Non-criminal remedies for crime victims

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Contents

Foreword

Statistics show that up to 1 in 4 of European citizens have been victims of crime, making victimisation a daily phenomenon in Europe. Moreover, the threat of terrorism, as well as other forms of crime, has increased the need for improved forms of assistance available to victims.

It is essential to put victims at the very heart of the justice system. Victims should and need to be treated with the respect and dignity they deserve when coming into contact with justice, in particular so that they are safe from secondary victimisation.

The present document contains the final report on non-criminal remedies for crime victims prepared by the Group of Specialists on remedies for crime victims (CJ-S-VICT) and adopted by the European Committee on Legal Co-operation (CDCJ) during its 83rd meeting on 4-6 June 2008.

Introduction

1. Working method of the Group

1. The Group of Specialists on remedies for crime victims (CJ-S-VICT, hereafter referred to as "the Group") was established in January 2007 by the Committee of Ministers of the Council of Europe, under the aegis of the European Committee on Legal Co-operation (CDCJ).
2. The Group, composed of seven specialists in the field of victims, was chaired by a representative of the CDCJ, assisted by a consultant and a scientific expert and supported by the Secretariat of the Council of Europe. Representatives of other Steering Committees of the Council of Europe also attended the meetings and participated in the work of the Group.
3. The Group met on three occasions in 2007 with a view to carrying out its task of analysing legislation and practices of member states concerning civil, administrative and other remedies available to victims of crime and to identify good practices. The issue of compensation for damage inflicted on victims of terrorism offences, in particular the functioning of public and private insurance schemes, was also highlighted in the terms of reference of the Group.
4. The present report is aimed at presenting to the CDCJ the result of the work of the Group further to the mandate it has been given, addressing issues and referring to good practices which have been identified.
5. The *modus operandi* chosen by the Group in order to carry out its task was the following: a questionnaire was sent in June 2007 to all national delegations of the CDCJ in order to collect information and data related to the domestic situation of the various member states. On the basis of the 26 replies received,[1] Ms Christa Pelikan – the scientific expert – prepared a report on "non-criminal justice remedies for victims of crime", which was then analysed by the Group, together with the replies received, in order to identify good practices, innovative measures and systems and to agree on principles and guidelines to consider when dealing with non-criminal remedies for crime victims.
6. The Group would like to express its thanks to the member states who responded to the questionnaire.

1. Replies were received from Andorra, Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Finland, France, Germany, Greece, Ireland, Lithuania, Moldova, Monaco, the Netherlands, Norway, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine, and the United Kingdom.

7. Concerning the specific question of the compensation of victims of terrorism, members of the Group furthermore based their discussions on the reports prepared by Mr Bernhard A. Koch, "Report on indemnifying victims of terrorism" and the subsequent "Report on indemnifying victims of terrorism: preliminary considerations with a particular focus on the role of insurance", which appears in Appendix II (page 68 below).
8. Further to the analysis of the various working elements and documents, the members of the Group progressively agreed on the structure and content of the present report.

2. Background information

9. The European Ministers of Justice, meeting during the 27th Conference organised in 2006 (12-13 October 2006, Yerevan, Armenia) adopted Resolution No. 1 on victims of crime.
10. Through this resolution, the Ministers invited the Committee of Ministers to mandate the CDCJ to study the question of civil, administrative and other remedies to be made available to victims of crime, and to this end identify and analyse the existing best practices.
11. The Progress report[2] of the Committee of Experts on Terrorism (CODEXTER) on future priority areas for the work of the Council of Europe in the fight against terrorism furthermore identified, in the list of topics submitted to the Committee of Ministers for future action, the issue of insurance schemes covering terrorism-related damages.

3. Latest developments and standards

12. The Group first considered the work already carried out within the Council of Europe in the field of victims, in order to ensure complementarity and avoid duplication.
13. It took note of the work of the European Committee on Crime Problems (CDPC) in the follow-up and implementation of Recommendation (2006) 8 on assistance to crime victims. The Group underlined the broad scope of this recommendation, which goes beyond the strict criminal sphere, as it tackles a number of aspects linked to non-criminal assistance to be provided to victims, such as the role of agencies in the community, the promotion and co-ordination of dedicated services for the support of victims, access to information, the right to effective access to civil remedies, compensation mechanisms, protection measures, etc.

