities to **enable them to request that a lawyer be designated** to represent them or to otherwise obtain information concerning legal representation.
20. We recommend that **sufficient funding be provided to legal counsel** for victims to enable them to represent their clients in all stages of the investigation and prosecution and to engage in important follow-up regarding the outcome of proceedings and enforcement of compensation awards. This is considered especially important where victims are given the status of witnesses (whether due to the need for measures to protect their identities, the narrow scope of the final charges against the accused or other factors). In particular:
 - (a) With respect to **GERMANY** and **SWEDEN**, we recommend a cautious approach to grouping victims and appointing **common legal counsel** in order to ensure the right of victims to access effective representation.
 - (b) With respect to **THE NETHERLANDS**, we recommend that the **Legal Aid Act (Wet op de rechtsbijstand)** be amended and that future reforms of the Dutch legal aid system ensure victims of international crimes can access legal aid on the same basis as victims of other serious crimes.
21. We recommend that Member States examine ways to ensure witnesses (including victims) can obtain **advance funding to cover expenses** incurred during participation in investigations.
22. We recommend that Member States ensure **adequate interpretation** of trials concerning international crimes such that the trials are made more meaningful to affected communities and in recognition of the broader international interest in such cases. Member States should also consider ways to support journalists and trial observers from within the affected community who wish to attend proceedings.
23. We recommend that the specialised units and courts develop **robust victim-oriented communications strategies** that ensure victims, affected communities and the broader public can obtain information about the progress of proceedings. This should include, at a minimum, issuing frequent and detailed press releases that are translated into local languages and widely disseminated (including online and on social media).

available online. All of this information is compiled on a dedicated website and promoted on social media.

SUPPORT SERVICES

The right to support is one of the core rights in the Directive.⁶⁸⁶ Articles 8 and 9 of the Directive are designed to ensure that all victims have access to confidential victim support services free of charge, before, during and for an appropriate time after criminal proceedings. Support is to be provided to victims irrespective of whether they make a criminal complaint. Investigative authorities (as well as other relevant entities who may be in contact with victims) are required to be proactive in referring victims to support services. At a minimum, general victim support services shall include information and advice, emotional and (where available) psychological support and practical assistance. In addition, vulnerable victims should have access to specialist support services free of charge in

accordance with their needs, including trauma support and counselling.

Victim support services may be provided by public or non-governmental bodies and may be organised on a professional or voluntary basis. **General victim support services** exist in each of the countries under review in this Report. Some Member States, such as **THE NETHERLANDS** and **GERMANY**, have nation-wide services provided by non-governmental bodies. In others, such as **FRANCE**, support is provided by local NGOs grouped under a national federation. In **SWEDEN**, by contrast, support services are provided under the framework of social services, in cooperation with local NGOs. In **BELGIUM**, support services fall within the competence of the Belgian communities and support surrounding criminal proceedings is provided by social workers employed by Victim Reception Services.

These general support services have rarely been

⁶⁸⁶ Directive Guidance, p.24.

called upon to provide support to victims of serious international crimes. Where they have provided support, it has been partially geared towards facilitating the appearance of witnesses travelling from abroad. In **FRANCE**, for example, this was due to the absence of any dedicated witness support unit to provide the necessary logistical support. In any event, while these general support services appear to function well for most categories of victims, they are often ill-equipped to support victims of serious international crimes. On a practical level, their services are often unavailable to victims who reside abroad. Even those that are prepared to provide support remotely will face difficulties maintaining contact with victims who live in remote locations or who require an interpreter. In addition, specialised knowledge may be required due to the complexity of such cases and the differences in the applicable legal framework.

More importantly, **the types of support provided by these associations are not always adapted to the unique circumstances of victims of serious international crimes**, particularly those suffering from severe trauma. One reason for this is that general victim support structures were not designed to meet the needs of victims of largescale atrocities. Besides, international crimes trials occur only infrequently before domestic courts and the approach to victim support will vary from case to case (reflecting the nature of the crimes, the composition of the affected community as well as the background, current circumstances and needs of the individual victims).

While acknowledging these challenges, Member States are nevertheless obliged to enable **all victims within their jurisdiction or engaged in criminal proceedings—**

including victims of serious international crimes—to access holistic as well as specialist support free of charge, in accordance with their needs. In particular, sufficient support must be provided to enable victims to exercise their rights and to be protected against secondary victimisation during criminal investigations and proceedings. This may require: information, practical assistance and accompaniment (particularly when travelling from abroad); psychosocial support during interviews and court hearings; medical rehabilitation; trauma counselling; and, at times, long-term therapeutic intervention.

Some of these services can be provided by general victim support services. In addition, a number of treatment centres that cater specifically to victims of armed conflict or serious human rights abuses exist across Europe (although their limited resources often mean victims face long waiting periods). They include, for example, the Center ÜBERLEBEN in **GERMANY**, the TRACES Réseau Clinique International in **FRANCE**, Stichting Centrum'45 in **THE NETHERLANDS** and the Swedish Red Cross treatment and rehabilitation centres for victims of torture in **SWEDEN**.

