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Offenders and victims: accountability and fairness in the justice process

Offenders and victims: accountability and fairness in the criminal justice process

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I. Background

1. Ever since the advent of modern democracies, criminal justice systems have had the dual function of holding offenders accountable to society for their misdeeds and holding the criminal authorities accountable for their punitive actions against the offender. A balance must be struck between crime control and due process.

2. In the rehabilitation model, which prevailed in many countries during the third quarter of the twentieth century, the interests of the community in successful treatment of the offender had to be reconciled with the rights of the offender. The prospects of rehabilitation rather than the accountability of the offender determined the length of sentences. Sentences of indeterminate length tended to be rather harsh and were subsequently criticized as infringements of the offender's rights. That criticism led to a greater emphasis in sentencing on the offender's accountability or just deserts. In recent years the accountability of the offender has again become a central consideration in sentencing, even in the case of juvenile delinquents. At the same time, the sentencing discretion of the courts has been reduced. This new retributivist model seems in line with the individualistic culture of the prevailing market economies. In practice the new approach to sentencing has contributed to a substantial increase in the prison population in many countries, which has caused overcrowding in prisons and forced Governments to increase expenditure on prison services.

3. The new sentencing philosophy has not in any way lessened the importance of the rights of the offender, including the right to due process, however. Over the years the accountability of the authorities has in fact been extended and refined, in parallel with the democratization of state institutions in general. Due process safeguards have been extended by tightening the rules concerning the admissibility of evidence. Defendants have extended rights of appeal to higher, in some cases even international, courts. In many countries, police and prosecution are not only accountable to the law and the courts, but they also operate under the supervision of democratically elected institutions. Offenders can seek remedy for assumed misbehaviour of criminal justice authorities through statutorily based police complaints boards, prison appeal boards or prison or general ombudsmen. A new, dynamic balance has been found between the two traditional

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functions of the criminal justice system, controlling crime and controlling the controllers.

The victim as third party

4. During the last quarter of the twentieth century, the victim has been seen mainly as third party in the criminal process. Victimological research demonstrated that many victims were dissatisfied with their treatment by the system. According to the International Crime Victims Survey more than half of crime victims across the world are dissatisfied with the way the police dealt with their complaint.[1] In many cases victims are severely traumatized by their treatment by the criminal justice system, resulting in so-called "secondary" victimization.

5. It is now generally recognized that the criminal justice process must not only be fair to the defendants/offenders, but also to the victims of crime. A landmark for this new development was the adoption by the General Assembly in 1985 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex). In many countries new legal provisions were introduced to advance the interests of victims, although the implementation of those new rights is not always immediately ensured.

6. There are different views about how the rights of victims relate to the more established rights of offenders. According to one view, victim's rights have a negative impact upon the enforcement of the rights of the defendant. Others see no intrinsic conflict between the interests of offenders and those of victims. The Declaration of Basic Principles indicates that the participation of the victim in the proceedings is guaranteed in so far as it does not prejudice the rights of the defendant. Some options might even serve the interests of both parties.

7. Conflicts may also arise between the interests of the community as represented by the prosecution and those of the individual victim, for example, if the latter is unwilling to testify in a public court because of the sensitive nature of the crime. The imposition of a fine on the offender rather than compensation to the victim might also be construed as a conflict of interest between the State and the victim. In some cases the victim might even be opposed to prosecution because a satisfactory settlement has been reached with the offender. The prosecutor may have reasons to persist in a prosecution in the general interest, regardless of the victim's wishes.

8. Criminal provisions must not only govern the relationships between State and defendant, but also those between offender and victim and between State and victim. At the present time criminal justice systems are faced with the difficult tasks of seeking to achieve a balance between the legitimate interests of three parties, the community, the offender and the victim. The model of restorative justice has recently been presented as a possible alternative, which may help to find the desired balance between the interests of all parties concerned. That model can look back to a long tradition in customary law in many different parts of the world. It seems therefore of particular interest for an international forum.