2. Document CM (2005) 172 Addendum of 16 November 2005.

14. The work of the European Commission for the Efficiency of Justice (CEPEJ) in the preparation of guidelines aiming at improving the effective implementation of the various recommendations in the field of mediation was also taken into account.
15. The mandate of the "Task Force to Combat Violence against Women, including Domestic Violence" (EG-TFV) to evaluate progress at national level and to establish instruments for quantifying developments at pan-European level with a view to drawing up proposals for action was noted. In this context, the Task Force recommends the development of a Council of Europe binding legal instrument to combat violence against women.
16. Concerning international developments, the Group took note of a number of recent changes implemented at domestic level in some of the member states. Enactment of new legislation, reviews of practices and changes of structures and networks have been underlined in the replies received. Victims' issues thus appear to be evolving in a number of states, such as Bulgaria (recent law on "support and financial compensation to crime victims" and the establishment of a National Council), Finland (new law entered into force in 2008 extending the scope of compensation), Lithuania (plans to amend the "law on compensation of damage inflicted by violent crimes" to extend the scope of compensation), or Norway (preparation of a new action plan concerning victims of domestic violence and proposals to be made by a "Rape Committee").
17. The Group constantly kept in mind throughout its work the following instruments or documents which deal – partly or completely – with victims and which will be referred to further on in the report:

- the European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116);
- the Council of Europe Convention on the prevention of terrorism (CETS No. 196), and in particular its Article 13 on the "protection, compensation and support for victims of terrorism";
- the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) and in particular its Chapter III "Measures to protect and promote the rights of victims, guaranteeing gender equality", Articles 10, 12 and 15;
- the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (CETS No. 201);
- Recommendation (2002) 5 of the Committee of Ministers on the protection of women against violence;
- the Guidelines on the protection of the victims of terrorist acts (adopted by the Committee of Ministers on 2 March 2005);

- Recommendation (2006) 8 of the Committee of Ministers on assistance to crime victims;
- Resolution No. 1 on victims of crime adopted by the European Ministers of Justice in Yerevan in 2006; and Resolution No. 2 on child-friendly justice adopted by the European Ministers of Justice during their 28th Conference in Lanzarote;
- European Union Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

4. Key definitions and list of non-criminal remedies

18. In order to reply adequately to its mandate, the Group agreed on the following definitions, which are – in some instances – directly taken from Recommendation (2006) 8 on assistance to crime victims:

- "remedies" are defined as civil, administrative and other[3] means for victims to protect their interests and exercise their rights;
- "victim" means a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a member state. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim;
- "vulnerable victims" are considered vulnerable either through their personal characteristics[4] or through the circumstances of the crime[5];
- "secondary victimisation" means the victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim;
- "repeat victimisation" means a situation where the same person suffers from more than one criminal incident over a specific period of time.

19. The non-criminal remedies which are commonly used in order to protect the interests of the victims can be divided into two categories: remedies aimed at compensating the damage suffered (i.e. compensation from the State, restitution from the offender) and remedies aimed at protecting the victims. The latter, non-compensatory judicial remedies, mentioned in the replies received consist mainly of the following measures:

- Safety order: court order which prohibits the offender from using or threatening violence towards the person applying for the order. It does not oblige the offender to leave the family home. If that person lives apart from

3. Excluding remedies in criminal proceedings.
4. For example children or people with physical or learning disabilities.
5. For example domestic violence, sexual violence or organised crime.

the victim, the order prohibits him/her from watching or being in the vicinity of the victim's home.