PROTECTION MEASURES

Article 18 of the Directive requires that a wide range of protection measures be made available to protect victims and their family members against **secondary and repeat victimisation, intimidation, retaliation** as well as the risk of **physical, psychological or emotional harm**. Measures must also be available to protect the **dignity** of victims during questioning and while testifying in court.

RECOMMENDATIONS

24. We recommend that the **capacity of general victim support services be strengthened** to enable them to provide information to victims of international crimes about their rights, refer victims to specialist support services and, where permitted, assist victims in accessing legal representation (for example, through referral to bar associations).
25. We recommend that general victim support services be **allocated sufficient resources and given specialised training** where they are expected to provide accompaniment and psychosocial support to victims of serious international crimes. In addition, general victim support services should

be engaged **sufficiently in advance** of criminal proceedings to provide information and support and to facilitate victims' exercise of their rights.

26. We recommend that Member States **improve victims' access to specialist support services**, provided **free of charge**, including medical rehabilitation and trauma counselling. In particular, we recommend that eligibility requirements which might inhibit access for victims of serious international crimes be removed. Such services should be made available irrespective of a person's legal status.

Article 22 requires an individual assessment:

- ▶ to identify a victim's specific protection needs and
- ▶ to determine whether he or she would benefit from special protection measures

One of the “major achievements” of the Directive is the obligation to take a **case-by-case approach to protection**.⁶⁸⁷ This is to be achieved by an **individual assessment of every victim** to identify specific protection needs and to determine whether and to what extent the victim would benefit from special protection measures. Individual assessments must be carried out with the close involvement of the victim and take into account the victim’s wishes.

In particular, the individual assessment must consider:

- the **personal characteristics of the victim** (with specific rules applying to child victims);⁶⁸⁸
- the **type or nature of the crime** (paying particular attention to victims who have suffered considerable harm due to the severity of the crime as well as victims of certain specified crimes, including sexual and gender-based violence); and
- the **circumstances of the crime** (for example, the existence of discriminatory intent or abuse of power).⁶⁸⁹

In our view, **victims of serious international crimes should be presumed to have specific protection needs**. Such crimes are, by definition, more than isolated acts against individual victims and their nature, scope and impact surpass that of most ordinary domestic crimes. In particular, they are often characterised by brutality, target those most vulnerable and have long-lasting consequences for entire communities. Moreover, the victims of such crimes are often in a particularly precarious situation, leaving them vulnerable to secondary and repeat victimisation, intimidation and retaliation.

For example, some victims (or members of their family)

may continue to live in conflict areas or face a real risk of reprisal due to their perceived cooperation in investigations.⁶⁹⁰ In such cases, “the risk of retaliation may exist from the moment investigators approach them”.⁶⁹¹ Those who reside in the EU may be unsure of their immigration status or fear being returned to their country of origin (particularly those who have only received temporary asylum).⁶⁹² Many will suffer from severe trauma and experience limited access to medical and rehabilitative services.

“Meeting the police had a very negative impact on me. Each time I was contacted about the case I had the same problems, nightmares and trouble sleeping.”

Afghan victim

In addition, while criminal proceedings place a significant strain on all victims, this is amplified in the case of victims of international crimes. There are enormous obstacles to bringing international crimes cases to trial and it is not unusual for litigation to take decades, perhaps with no satisfactory outcome. As such, victims’ expectations need to be carefully managed to prepare them for likely delays or setbacks. Moreover, the importance of witness testimony to such cases can weigh heavily on victims, who are “sometimes witnesses and sometimes the proof themselves”.⁶⁹³ For those who have survived atrocities, they may feel a sense of duty or obligation to pursue justice on behalf of those who did not.⁶⁹⁴ For example, as one victim explained during our consultations: “I’ve been a witness to the death of many people in prison. These people don’t have any voice anymore. If I don’t speak for them, no one else will”.⁶⁹⁵ Similarly, as an indirect victim recounted during our consultations: “Would I do it again? If I consider all the difficulties it brought to my life, then no, certainly not. There are enormous emotional, financial, social and even physical costs. But I felt I needed to do something to honour my sister. Maybe I would have done something else instead of seeking justice. Because this fight of 25 years, it’s inhumane.”⁶⁹⁶

687 Directive Guidance, p.44.

688 Children are always presumed to have specific protection needs. In addition to the special protection measures available to *adult* victims with specific protection needs, Member States must ensure that additional measures are available with respect to child victims, such as audio-visual recording of interviews. Directive, arts.22(4), 24.

689 Directive, art.22, recitals 55-57.

690 Interview with Syrian victim (19 February 2019); Interview with Syrian victim (23 September 2019); Interview with Swedish War Crimes Unit (10 September 2019).