9. In addition to the community, the offender and the victim, there is often a fourth party involved, the media, which claim to serve the community but often have additional interests and obligations of a partisan nature, whether to a political party, to shareholders or to advertisers. The situation becomes even more complex when the crime involves terrorism. What distinguishes acts of terrorism from other violence is that the relationship between the terrorist offender and his (rarely her) victim(s) is an instrumental one. The victim is often only "the skin on a drum beaten to reach a wider audience", as one author put it.[2] The wider audience—which might include the public, the Government, international public opinion, a rival political movement and the families of hostages and kidnapping victims—is generally the main target of terrorists. In this triangle of terrorism—terrorist, victim, target audience—the perpetrator selects a victim such as a member of the Government, if the terror is focused, or a member of the public at large in the case of indiscriminate terror. Mass reporting of repeated terrorist victimization subsequently affects the final target group, which experiences feelings of terror towards the person or group perpetrating the terrorist act. Such use of violence as communication to intimidate media audiences has enlarged the scope of indirect victims.

II. Basic principles of justice for offenders and victims

10. The legal rights of defendants and victims, which are essential to ensure the rule of law in criminal justice, are dealt with in the document entitled "Promoting the rule of law and strengthening the criminal justice system" (A/CONF.187/3). Here both sets of rights will be reviewed in order to identify possible conflicts of interest.

A. Fairness for the offender

11. The general public in many countries is extremely sensitive about both the perceived and actual threat of crime. At the same time, public opinion is also sensitive about perceived or actual miscarriages of justice. The criminal justice process can therefore be seen as the litmus test of the quality of the relationship between the State and individual citizens.

12. Although criminal justice systems show considerable variation in the provision of rights to offenders, many now share the following elements of procedural fairness:

(a) The right not to be subject to arbitrary arrest, detention, search or seizure;

(b) The right to know the nature of the charges and evidence;

(c) The right to counsel;

(d) The presumption of innocence;

(e) The standard of proof (beyond a reasonable doubt);

(f) The right to a public trial by an independent court;

(g) The right to test the prosecution evidence (e.g. cross-examine witnesses);

(h) The right to give and call evidence;

(i) The right to appeal.

13. The rights of offenders are guaranteed in the constitutions of many countries as well as in international law. The Commission on Crime Prevention and Criminal Justice has played an important role in the codification of those rights in its collection of standards and norms.[3] The annex to the present paper includes a list of instruments concerning the rights of the offender that have gained international approval. The list is included here so that comparisons can be made with the less known rights of victims discussed below.

B. Fairness for the victim

14. In some systems of criminal law, such as the Islamic system, the victim and his or her family have traditionally played a central role in criminal proceedings. In other systems, the rights of victims were marginal and have been extended only in recent years. The internationally accepted basic elements of fairness for victims can be found in the Declaration of Basic Principles and include the following:

(a) The right to be treated with respect and recognition;

(b) The right to be referred to adequate support services;

(c) The right to receive information about the progress of the case;

(d) The right to be present and to be involved in the decision-making process;

(e) The right to counsel;

(f) The right to protection of physical safety and privacy;

(g) The right of compensation, from both the offender and the State;

15. Criminal justice systems in most countries have only recently begun to introduce rights for victims. As with other standards and norms, most countries are still far removed from full implementation of the basic principle.[4] State compensation schemes in many countries have been found to operate bureaucratically and with considerable delays. An example of how such a situation may be remedied is the state compensation scheme in New South Wales, Australia, which was recently replaced by a system of victim services vouchers, to be handed out by the police. In many jurisdictions police officers and prosecutors often fail to comply with their statutory or administrative duties with regard to victims. Victims are still often treated with disrespect and not informed about the case and their interests are often not taken into account in essential decisions. In only a few instances is free legal counsel made available to victims of crime.

16. Unlike infringements on the rights of offenders, the failure to respect the rights of victims does not jeopardize the success of the prosecution. Infringements of the rights of victims do not result in inadmissibility of evidence or acquittals. Criminal procedure as such does not provide a built-in system of sanctions for non-enforcement of the rights of victims and there are few if any legal safeguards for those rights. For that reason, victim advocates in the United States of America have started a campaign to amend the federal constitution by adding an article on the right of victims to be present and heard at all crucial stages of criminal proceedings.[5] In other countries victim support groups have argued that generally formulated consti-

tutional human rights, such as the right to privacy, apply also to crime victims.