- Protection order: while the victim is waiting for the court to decide on his/her application, the court can give him/her an immediate order called a protection order. This has the same effect as a safety order and it is intended to last until the court decides on victim's case.
- Injunction: court order requiring the offender to do, or to refrain from doing certain acts or particular things.
- Barring or exclusion order: court order requiring the perpetrator to leave and stay away from the place of residence of the person applying for the order. These are different from eviction orders, which are used in a more general context by landlords legally requesting that their residential tenant be removed from the rented location.
- In Ireland and in the United Kingdom: anti-social behaviour orders ("asbos") are injunctions taken against persons behaving "anti-socially" which cover a wide array of restrictions and bans. They are civil orders aimed at protecting the public from a behaviour that causes or is likely to cause harassment, alarm or distress.
- Decision on children's care: placement of children in institution or foster families, parental custody, contact decisions, etc.
- Protective measures: taken to prevent repeat or secondary victimisation.

20. Alongside those judicial remedies, procedural remedies are also available to crime victims, as well as a variety of measures aimed at ensuring effective access to remedies and protecting the victim, the first one being the provision of information, be it by police forces, dedicated help-lines or support centres.
21. Other measures contributing to the effectiveness of the remedies and the protection of the victim are the establishment and use of simplified procedures, the right to legal aid, the diversion of judicial proceedings by alternative means of dispute resolution and the introduction of codes of conduct.

5. Structure of the report

22. Further details on those remedies and means will be given later on in this report, which is structured as follows:

- the first chapter will focus on the rights enshrined in the European Convention on Human Rights and principles recalled by the European Court of Human Rights (page 13);
- the second chapter will insist on the necessity to make effective use of the remedies (page 17);

- the third chapter will cover the specific situation of vulnerable victims, their needs and the corresponding dedicated remedies and means (page 22);
- the fourth chapter will specifically target the victims of terrorism – although forming part of the wider category of crime victims – and compensation mechanisms (page 32);
- the fifth chapter will address the question of the reduction of the risk of secondary victimisation (page 38);
- the sixth chapter will cover the compensatory dimension of the redress;
- the seventh chapter will focus on rehabilitation from crime suffered (page 43);
- the eighth chapter will be related to the organisations and persons involved in the protection and assistance of victims, with an accent on the role to be played by the authorities (page 52);
- the ninth chapter will refer to alternative dispute resolution and codes of conduct (page 54);
- and the last chapter of the present report will contain the CDCJ's recommendations as to the follow-up and steps to be taken (page 57).

Chapter 1. Principles enshrined in the European Convention on Human Rights[1]

23. The foremost principle which arises in cases involving remedies for victims of crime is that states "should ensure the effective recognition of, and respect for, the rights of victims with regard to their human rights; they should, in particular, respect the security, dignity private and family life of victims and recognise the negative effects of crime on victims". This principle, set out in Recommendation (2006) 8 on assistance to crime victims, clearly states that victims' rights are based on human rights and that states' obligations derive from the European Convention on Human Rights (ECHR).
24. The ECHR does not expressly guarantee rights to the victims and states' obligations thus essentially derive from the positive obligation to respect human rights and to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention" (Article 1). This obligation, taken together with other articles of the Convention, requires that states take measures designed to ensure that individuals within their jurisdiction are not subjected to violations of their rights. More specifically, the states have to take measures to respect the following articles of the Convention: the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery and servitude (Article 4), the right to a fair trial (Article 6), the right to private and family life (Article 8), the right to an effective remedy (Article 13) and the prohibition of discrimination (Article 14).
25. It should furthermore be recalled that alongside the cases related to the breaches by states of their positive obligations, states will be held responsible for the actions committed by their subordinate bodies which constitute direct violations of the rights enshrined in the ECHR.
26. Another important point to mention is that the ECHR is concerned in the first instance with the protection of the accused person, thus implying that victims' rights are not unlimited, and are granted in the limits of the rights recognised to the defence. In practice, the interests of the parties will have to be carefully balanced, the victim's concerns being taken into consideration as the defence interests, which will in some cases limit the rights of the victims, as for instance in the case of the publicity of a trial (Article 6 §1

1. Also see the document on selected cases of the European Court of Human Rights in Appendix I, page 59.

ECHR), or the right of the accused person to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (article 6 §3 litera d).