691 Intervention by Europol in Practitioner Workshop (5 November 2019).

692 Interview with Syrian victims (9 September 2019).

693 Interview with Victims’ Lawyer (4 April 2019).

694 Interview with Afghan victim (1 November 2019); Interview with Center ÜBERLEBEN (26 September 2019).

695 Interview with Syrian victims (9 September 2019).

696 Interview with Civil Party (9 July 2020).

“Treating victims properly during criminal investigations should be a basic element of good administration of justice. It will improve the quality of evidence victims provide and thus facilitate a good outcome of the criminal proceedings.”

Directive Guidance, p.42

Furthermore, direct victims are often required to revisit traumatic events without adequate psychosocial support. This can have a serious destabilising effect that may only present *after* the interview or hearing. In particular, harsh, persistent or probing questioning may cause victims to re-experience the traumatic event. This can take the form of intrusive memories, nightmares, flashbacks, depression and even a dissociative state. For indirect victims, being questioned or hearing about the circumstances surrounding the death of a loved one—often for the first time—undoubtedly has an emotional toll as well.⁶⁹⁷

Measures to Protect against Secondary Victimisation

Secondary victimisation can be defined as “negative consequences for victims that may result from victims’ participation in criminal proceedings, including victims’ exposure to contacts with their perpetrators, judicial authorities and/or the general public”.⁶⁹⁸ In addition to the negative consequences set out above, secondary victimisation can also be caused through: unprotected contact with the offender on court premises or in the courtroom; lack of recognition of the harm caused to the victim; and treating the victim as an instrument to achieve a certain judicial outcome (including by denying victim status and instead forcing a person into the role of witness).⁶⁹⁹

Numerous measures can diminish the risk of secondary victimisation. Some are explicitly required by the Directive,⁷⁰⁰ particularly for victims with specific protection needs, such as:

- measures to enable **avoidance of contact between victims and the offender** within court premises, including: separate entrances for victims or accompaniment by court staff or

support services; separate waiting rooms; and designated seating in the courtroom;

- measures to **minimise the impact of interviews** with victims during investigations, including: conducting interviews without unjustified delay; ensuring interviews are carried out by properly trained professionals in premises designed or adapted for that purpose; offering the possibility to be questioned by a person of the same gender; allowing victims to be accompanied by their legal representative and a support person of their choice; keeping the number of interviews to a minimum; and ensuring follow-up interviews are conducted by the same person; and
- measures to **minimise the strain of testifying or being heard in court**, including: adapting the layout of the courtroom to shield the victim from visual contact with the offender; allowing the victim to be heard in the courtroom via video-link from a victim-friendly location; allowing a support person to sit next to the victim; presence of a psychologist to monitor the victim’s well-being; allowing questioning to occur via an intermediary (such as the presiding judge); allowing the victim to testify without the presence of the public; and measures to avoid unnecessarily intrusive, embarrassing or repetitive questions (particularly about the victim’s private life).

There has been **significant improvement in the practice of the specialised units** with respect to minimising the risk of secondary victimisation during investigations. For example, the units appear more conscious of the need to adapt their approach for severely traumatised victims (in particular, providing a more welcoming environment for interviews and ensuring victims of sexual violence have a choice as to the gender of the investigator conducting the interview). Specialised training has also led to some improvements in the quality of interviews.

However, there remains room for further improvement. In particular, some of the specialised units remain **reluctant to allow victims to be accompanied during interviews**. As the European Commission’s Directive Guidance emphasises, this is a positive right for all victims: “Only in exceptional circumstances should the possibility to be accompanied by a person of the victim’s choice be limited, and then only in relation to a specific person”.⁷⁰¹ While other units take no issue with victims being accompanied, more needs to be

697 Interview with Civil Party (9 July 2020).

698 EU Strategy on Victims’ Rights, p.2 (n.14).

699 For example, victims who wish to remain anonymous due to fears of retaliation are often excluded from registering as civil parties or injured persons, and are thereby treated as mere witnesses, with implications for their right to be informed of updates or to express their views and concerns during proceedings.

700 See Directive, arts.19-24.

701 Directive Guidance, p.42.

done to inform victims in advance of this right.

Psychological screening is still not integrated into the interview process of the specialised units.⁷⁰² Only **THE NETHERLANDS** has ensured (voluntary) psychological screening of vulnerable witnesses prior to witness hearings before the investigating judge. This is provided for in a witness protocol developed by the judge together with a psychologist specialised in trauma, along with a range of other measures to limit the impact of questioning on a witness' psychological well-being.

Some of the reasons for failing to provide for psychological screening include: lack of funding; unavailability of appropriately qualified experts; absence of any legal basis to permit screening; fear of interference in the conduct of interviews; and a perceived lack of any need for such support. A number of these reasons must be addressed by educating criminal justice authorities and policy-makers about the potential consequences of questioning severely traumatised individuals without proper support and about the benefits of psychological screening.