17. It would be possible to make police and prosecution accountable to an independent institution such as an ombudsman for failure to comply with victim-oriented laws or instructions. Governments could be made liable under administrative or civil law for failure to enforce the rights of victims. In the Netherlands, the prosecution department is liable to pay civil damages to victims if the prosecutor has failed to inform the victim, in his capacity as *partie civile*, about the occurrence of the trial. In the majority of Member States, however, accountability for enforcing the rights of victims within the justice process is still ill defined. Most countries still have a long way to go with the implementation of basic principles of fairness for victims of crime. As a follow up to the Declaration of Basic Principles, the Centre for International Crime Prevention has published a guide for policy makers on the implementation of the Declaration of Basic Principles and a handbook on justice for victims on the use and application of the Declaration of Basic Principles, adopted by the Commission on Crime Prevention and Criminal Justice. Up-to-date information on victimological best practices is made available also on a specific World Wide Web site, at http://www.victimology.nl

18. The Declaration of Basic Principles includes a section on the rights of victims of abuse of power. That section has acquired a new significance in the light of recent developments in international criminal law. The rules of procedure and evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 provide some measures for the protection of victims and witnesses, including the option of video camera proceedings and other protective measures. A special Witness Assistance Unit has been set up at the Tribunal in The Hague. By and large the procedures conform to the adversarial model, which limits the opportunities for protection of the victims/witnesses.[6] The Rome Statute of the International Criminal Court (see A/CONF.183/9) also envisages special provisions for victims/witnesses. Procedural rules for victims and witnesses need still to be drawn up. Draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law have been prepared by a Special Rapporteur (E/CN.4/1997/104, appendix) and deserve close scrutiny by the international criminal justice community.

19. The draft United Nations Convention against Transnational Organized Crime and the protocols thereto, addressing illicit manufacturing of and trafficking in firearms, illegal trafficking in and transport of migrants and international trafficking in human beings, especially women and children, also include provisions on the protection of and support for witnesses and victims. The draft Convention and protocols will be submitted for adoption in 2000 (for more information, see http://www.uncjin.org).

C. Conflicts of interest between offenders and victims

20. It is stipulated in the Declaration of Basic Principles, as well as in many national proposals, such as the constitutional amendment mentioned above, that victim's rights may not compromise the right of the offender to a fair trial. It is not clear, however, where rights of victims do impinge upon those of offenders. Since the rights of victims are a new issue, it seems useful to examine whether and how they conflict or interfere with the older and more established rights of the defendant/offender.

21. Looking at the rights of victims as a whole, the right to counsel seems the logical complement of the defendant's right to counsel. There is no zero-sum game between those two rights. The victim's right to be treated with respect seems to have little if any negative implications for the offender. One argument used against instructions for a more respectful and considerate treatment of victims by police officers and prosecutors is that this might infringe on the assumption of innocence of the offender. In the past police officers sometimes tended to treat all citizens as potential suspects. It is hard to understand, however, how the real interests of the defendant would be harmed by better treatment of victims by the authorities.

22. More problematic is a decision of the United States Supreme Court not to reopen rape cases on the ground of insufficiencies in the defence because this would inflict new trauma upon the victim.[4] In a more general sense,

consideration for the risk of secondary victimization may lead courts to limit opportunities for the defence, especially in rape cases and cases with child victims. In many jurisdictions video screening of testimonies of victims/ witnesses has been introduced with special arrangements for the defence. Arrangements for anonymous testimony are sometimes made for victims/ witnesses who have reason to fear retaliation from the defendant. Opinions as to the constitutionality of such arrangements differ.

23. The victim's right to receive information seems to be the natural equivalent of the offender's right to know his charges and fairly harmless from the defendant's perspective. Problems can arise, though, if information is given about the defendant that is subsequently used by the victim to denounce the offender publicly. Detailed information about the defendant could in some cases infringe on the defendant's right to privacy.