27. States' positive obligations towards victims underlined in the case-law of the European Court of Human Rights (the Court[2]) can be examined under the following categories, (several of them may be of relevance in a given case):
   - Obligation of providing adequate domestic legislation to protect the victim;
   - Obligation of protection;
   - Obligation of carrying out an effective investigation; and
   - Procedural rights, i.e. the right to free legal aid, the right to an effective remedy, the right to a reasonable length of the (civil) proceedings and the right of access to a court (Articles 6 §1 and 13).

1.1. Obligation of providing adequate domestic legislation to protect the victim

28. The obligation of providing adequate domestic legislation to protect the victim is applied to a number of rights, in order to secure their tangible and effective protection against practices prohibited. This obligation gives an active role to the legislator.
29. The Court has held that the domestic legislation failed to protect an individual in the absence of adequate means of obtaining a remedy, or on the contrary the Court concluded in certain circumstances that civil law afforded adequate protection to prove the violation of a right and to obtain redress for the damage and that no other provisions were necessary to protect the victim.

1.2. Obligation of protection

30. The obligation of protection in the administrative field is clearly linked to the maintenance of public order.
31. The Court holds that the obligation of protection in the context of the right to life (Article 2) requires a state not only to refrain from the intentional and unlawful taking of life, but may also require a state to take appropriate measures to safeguard the lives of those within its jurisdiction. This re-

2. Also covering, where appropriate, decisions of the former European Commission of Human Rights.

quires in certain circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from criminal acts of another individual – e.g. a special protection scheme in certain litigation procedures, or family court cases.

32. In the context of the prohibition of torture (Article 3), the obligation of protection requires a state to provide an individual with adequate protection against inhuman and degrading treatment.

33. It has to be underlined that providing an adequate protection includes the obligation for the states to take effective steps and protective measures.

34. In the context of the right to respect for private and family life (Article 8), the obligation of protection may require a state to take effective measures so as to ensure an individual's right to respect for home and private and family life.

35. This positive obligation of protection leads to the principle that states also have to provide victims with a range of available remedies in case of threat and in order to avoid further damage being done (exclusion order, etc.).

36. Another principle well established by the Court is that the positive obligation of protection and the ensuing obligation of taking preventive measures to ensure the effective protection of citizens also includes the public's right to information regarding potential risks of dangerous activities.

1.3. Obligation of carrying out an effective investigation

37. This obligation of carrying out an effective investigation can be applied in connection with a number of rights enshrined in the ECHR, such as the right to life, the prohibition of torture, or even in connection with the right to an effective remedy.

38. Where an individual raises an arguable claim that he has been seriously ill-treated by the police or other state agents (Article 3), or in cases concerning of the death of an individual (Article 2), even in situations where it is not established that death was induced by state officials, this obligation requires that there should be an investigation that meets certain minimum requirements.

39. The obligation of carrying out an effective investigation can also be linked to the right to private and family life as when assessing the question of custody of children, the competent authorities will have to carry out an effective investigation in order to prevent a violation of Article 8 of the ECHR.

1.4. Procedural rights

40. Victims' rights can be violated through the violation of a variety of procedural rights, which essentially concern the right to free legal aid, the right to an effective remedy, the right to a reasonable length of (civil) proceedings and the right of access to a court (Articles 6 §1 and 13). The Court holds that the individual has certain procedural rights in order to be able to exercise the individual's rights enshrined in the ECHR.

41. Concerning free legal aid in a civil procedure, the Court held that there may be a positive obligation to provide such legal aid in order to guarantee access to a court, in particular when legal representation is rendered compulsory or is absolutely necessary because of the complexity of the procedure or of the case. This procedural right is particularly important in cases involving children who, by definition, do not have the financial means to exercise their rights and who could be in conflict with their parents or guardians. Another factor leading to the requirement of legal aid being granted is the emotional involvement of the victim in the legal issues concerned (for instance the emotional situation of an abused wife wanting to divorce her husband).

42. As regards the right to an effective remedy, the Court has held that under Article 13 the requirements of an effective investigation include also effective access for the victim, or the victim's family, to the investigatory procedure. Through lack of an effective remedy concerning the investigatory procedure, the Court held that thereby access to any other available remedy, including a claim for compensation, was denied.