In addition, some of the units could adopt a more sensitive approach to the manner in which they summons victims or witnesses to be interviewed, particularly if this represents the first contact they may have had with investigating authorities. Similarly, greater reflection could be given to arranging interviews in a way that allows victims travelling from abroad time to acclimatise and that is adapted to their particular needs and circumstances. For example, some units (as well as the specialised investigating judge in **THE NETHERLANDS**) obtain advice from an anthropologist or other experts to ensure their interactions with victims and witnesses are adapted to the personal characteristics of the victim, as well as the type, nature and circumstances of the crime.

Unfortunately, **few countries have implemented the necessary measures designed to minimise the risk of secondary victimisation in court.** Only **SWEDEN** and **THE NETHERLANDS** provide for the full range of measures required by the Directive. In the remaining countries, measures such as testimony by video-link and closed court sessions tend to be reserved for situations where a witness is threatened or unable to travel. For example, **FRANCE** provides insufficient measures to avoid visual contact with the offender or to allow the victim to be heard by video-link from a more comfortable environment. Similarly, in **GERMANY**,

the circumstances in which video-links or closed-court sessions will be permitted are very limited and courts are reluctant to place restrictions on questioning by defence counsel. While recent reforms in **BELGIUM** have expanded the category of individuals eligible to benefit from such measures, vulnerability is defined so strictly that few victims will qualify.

More concerning, however, is the fact that **practitioners appear reluctant to use such measures even where they are available.** For example, some

interviewees expressed a strong preference for in-court testimony as it was considered to have greater impact (and, in some jurisdictions, greater evidentiary weight). In addition, there is often considerable opposition to using such measures on the (purported) basis that they impinge upon the rights of the defence. Yet as the European Commission maintains, "real situations in which such defence rights could legitimately override the need for victims' protection are likely to be extremely rare".⁷⁰³ The Directive requires that the assessment as to whether special protection measures should be applied be carried out with the close involvement of the victim and take into account his or her wishes. Prosecutors should therefore inform victims of the potential consequences of applying certain protective measures (such as the impact on the probative value of their testimony) and involve them in the decision-making. Again, improved education of criminal justice authorities would be beneficial.

"We try to assess them ourselves when we meet with victims or witnesses, to see if they are fit for an interview, but we are not trained to do psychological screening."

Investigator with a Specialised Unit

"We were really scared to receive mail from the police. But my Swedish family, they explained it was different."

Syrian Victim

⁷⁰² Although the specialised unit within the police in **FRANCE** has plans to allow psychologists to follow interviews, this appears to be geared more towards enhancing interrogation methods than supporting vulnerable victims.

⁷⁰³ Directive Guidance, p.40.

Measures to Protect against Intimidation or Retaliation

The right to protection against all forms of ill-treatment, intimidation and retaliation for victims and witnesses participating in investigations or criminal proceedings is recognised both in the Directive and human rights law.⁷⁰⁴

Each of the countries under review in this Report provides for **protection of witnesses**. Measures include: omitting personal identifying information from criminal files and court documents; providing for confidentiality of witnesses' identities vis-à-vis the public or allowing witnesses to testify anonymously; allowing witnesses to testify remotely by video-link or teleconference (including with image or voice distortion); exclusion of the public from hearings; and orders preventing the accused from contacting witnesses. They each also have witness protection programmes that allow for more rigorous physical protection measures following structured risk assessments (including, in exceptional circumstances, relocation and change of identity). However, such measures are generally only available to witnesses living within the EU and thus far have been used infrequently in international crimes cases.

Few of these measures apply to victims who do not have the status of witnesses. In particular, victims who actively participate in proceedings cannot benefit from measures such as anonymity. Some countries permit NGOs to initiate or join criminal proceedings in their own name, which represents one way for victims to benefit (indirectly) from certain procedural rights while shielding them from exposure to retaliation. However, such protection will be lost once victims are heard or claim compensation.

Moreover, **Member States are limited in their ability to provide protection outside the EU**. Protecting victims and witnesses who reside in (post-)conflict zones, areas facing ongoing insecurity or in refugee or internally displaced persons camps can be particularly difficult (as well as costly). Authorities are often forced to improvise and find creative solutions to providing protection. In some cases, the authorities may enlist the assistance of other actors to provide for temporary relocation (including, where possible, local authorities, NGOs or international actors like UNHCR). In addition, where a witness' evidence is crucial to an investigation, the authorities may arrange for the witness to travel to Europe and apply for asylum or even enter a witness protection programme. However, this is very rarely done.

In most cases, the **authorities must rely on measures to minimise the risk of retaliation**. These may include: limiting those involved in interviews; using (properly-vetted) local contacts or legal counsel to contact potential victims or witnesses; carefully choosing safe and discreet locations for interviews; where necessary, arranging to hear victims or witnesses in a neighbouring country or by video-link; devising an explanation for their absence; and providing details for an emergency contact or safe house in case the victim or witness is subsequently threatened.