24. By far the most controversial right of the victim is his or her right to be present at all crucial stages of the proceedings and to be involved in decision-making. There seems to be consensus that victims ought to get a chance to relate the emotional impact of the crime as well as the damages incurred to the relevant authorities. In many jurisdictions victims do have the right to initiate criminal proceedings if the prosecutors refrain from prosecution. There is no consensus, however, on the question of whether victims or family members should have the right to be involved in the sentencing process by addressing the judge or jury.[7]

25. No agreement exists as to the desirability of giving victims the right to a decisive or even final say in decisions on pre-trial detention, plea bargaining, sentencing or parole. Such a right would seem to conflict directly with the interests of the defendant/offender. Another argument against such a right is that it may pose a burden on the victim and expose him or her to undue influence or retaliation from the side of the defendant. If the victim is consulted about the offender's release from pre-trial detention, the victim's right to physical safety may be at stake. In such cases there may be a conflict between one of the victim's rights and the basic right of the offender not to be unnecessarily detained prior to a conviction.

26. The right to compensation from the State does not compromise any of the defendant's rights. In part for this reason, the right to compensation has met with little resistance from criminal authorities and has in many countries been introduced as the first state provision on behalf of victims of crime. State compensation does not lie well with the current emphasis on the accountability of the offender, however. According to research, many victims would rather receive compensation from the offender. Offender compensation—or restitution—has obvious negative implications for the offender. Most offenders have a very limited earning capacity and cannot afford to pay out large sums. However, it may be in the interest of the offender to pay at least a modest amount of compensation. If the payment of compensation is ordered instead of imprisonment or a fine, a situation could well arise that benefited both victim and offender. Offender compensation offers a straightforward way to hold the offender accountable for his or her misdeeds while also serving the financial and moral interests of the victim.

D. The victim versus the State

27. The involvement of the victim in the court proceedings will normally strengthen the position of the prosecution. This is clearly the case if the victim acts as assistant prosecutor—an option in many central and eastern European jurisdictions—or presents a written or oral victim impact statement to the court. In the balance between the rights of the offender and interests of the community, the appearance of the victim as third party will probably shift the point of gravity somewhat towards the State. In some cases the interests of the victim and those of the State do not coincide and serious conflicts can arise. A victim may be opposed to a decision by the prosecutor to dismiss a case for lack of evidence or for reasons of expediency. In most jurisdictions victims have the right to initiate private prosecutions or to ask for a review of the dismissal by the court. Such a provision provides an important mechanism for correcting unfair dismissals, such as dismissals based on undue influence by politicians or corruption.

28. Victims may also be opposed to the decision to prosecute. Traditionally certain types of crime, such as violence between family members, can only be prosecuted if an official complaint is filed by the victim and/or with his or her written consent. Some advocates of more victim-oriented procedures have argued for a general right of victims to veto prosecutions. Such a right would certainly increase the victim's control over the handling of the case. The disadvantage here is that victims would be exposed to pressure from the defendant to veto prosecution. As the experience with domestic violence in some countries has demonstrated, that risk is far from illusory. Even without

such rights victims/witnesses are frequently intimidated by defendants. For these reasons, some victims' organizations are strongly opposed to the introduction of such rights and argue for the right of victims not to be burdened with any responsibility for decisions regarding prosecution.

E. The alternative of restorative justice

29. Restorative justice is regarded as an alternative model of criminal justice. It is defined as a unique response to crime, to be distinguished from both the rehabilitative and retributive (just deserts) responses. It assumes a process "whereby all parties with a stake in a specific offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future".[8] Concrete examples are family group conferences in New Zealand whereby (usually) the juvenile offender and his or her family get together with the victim and his or her family in a relatively informal meeting to discuss the offence and the appropriate responses. Offenders are supposed to repair the damage caused to the victim, for example, by paying compensation. If necessary, the offender's family will share responsibility for the offence and assist the offender with the payment of reparation. Plans are also made about how repeat offending can be prevented in the interest of the local community.

30. The emphasis in this model is on reparation and prevention rather than on the infliction of punishment. It has been said that restorative justice and other forms of informal or semi-formal dispute resolution reflect the current trends of individualism and reduction of state functions. Closely related are other initiatives to mobilize the local community in addressing crime problems, such as community empowerment policing and community-based crime prevention. It is claimed that the model offers victims more control over the decision-making mechanism than traditional procedure—even where their participation is fully endorsed—whereas the interests of defendants can also be better served because less painful sanctions are imposed. The community might also benefit from lower recidivism and more preventive action generally.