43. In addition, the Court holds that in the event of a breach of the most fundamental provisions of the Convention (Articles 2 and 3), compensation for non-pecuniary damage induced by the violation should in principle be available as part of the possible remedies.

44. Furthermore, the obligation of protection entails that an incapable victim be legally entitled to representation, as the Court noted that the victim's right to an effective remedy had been violated when this victim, legally incapable, could not be represented in application of the domestic legislation. States should ensure that victims of abuse perpetrated by their guardian or legal representative have alternative means of being legally represented and of exercising their rights.

Chapter 2. Effective access to remedies

45. Alongside the need to provide victims with a sufficient range of remedies, the authorities have to ensure that such remedies can be effectively used by them. This problem raises a variety of issues, such as the provision of information, the entitlement to free legal aid, the simplification of procedures, and the benefit of a multi-agency approach.

2.1. Provision of information

46. Recommendation (2006) 8 deals extensively with the provision of information to victims, as a key element for the protection and exercise of their rights.
47. Section 6 of the Recommendation not only refers to the obligation for states to ensure that information be provided to victims as soon as they come "into contact with law enforcement agencies or criminal justice agencies or with social or health care services" but also details the content of the information that has to be provided to victims, namely details of the services or organisations providing support, types of support and, where relevant, the costs of the support.
48. Furthermore, the Group underlines the need to provide to victims information on what exists (which will vary depending on each national system) in respect of the procedures and remedies available, encompassing non-criminal remedies such as compensation mechanisms, free legal aid or advice, medical and social services available.
49. The Group insists on the need to provide this information on the spot, as a crucial way of facilitating access to information, and thus acknowledges the important and key role of police forces in the provision of information and referral to the competent services. The same responsibility in the provision of information lies with the social or health care services which can be the first instances in contact with a victim.
50. The information is to be provided to victims, as well as to their immediate family and dependents.
51. Provision of information can be ensured by written means, thereby allowing the victim to reflect on the information received at any time and leaflets could to this end be published.
52. The setting up of free national telephone helplines for victims in a number of jurisdictions, aside from providing immediate and direct accessibility, can furthermore be very helpful to the victim because of its non-"legally

binding" nature. Access to information via the Internet should also be promoted.

53. The particular vulnerability of a victim who does not understand the language of a state has to be taken into consideration and specific measures should be taken in order to ensure that information given can be understood.
54. The Group also wishes to recall that "victims should be given the opportunity to indicate that they do not wish to receive such information", as stated in Recommendation (2006) 8 on assistance to crime victims.
55. The question of the automatic passing of victims' details to support services has to be raised and there again, the "negative consent" of the victim (also referred to as "opt-out") should be the principle to follow: referral to services should be made unless the victim expressly refuses, in which case only confidentiality of personal data will be kept.
56. The Group wishes to recall that European Union Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims places an obligation on states to inform victims, in particular its Article 4 on "information to potential applicants" which says that "member states shall ensure that potential applicants for compensation have access to essential information on the possibilities to apply for compensation, by any means member states deem appropriate". The "assisting authority" shall provide, upon the request of the applicant, general guidance and information on how the application should be completed and what supporting documentation may be required (Article 5 on assistance to the applicant).
57. An example of good practice in the field of the provision of information can be taken from the Victims' Code of Practice for England and Wales which, as a statutory instrument, lays down a right to information within specified time scales.

2.2. Free legal aid

58. As previously mentioned under the chapter on the principles enshrined in the European Convention on Human Rights (see paragraphs 41 and 42, page 16), provision of free legal aid can be considered a procedural requirement.
59. While this compulsory nature of free legal aid depends on the circumstances of the situation, the Group nevertheless wishes to insist on the need to ensure that remedies available to victims can be effectively accessed, free legal aid constituting a distinct means of facilitating this access. The availability of free legal aid can even constitute an absolute necessity for the victim in some cases, as when the victim is financially de-

pendant on the perpetrator, or when the victim is very poor and unable to support costs linked to the legal action.