“We have a moral obligation towards these brave persons who have spoken to us about what they have gone through and we can’t just leave them behind and say good luck, we’ll see you in court!”

Swedish Prosecutor

704 See e.g. UNCAT, art.13; CED, art.12. See also CAH Articles, art.12(1)(b); EU Torture Guidelines, p.29.

RECOMMENDATIONS

27. We recommend that victims of serious international crimes **be presumed to have specific protection needs**. As such, the specialised units should undertake an in-depth individual assessment of every victim to assess their specific protection needs and determine which special protection measures may be able to address those needs during the investigation and any eventual criminal proceedings.
28. We recommend that Member States **enact laws to enable victims with specific protection needs to benefit from the protection measures set out in Article 23(3) of the Directive**, namely measures that: avoid visual contact between victims and offenders (including when testifying in court); ensure that the victim may be heard in the courtroom without being present; and avoid unnecessary questioning concerning the victim's private life. In particular:
 - (a) With respect to **BELGIUM**, we recommend that **Chapter VIIbis of the Criminal Investigation Code (Code d'instruction criminelle)** concerning vulnerable victims and witnesses **be amended** to make specific reference to serious international crimes in Book II, Title Ibis of the Criminal Code (*Code pénal*). We also recommend that urgent measures be taken to **renovate (or at least reorganise) the Palais de Justice** to provide a more victim-friendly environment.
 - (b) With respect to **FRANCE**, we recommend an **urgent review of the Criminal Procedure Code (Code de procédure pénale)** to determine what reforms are required to bring it into compliance with Article 23 of the Directive.
 - (c) With respect to **GERMANY**, we similarly recommend a **review of the StPO** to identify gaps in implementation of Article 23 (particularly concerning measures to limit visual contact during testimony). We also recommend that all victims of serious international crimes be **offered psychosocial trial support (Psychosoziale Prozessbegleitung)** during criminal proceedings and that a sufficient number of professionals with expertise to provide such support be made available.
29. We recommend that the specialised units take a **sensitive approach to the manner in which they invite or summons victims and witnesses to be heard** that reflects their specific protection needs and avoids causing unnecessary anxiety. In particular, victims should be informed that they are entitled to be **accompanied by a support person** and that person should be permitted to attend the interview or hearing in accordance with Article 20(c) of the Directive. Where victims or witnesses are also entitled to be **represented by legal counsel**, they should be specifically informed of this right in advance and legal counsel should be permitted to attend the interview or hearing.
30. We recommend that the specialised units **ensure psychological screening of particularly vulnerable victims and witnesses** by an appropriately trained psychologist prior to being interviewed or testifying. Similarly, we recommend that the authorities obtain the psychologist's advice with respect to appropriate measures to address any specific protection needs during the interview or hearing. In addition, we recommend that a psychologist be made available to vulnerable victims and witnesses if they wish to obtain **psychological support surrounding their interview or testimony** (including preparation as to what to expect and post-interview support).
31. We recommend that the specialised units obtain advice from **anthropologists and other experts** and arrange witness interviews in a manner that is adapted to the personal characteristics of witnesses, the type, nature and circumstances of the crime and the need for witnesses travelling abroad to have time to acclimatise.
32. We recommend that Member States support a **strong provision concerning protection of victims and witnesses** in the proposed treaty on international cooperation in the domestic prosecution of serious international crimes (the MLA Initiative) to improve cooperation in this area.
33. With respect to **SWEDEN**, we recommend the Swedish government continue to explore **possibilities to permit anonymous testimony** or to otherwise **enhance protection** of victims and witnesses who are at risk of retaliation due to their participation in criminal investigations and proceedings.
34. We recommend **regular and continuous training** for all actors likely to come into contact with victims of serious international crimes—including immigration and asylum authorities, police, prosecutors, lawyers and judges—concerning victims' rights, with a particular focus on the needs of such victims. This should include training on secondary victimisation and the impact that trauma can have on memory. We also recommend that where factfinders include lay jurors, **expert testimony** be heard to enable them to properly assess testimony given by witnesses suffering from severe trauma.

RIGHT TO COMPENSATION

Victims of serious international crimes have a right under international law to obtain full and effective reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁷⁰⁵ Where those crimes are attributed to a State, that State must provide reparation. States should also provide mechanisms under their domestic law to allow victims to seek compensation directly from those responsible for the harm, as well as measures to enforce compensation awards. Finally, States should endeavour to establish national reparation programmes and other assistance to victims in the event that the parties liable for the harm suffered fail to meet their obligations.⁷⁰⁶

The Victims' Rights Directive only deals with compensation from the offender, not from the State.⁷⁰⁷ Moreover, the Directive only addresses financial compensation.⁷⁰⁸ Where prosecutions take place in a Member State exercising extra-territorial jurisdiction, victims of serious international crimes have a right under Article 16 of the Directive to obtain a decision on compensation from the offender in the course of criminal proceedings. Member States are also required under the Directive to promote measures to encourage offenders to provide adequate compensation to victims.