31. So far, experiments with the new model have largely been restricted to juvenile delinquency and minor crimes. Evaluation research shows that both victims and offenders are in most cases reasonably satisfied with the results of the proceedings.[9] Critics have questioned, though, whether due process for offenders is sufficiently guaranteed. Undue influence may also be exerted upon the victims, especially with crimes involving power relations between the offender and the victim.

32. The model may be appealing for Governments as a cost-saving device and in particular as a means to reduce prison populations. Such favourable side-effects can only be achieved on a significant level, however, if the model is extended to more serious forms of crime. It remains to be seen whether the model can also be successfully applied to such crimes, as will be discussed below. In a more general sense, the success of the trend towards informal solutions ultimately depends on the strength and commitment of local communities. In most urban environments these conditions cannot be taken for granted.

III. The challenge of transnational and organized crime

A. Problems of visibility

33. Most forms of organized crime cause great harm to society or groups of citizens but not necessarily to individual persons. Trafficking in illegal goods such as drugs and many forms of racketeering and fraud against the State belong to the category of "victimless crimes". Large-scale consumer fraud, inflated prices, inadequate products and machines, contravention of labour safety regulations, environmental pollution and other illegal acts by international corporations may victimize large groups of individuals who are not even aware of their victimization. Vast segments of the population, especially in developing countries, fall victim to such criminal practices. In the case of insider trading, hundreds of thousands of stockholders across the world are financially affected.

34. Environmental crime, in particular, makes victims hard to identify. Future generations are sometimes the main victims of such acts. Corruption increases the costs of services for those individuals willing to pay. Proportionally the poorer segments of the population tend to suffer most. The general taxpayer carries the bill if corporate payments are made to government officials. After a crackdown on corruption, substantially lower costs for public works have been documented in several instances. In developing countries society at large is victimized because rampant corruption deters foreign investment and acts as a hidden brake on development. The lack of easily identifiable victims can result in

passivity on the part of law enforcement and prosecution agencies, so the necessary momentum behind the investigation of organized crime and corruption must be generated by democratically controlled state agencies.

B. Problems of distance

35. One of the most challenging questions concerning criminal procedures is how criminal justice systems can respond to growing transnational crime. The issues involved are complex because the mobility of both victims and offenders is increasing steadily, commodities and knowledge can be moved with great ease, offences can be committed in more than one country and victims can include citizens from different countries, as in the case of computer crimes.

36. Lack of knowledge of local languages and cultural practices sets restrictions on both offenders and victims to enjoy their rights and participate in the criminal justice process. Various other problems related to distance for defendants can also be identified, such as procedural variations in different jurisdictions and bilateral or multilateral cooperation at different levels of the criminal justice system. For foreign victims the problems associated with the criminal justice process may result in higher risk of secondary victimization.

37. In 1999, the European Commission produced a report entitled "Crime Victims in the European Union: Reflections on Standards and Action",[10] in which the issue of distance is discussed in detail. The report focuses on the position of victims in the criminal justice process when the crime occurs in a country other than their own. The report includes a number of suggestions as to how to respond to the particular needs of foreign victims. Those needs are discussed below.

38. For foreign victims, language problems can create constraints to their providing testimony and receiving adequate material and emotional support and legal assistance. Reporting of crime may be difficult and can even result in rejection of complaints as a result of incomplete statements stemming from language problems. Being a stranger to the system of the country in which one is victimized can make it difficult to obtain information about issues such as how to start a procedure, whether to testify or how to claim compensation. Because the conditions for claiming compensation vary between countries[11] the amount of compensation to be obtained by a non-resident is determined in a random manner and procedures are often long. The possibility of participating in the criminal procedure is particularly problematic for foreign victims because they are only staying temporarily in the country where the crime took place. In some countries it is possible to use fast-track procedures to speed up the process and the victim may be allowed to submit a statement in advance or even from his or her home country by means of video-conferencing, telephone hearings or other modern technologies.

39. Restorative justice in crimes involving foreigners may be considered in cases of less serious victimization. The immediate use of, for example, mediation in property crimes can make possible the compensation for damage or recovery of lost property outside the criminal procedure before the victim leaves the country. There is also the possibility of using third-party mediation, that is, where an intermediary acts on the victim's behalf in an effort to reach a mediated agreement. This can also be used when the victim has already returned to the home country.