Each of the countries under examination in this Report follows an "adhesion model" that allows victims to pursue a **civil claim for compensation** against an offender during criminal proceedings. The claim is subsidiary to the determination of the accused's guilt and is governed by civil law. In some countries (such as **BELGIUM**, **GERMANY** and **THE NETHERLANDS**), the claim is only admissible if the accused is found guilty, while in others (such as **SWEDEN** and **FRANCE**) compensation can be awarded even in the event of an acquittal. In some countries, the courts have the possibility to divert the compensation claim to a civil court if, for example, it would be too complicated to deal with alongside the criminal case. In such situations, the victim may still bring a claim before a civil court, however this can be time-consuming and expensive.

The possibility to obtain a compensation award against an offender is only open to those victims who are sufficiently aware of their rights and receive the support they need to exercise them. This number is further restricted by the narrow scope of most trials before domestic courts exercising extra-territorial jurisdiction. Moreover, even where victims obtain a decision on compensation during criminal proceedings, offenders rarely have the means to pay. Offenders who do possess assets often avoid paying compensation due to the difficulties associated with enforcing such awards (the responsibility for which generally lies with the victim). This is particularly common where assets are located abroad; assets will then only be accessible through costly enforcement proceedings in a foreign jurisdiction, or perhaps not at all. In addition, due to the length of proceedings and the failure to seize their assets early in an investigation, "the accused often have time to put their assets in someone else's name."⁷⁰⁹

Some countries have sought to address this issue by establishing schemes where the State assumes responsibility for enforcement of compensation awards. For example, in **THE NETHERLANDS**, the court can impose a compensation measure (*schadevergoedingsmaatregel*), which is a penal sanction enforced by the State. In addition, victims may obtain an advance payment (*Voorschotregeling*) from the State if the victim has not received the full amount from the offender within eight months of the decision. The State will then pursue the offender to recover the debt. **FRANCE** has also established a service to facilitate enforcement of awards and provide advance payments. Similarly, **SWEDEN's** Enforcement Authority is available to assist all victims in enforcing judgments of Swedish courts, but they can only assist where the offender's assets are located in Sweden. In **BELGIUM** and **GERMANY**, no effective measures exist to assist victims in enforcing awards.

One of the reasons for the lack of emphasis on effective enforcement measures in some Member States is that State-funded compensation schemes have been established pursuant to a 2004 EU Directive on compensation.⁷¹⁰ However, strict eligibility criteria based on the nationality or residence of the victim at the time of the crime and/or the place where

705 See e.g. CED, art.24(4)-(5); UNCAT, art.14; Basic Principles and Guidelines, Pt IX. See also CAH Articles, art.12(3).

706 See Basic Principles and Guidelines, Pt IX.

707 The Directive does require, however, that victims be provided with information as to how and under what conditions they can access State-funded compensation schemes. See Directive, arts.4(1)(e), 9(1)(a).

708 See generally Joëlle Milquet (Special Adviser to the President of the European Commission, Jean-Claude Juncker), *Strengthening Victims' Rights: From Compensation to Reparation, for a New EU Victims' Rights Strategy 2020-2025* (March 2019).

709 Interview with Civil Party (9 July 2020).

710 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims obliges Member States to establish national compensation schemes for victims of violent intentional crimes committed on their territory. It also establishes an EU-wide system of cooperation to ensure victims of crime can access such compensation schemes regardless of where in the EU the crime was committed.

the crime was committed effectively **rule out State-funded compensation for the vast majority of victims of serious international crimes:**

- In **THE NETHERLANDS**, the Violent Offences Compensation Fund (*Schadefonds Geweldsmisdrijven*) is limited to intentional violent crimes committed in the Netherlands or on board a Dutch vessel or aircraft.
- In **SWEDEN**, compensation from the Crime Victim Authority (*Brottsoffermyndigheten*) is limited to cases where the crime was committed in Sweden or the victim was a Swedish resident at the time of the crime.
- In **FRANCE**, compensation from the Crime Victims Compensation Board (CIVI) is only accessible to victims who were French citizens at the time the crime was committed or victims of crimes committed on French territory.
- In **BELGIUM**, access to the Commission for Financial Aid for Victims of International Acts of Violence (*Commission pour l'aide financière aux victimes d'actes intentionnels de violence*) is limited to crimes committed in Belgium, with certain exceptions for Belgians serving abroad and terrorist offences.
- Partial compensation is available from **GERMANY's** State-funded compensation scheme where the crime was committed abroad, but only with respect to victims whose habitual and lawful place of residence is Germany and who were temporarily residing abroad at the time of the crime for no longer than six months.

As a result, very few victims of serious international crimes prosecuted in the EU on the basis of extra-territorial jurisdiction receive compensation. To the extent that compensation awards are made in the course of criminal proceedings, these are largely symbolic. In some circumstances, the inability to access compensation can even constitute a source of secondary victimisation.⁷¹¹

“It’s almost a humiliation. We are being told that we might get something but in the end nobody gets anything.”

Civil Party

RECOMMENDATIONS

35. We recommend that Member States remove any obstacles to victims of international crimes accessing **services that support enforcement of compensation awards** against offenders.

36. Where such services do not exist, and in light of the exclusion of most international crimes victims from the scope of State-funded compensation schemes, we recommend that Member States **identify ways to assist victims in enforcing compensation awards** against offenders, including:

(a) enhancing cooperation between the specialised units and agencies responsible for financial investigations and asset tracing to

ensure that confiscation or freezing of assets is integrated into investigation strategies (with a view to such assets being made available to victims as reparation); and

(b) use of mutual legal assistance and other international cooperation frameworks to provide access to assets located abroad, including the proposed treaty on international cooperation in the domestic prosecution of serious international crimes (the MLA Initiative).

⁷¹¹ Interview with Belgium's Commission for Financial Aid (14 May 2019).



RECOMMENDATIONS TO THE EUROPEAN UNION

We welcome the EU's efforts to promote the fight against impunity for serious international crimes and to support Member States in their efforts to hold perpetrators to account. In particular, we commend the EU for extending the mandates of Eurojust and Europol to improve cooperation and coordination in this area. Nevertheless, further harmonisation is required between the EU's **external actions** to combat impunity and the **internal dimensions** of this policy, particularly with respect to victims' rights.

For example, in June 2020, the European Commission presented its first-ever EU Victims' Rights Strategy. Even though "strengthening the international dimension of victims' rights" is one of the key priorities of the Strategy, it does not address the role of the EU and its Member States in fighting impunity for serious international crimes. Nor does it reaffirm the obligation on Member States to apply EU standards on victims' rights when exercising extra-territorial jurisdiction over such crimes. While having a Victims' Rights Strategy in itself is a landmark, we regret that the opportunity to improve the position of victims of serious international crimes was missed.

RECOMMENDATIONS

37. We recommend that the EU **reaffirm its commitment** to the fight against impunity for serious international crimes and to ensuring the specific rights and needs of victims of such crimes are adequately recognised and upheld within the field of Justice and Home Affairs. In particular, we recommend that:

- (a) the JHA Council adopt conclusions **reaffirming these commitments** and calling for the development of an EU Action Plan or Strategy on Combatting Impunity for Serious International Crimes;
- (b) the implementation of the **Victims' Rights Strategy** include initiatives aimed at improving the position of victims of serious international crimes and that any updates to the Strategy include specific reference to victims of serious international crimes;
- (c) the EU Genocide Network be included in the **Victims' Rights Platform** to raise awareness surrounding obstacles to victims of serious international crimes exercising their rights;
- (d) the EU develop an **Action Plan or Strategy on Combatting Impunity for Serious International Crimes** to ensure consistency and coherence of its internal and external policies in the fight against impunity for international crimes, to foster greater cooperation amongst Member States and to increase engagement by key EU institutions (including the Commission, Council and Parliament);
- (e) the European Commission specifically **examine the position of victims of serious international crimes** when monitoring the transposition and adequate implementation of the Victims' Rights Directive and that it **initiate infringement proceedings** where a Member State fails to ensure such victims can benefit from the rights set out in the Directive;

(f) the European Commission **formally evaluate the implementation of Council Decisions 2002/494/JHA and 2003/335/JHA**;

(g) the European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) Committee, in collaboration with the Subcommittee on Human Rights (DROI), hold an **annual hearing on the fight against impunity within the EU** with a view to bridging the gap between the internal and external dimensions of its policies and to fostering inter- and intra-institutional cooperation;

(h) **sufficient resources be allocated** to EU agencies working to combat impunity for serious international crimes, including the EU Genocide Network, Eurojust and Europol's AP CIC; and

(i) the EU assess **additional funding possibilities** to support national authorities to establish specialised units, form Joint Investigation Teams and engage in training and capacity-building activities, particularly in respect of victims' rights.

38. We recommend that the **EU Genocide Network** place victims' rights on the agenda of future meetings and ensure victims' voices are heard in Network meetings (including through **greater representation of victims' associations, victims' rights advocates and experts in victims' rights on panels**).

39. We recommend similarly that **EASO** provide capacity-building support to national immigration and asylum authorities with respect to the **rights of victims of serious international crimes** (for example, by including a specific module in their training curriculum on obligations arising out of the Victims' Rights Directive).