40. Many of the above-mentioned difficulties are present, for example, in cases of trafficking in human beings for sexual exploitation and forced labour. The victims in such cases are usually foreigners, usually without knowledge of the language or culture of the country, ignorant of their rights and of the procedures of the criminal justice system and not in a position to attain information about victim services. The situation makes such victims particularly vulnerable and easy to control. Solutions that are made possible by restorative justice cannot be used. The question of how the rights of foreign victims can be guaranteed and, especially, of how secondary victimization by the criminal justice system can be eliminated poses a special challenge to Member States.

B. Offender's rights revisited

41. The emergence of organized crime has important implications for the balance between different parts of the criminal justice system. Perpetrators of organized crime commit their crimes by definition with a high degree of premeditation. Their crimes tend to attract large media attention and to arouse moral indignation and fear among the general public. Their activities do not just victimize individual persons, but often undermine the economic, legal and political order of society. (See the document entitled "International cooperation in combating transnational crime: new challenges in the twenty-first century"

(A/CONF.187/6), for an analysis of the impact upon society.)

42. Since the stakes for the community are extraordinarily high, Governments are inclined to allow more infringements of the defendant's rights in the course of investigations against organized crime than in other cases. The point of gravity in the dynamic balance between the rights of the offender and those of the community tends to shift towards the latter if societies feel threatened by organized crime.

43. In some countries legislators have introduced special legal regimes for the repression and prevention of organized crime. For example, Japan has passed special administrative legislation concerning large-scale criminal organizations in which there are special legal provisions that can be used exclusively in relation to mafia-type organizations.[12] In many countries most organized crime is committed by more loosely organized groups or coalitions that do not function in the same way as the Mafia or Cosa Nostra. The draft United Nations Convention against Transnational Organized Crime follows a relatively open definition of organized crime and the scope of application of the provisions of the Convention will be wider than those of the national laws just mentioned. If more open definitions are used, more safeguards are needed for a restricted use of special provisions. The danger exists that provisions needed specifically in the fight against organized crime are eventually applied in all situations.

44. In many countries legislators have provided the police and prosecutors with new techniques and have granted them more rights in order to address organized crime more effectively. Special investigative techniques such as undercover operations, entrapment and the use of listening devices are permitted in certain circumstances. Such techniques intrude upon the privacy of citizens and would not otherwise be permitted. Provisions have also been made for the immunity of key witnesses for the prosecution and for the seizure and confiscation of illegally acquired assets. Measures aimed at the confiscation of criminal assets of organized criminal groups seem highly appropriate,[13] although in practice the implementation of such measures often proves difficult. Those convicted of organized crime may also be excluded from entering certain professions, establishing corporations or tendering for public works. Prison sentences for those convicted of organized crime are often served in special prisons because of the danger they represent and their capacity to corrupt prison personnel. In some countries such offenders are also treated differently in the correctional system. For example, in Germany a property penalty can be used as an alternative punishment together with a shorter prison sentence for those convicted of organized crime. As a consequence of that punishment, the offender may be deprived of his or her financial resources and may lose his or her position in the hierarchy of the criminal organization.[14]

45. The investigation and prosecution of organized crime expose criminal justice personnel at all levels to corruption and intimidation. Special measures need to be taken to protect personnel dealing with organized crime from those risks.

C. Protection of victims and witnesses

46. One of the problems in the prosecution of organized criminals is the hesitation of victims/witnesses to come forward to testify because of fear of retaliation. To remove that fear and to ensure the participation of witnesses, Governments must establish effective witness protection programmes. Unfortunately, in most developing countries no such provisions exist at present. Even if witnesses are offered some sort of protection before and during the trial, their safety in the long term remains a major concern. Special problems are caused by the long delays in the completion of trials: the longer a trial, the more opportunities defendants have to bribe or threaten witnesses.

47. Victim/witness protection programmes, which, for example, offer the witness a new identity after the trial, can only be used in special cases. Financial restraints may limit the frequent use of such measures and there is therefore an urgent need to experiment with other, less expensive means of witness protection, for example, for victims of trafficking in human beings. Some courts allow witnesses in organized crime cases to remain anonymous. In such cases special arrangements are made for the involvement of defence counsel in the examination. Such arrangements are less feasible in the context of the adversarial trial model of countries that follow common law. One of the basic rights of the defendant in this model is the right to confront the accuser. In other jurisdictions courts are more willing to compromise that right in order to protect witnesses from retaliation.