FIDH field mission to Shuja'iyya, Gaza © FIDH 2014

ANNEX – LIST OF INTERVIEWS

Belgium

1. NGO representative (2 April 2019)
2. Victims' lawyer (4 April 2019)
3. Two victims' lawyers (4 April 2019)
4. Victims' lawyer (5 April 2019, 17 May 2019, 29 July 2020)
5. Academic (25 April 2019)
6. Victims' lawyer (10 and 14 May 2019, 28 July 2020)
7. Victims' lawyer (14 May 2019)
8. European Association for the Defence of Human Rights representative (13 May 2019)
9. Two LDH representatives (13 May 2019)
10. Commission for Financial Aid representative (14 May 2019)
11. Three Victim Reception Service representatives (14 May 2019)
12. Two Federal Judicial Police representatives (14 May 2019)
13. Three SPF Justice representatives (15 May 2019)
14. Two Federal Prosecutor's Office representatives (15 May 2019)
15. Former investigating judge (16 May 2019)
16. Former prosecutor (16 May 2019)
17. Investigating judge (16 May 2019)
18. Victims' lawyer (17 May 2019)
19. Police Victim Assistance Service representative (17 May 2019)
20. Victims' lawyer (17 May 2019)
21. Victims' rights expert (17 May 2019)
22. Civil party (9 July 2020)

European Union

23. Europol AP CIC representative (10 January 2019)
24. FRA representative (31 January 2019)

25. Two LIBE Committee representatives (3 April 2019)
26. Three European Commission representatives (3 April 2019)
27. Two VSE representatives (5 April 2019)
28. Two EEAS representatives (15 May 2019)

France

29. DIAV representative (17 June 2019)
30. Two SCM representatives (17 June 2019)
31. Victims' lawyer (18 June 2019)
32. Victims' lawyer (18 June 2019)
33. CPCR representative (18 June 2019)
34. Victims' lawyer (18 June 2019)
35. Pôle representative (19 June 2019)
36. Two France Victimes representatives (19 June 2019)
37. Two Paris Court of Appeal judges and a prosecutor (19 June 2019)
38. Victims' Lawyer (20 June 2019)
39. TRACES Réseau Clinique International psychotherapist (20 June 2019)
40. Two OCLCH representatives (20 June 2019)
41. Victims' lawyer (21 June 2019)
42. OFPRA representative (1 July 2019)
43. FIDH representative (12 July 2019)
44. FGTI representative (15 July 2019)
45. Paris Aide aux Victimes representative (17 July 2019)

Germany

46. Two NGO representatives (7 May 2019)
47. Academic (23 September 2019)
48. Two Syrian victims (23 September 2019)
49. Four ECCHR representatives (23 September 2019)

50. Four BMJV representatives (24 September 2019)
51. Two Federal Foreign Office representatives (24 September 2019)
52. Two GBA representatives (24 September 2019)
53. Two BAMF representatives (24 September 2019)
54. Academic (25 September 2019)
55. Centre ÜBERLEBEN psychotherapist (26 September 2019)
56. Two ZBKV representatives (26 September 2019)
57. Two WEISSER RING e.V. representatives (26 September 2019)
58. Victims' lawyer (1 October 2019)
59. Witness' lawyer (2 October 2019)
60. Victims' lawyer (7 October 2019)
61. Vivo International psychotherapist (15 October 2019)
62. BAfF representative (16 October 2019)
63. NGO representative (16 January 2020)

Netherlands

64. Academic (30 January 2019)
65. Violent Offences Compensation Fund representative (30 January 2019)
66. Two Public Prosecution Service representatives (5 February 2019)
67. Two Nuhanovic Foundation / Syria Legal Network representatives (6 February 2019)
68. Victims' lawyer (8 February 2019)
69. Academic (12 February 2019)
70. Victim Support Netherlands representative (12 February 2019)
71. Ministry of Justice and Security representative (15 February 2019)
72. District Court of The Hague trial judge (15 February 2019)
73. Ministry of Justice and Security representative (19 February 2019)
74. Syrian victim (19 February 2019)
75. Public Prosecution Service representative (20 February 2019)
76. Investigating judge and legal officer (20 February 2019)
77. IND representative (22 February 2019)

78. Public Prosecution Service representative (22 February 2019)
79. Five TIM representatives (26 February 2019)
80. Victims' lawyer (13 March 2019)
81. Victims' lawyer (30 April 2019)
82. Afghan victim (1 November 2019)

Sweden

83. Two ECCHR and CRD representatives (9 September 2019)
84. Three Syrian victims (9 September 2019)
85. Ministry for Foreign Affairs representative (9 September 2019)
86. Three Victim Support Sweden representatives (9 September 2019)
87. Public Prosecution Authority representative (10 September 2019)
88. Three War Crimes Unit representatives (10 September 2019)
89. Crime Victim Authority representative (10 September 2019)
90. Academic (11 September 2019)
91. Stockholm District Court judge (11 September 2019)
92. Swedish Red Cross representative (11 September 2019)
93. Victims' lawyer (20 September 2019)
94. Victims' lawyer (15 October 2019)





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