48. In cases of smuggling of migrants and trafficking in women for sexual exploitation, victims can be treated as

violators of prostitution laws and/or immigration laws, which usually excludes them from receiving protection as victims. Illegal status also makes victims hesitant to report any violations against them to law enforcement authorities. In some cases, if the trafficked or smuggled person cooperates with the police and the prosecutor, his or her status can be changed from offender to victim/witness and he or she will be given access to support and protection services. However, as discussed above, witness protection programmes are difficult and expensive to arrange. This leads to the ethical question of how much cooperation can be expected from victims who may face a very real threat from the criminal groups involved with no reassurance that they and their families will be effectively protected. In some central and eastern European countries, the experience of the criminal police has shown that, once the main players of the organized groups behind trafficking and smuggling have been arrested, victims are more willing to cooperate. It must be stressed that in such cases the trafficked and smuggled persons are always perceived as victims.[15]

D. Victim-oriented sentencing and the new crimes

49. One characteristic of transnational crimes is, as already mentioned, the absence of easily identifiable individual victims. Victim involvement and victim participation will require arrangements for the representation of groups of victims. In civil law such arrangements are well developed in the form of class actions, for instance, those against the tobacco industry. Quite recently, a group representing victims of the Bhopal disaster, who successfully sued for damages in civil courts in the United States, filed a complaint with a criminal court in New York against the company involved. Under the *partie civile* model of continental European law, such class actions are sometimes also allowed. Organizations representing groups of victims of organized crime could in theory make use of those provisions and sue collectively for civil damages in the framework of a criminal trial. In theory, representatives of groups of victims could initiate criminal proceedings if the prosecutors refrain from prosecuting criminal organizations. This special option may be important in cases of collusion between organized criminal groups and the authorities or corruption of the latter.[16]

50. Restorative models rely heavily on the active involvement of individual citizens. In the case of organized crime, individual victims often cannot be identified. Even if the interests of distinct groups are damaged, however, it is difficult to imagine how leaders of local communities could engage in negotiations with leaders of organized criminal groups in a semi-formal setting. Fear of retaliation would prevent them from such involvement and in the absence of sufficient protection, private parties would normally be anxious not to provoke the organized criminal groups operating in their environment. Although there is ample scope for involvement of private parties in the prevention of organized crime and for their collaboration with state agencies, the part to be played by victims in the prosecution and sentencing of organized criminals seems limited. However, that situation appears to be changing, as shown by the growth of citizens' associations and non-governmental organizations denouncing organized crime in a number of countries.

IV. Conclusion

51. For many decades criminal lawyers have been working to define the rights of offenders vis-à-vis the State. The consensus reached on those rights is reflected in the United Nations standards and norms in crime prevention and criminal justice. Recently that consensus has been challenged, however, by new ideas concerning the accountability of offenders and even more by the promotion of the rights of victims of crime and the threat posed by transnational and organized crime.

52. International consensus has been reached on the basic principles of justice for victims of crime as embodied in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Most Governments have only recently begun to implement those rights. Exchange of information on best practices and cost-effective methods of implementation is urgently needed. Much progress can certainly be made in the improved treatment of victims of crime without negative implications for the offender. In some areas, however, rights for victims do interfere with the rights of offenders and difficult choices will have to be made. Many issues have yet to be solved. Opinions differ, in particular, about the extent of participation of victims in the decision-making process. The restorative model may offer an alternative solution in some cases.

53. In the meantime, many countries are being confronted with new forms of transnational and organized crime. Certain traditional as well as newer notions of

fairness for offenders and victims need to be re-examined in the light of that new threat. Certain established rights of offenders may also have to be reconsidered, because they impede effective criminal investigation and prosecution.

Notes

[1] Graeme R. Newman (ed.), *Global Report on Crime and Justice* (New York/Oxford, Oxford University Press, 1999).

[2] A. Schmid and J. de Graaf, *Violence as Communication: Insurgent Terrorism and the Western News Media* (Newbury Park, Sage, 1982).

[3] *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (United Nations publication, Sales No. E.92.IV.1 and corrigendum).

[4] Marc S. Groenhuisen, "Victim's rights in the criminal justice system: a call for more comprehensive implementation theory of victimology", *Caring for Crime Victims: Proceedings of the IX International Symposium*, Jan J. M. van Dijk and others, eds. (New York, Criminal Justice Press, 1999).

[5] Leslie Sebba, *Third Parties: Victims and the Criminal Justice System* (Columbus, Ohio State University Press, 1998).

[6] Vladimir N. Tochilovsky, "Victim's procedural rights at trial: approach of continental Europe and the International Tribunal for the Former Yugoslavia", *Caring for Crime Victims ...* .

[7] In an important ruling, the United States Supreme Court held evidence of the victim's sufferings admissible in capital murder trials (*Payne vs. Tennessee*, 501 U.S. 808 (1991)). The ruling stipulated that offenders are accountable for the full extent of the harm caused.

[8] T. Marshall, "The evolution of restorative justice in Britain", *European Journal on Criminal Policy and Research*, No. 4, 1996, pp. 21-43.

[9] Elmar G. M. Weitekamp, "The paradigm of restorative justice: potentials, possibilities and pitfalls", *Caring for Crime Victims ...* .

[10] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee (COM (1999) 349 final).

[11] Anna Wargens, Crime Victims in the European Union (Umeå, Crime Compensation and Support Authority, 1999); and C. Bochman and K.-U. Griesheim, *Compensation Practices of States of the European Union Connected to Crimes Against Women*, HEUNI Paper No. 12 (Helsinki, European Institute for Crime Prevention and Control, affiliated with the United Nations, 1999).

[12] Further examples of this type of legislation are the 1970 Racketeer Influenced and Corrupt Organizations Act of the United States and the 1982 Rognoni-La Torre legislation of Italy.

[13] In the United States, courts can also issue civil injunctions, for example, appointing trustees who take over the management of corrupt labour unions (see James B. Jacobs, C. Friel and R. Radick, *Gotham Unbound: How New York City Was Liberated from the Grip of Organized Crime* (New York, New York University Press, 1999)).

[14] See Oliver Stolpe, "Due articoli bastano", *Narcomafie*, marzo 1999, p. 17, and Tatjana Hörnle, "Die Vermögensstrafe", *Zeitschrift für die gesamten Strafrechtswissenschaften*, 1996, p. 333).

[15] Information based on interviews by the Centre for International Crime Prevention of the Organized Crime Unit of the Criminal Police, Department of Trafficking in Human Beings, of the Czech Republic.

[16] Interestingly, the Racketeer Influenced and Corrupt Organizations Act of the United States also provides for the possibility of a civil action against criminal syndicates by groups of victims, e.g. companies who are harmed by racketeering can sue collectively for punitive damages. Little experience has yet been gained with such options in court.

Annex

United Nations standards and norms in crime prevention and criminal justice

A. Treatment of offenders

World social situation (Economic and Social Council resolution 663 (XXIV), annex, "Standard Minimum Rules for the Treatment of Prisoners") (1957)

Procedure of the effective implementation of the Standard Minimum Rules for the Treatment of Prisoners (Economic and Social Council resolution 1984/47)

Model Agreement on the Transfer of Foreign Prisoners and recommendations on the treatment of foreign prisoners, annex I, "Model Agreement on the Transfer of Foreign Prisoners", and annex II, "Recommendations on the treatment of foreign prisoners"

Basic Principles for the Treatment of Prisoners (General Assembly resolution 45/111)

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (General Assembly resolution 45/110)

Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released (General Assembly resolution 45/119)

International cooperation for the improvement of prison conditions (Economic and Social Council resolution 1997/36, annex, "Kampala Declaration on Prison Conditions in Africa")

International cooperation aimed at the reduction of prison overcrowding and the promotion of alternative sentencing (Economic and Social Council resolution 1998/23, annex I, "Kadoma Declaration on Community Service")

Penal reform (Economic and Social Council resolution 1999/27, annex, "Arusha Declaration on Good Prison Practice")

B. Torture and other cruel, inhuman or degrading treatment or punishment, extra-legal executions

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 3452 (XXX), annex)

Effective prevention and investigation of extra-legal, arbitrary and summary executions (Economic and Social Council resolution 1989/65, annex, "Principles")