60. The Council of Europe instruments in the field of legal aid are the European Agreement on the Transmission of Applications for Legal Aid (ETS No. 092), its Additional Protocol (ETS No. 179), Council of Europe Resolution (76) 5 on legal aid in civil, commercial and administrative matters, and Council of Europe Resolution (78) 8 on legal aid and advice. Legal aid is mentioned in a number of other recommendations as being a measure facilitating access to justice, an access which is even more crucial when considered from a victim's point of view.[1]
61. In respect of the eligibility criteria for legal aid to be granted in a civil action deriving from a crime, the Group calls on states to take into consideration, on a case-by-case basis, the special needs of the victims rather than solely a consideration of the financial resources.
62. It could be envisaged that in a number of specific situations, the victim might be automatically entitled to legal aid, on the basis of the materiality and existence of the infraction or because of the causal link between the civil procedure and the infraction perpetrated against the victim (as in employment conflicts when, further to the crime, the victim was fired by his/her employer on the basis of repeated absences; or housing conflict, when the tenant was evicted by his/her landlord after disturbances created by the perpetrator, in cases concerning the care of children).
63. The Group wishes to highlight Article 15.2 of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), which states that "each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law".
64. As an example of good practice, the Group noted the Finnish system which permits the victim to be granted free legal aid (more specifically free legal advice up to 100 hours) even outside the judicial proceedings context, for conflicts not brought to court. Notification to the police and submission of an application suffice to render one entitled to this kind of assistance.

2.3. Simplification of procedures

65. The Group encourages the simplification of procedures as a means of enhancing the effectiveness of remedies available to victims.

1. Recommendation (81) 7 of the Committee of Ministers on access to justice and Recommendation (93)1 on effective access to justice for the very poor.

66. The appendix to Recommendation (2006) 8 states in its Article 7.2 that "states should institute procedures for victims to claim compensation from the offender in the context of criminal proceedings."
67. The Group supports leaving to the victim the choice between the sentencing option and enabling financial compensation for the crime not only in the civil sphere but also in criminal proceedings. This system of "adhesion procedure" of civil claims in criminal proceedings exists in a large number of jurisdictions but is not efficiently functioning in all of them and the Group thus encourages member states to facilitate the implementation of this procedure, as well as to investigate and remove obstacles to adhesion procedures in criminal proceedings, whether such obstacles are created by the civil law system or by criminal law practices (issue of lawyers' fee structure for instance).
68. As examples of good practice, the Group noted the simplification efforts implemented in a number of countries in respect of the compensation mechanisms, which often tend to be complex for the victims. The Dutch example of the handling of a personal injury claim for victims of violent crimes (and the related code of conduct), as well as the possibility of requesting compensation on a simple form without the need for a lawyer, are to be noted.
69. Alongside the simplified procedures, the Group took note of the innovative "specialised courts" dealing with both civil and criminal aspects of a case, as is for instance the case in Spain or in England and Wales for domestic violence victims. Such a system aims at providing a global protection to victims, introducing measures such as dedicated police and prosecutors, separate entrances and waiting areas to avoid contact with perpetrators. The Group agreed that those courts, their functioning and their impact on victims should be further assessed.
70. The Group also noted the setting up of "small claims courts", although not initially designed to assist the victims but undeniably leading in practice to concrete benefits for victims in terms of simplicity and length of the procedures. Such courts exist in a number of countries, as for instance in France for cases involving payment of debts of less than 4 000 euros, and for which the procedure can be initiated by simple presentation to the Registry of the supporting documents by the creditor.

2.4. Multi-agency approach

71. The Group underlines that victims should not be subjected to additional stress and difficulties when receiving assistance and should not be sent from one agency to another.

72. To this end, a multiple agency approach is necessary to ensure proper networking of the large array of institutions providing assistance to victims and thus focus on the victims' needs.
73. A coherent strategy of victim support is required, involving either a single organisation as the unique contact point for victims (help-centres), which will guide and direct the victim through the maze of institutions, or relying instead on an existing network of several organisations to perform such duties.
74. A number of examples illustrate this multi-agency approach including those found in Austria (intervention centres and the co-operation they have established with the police, based on the Protection against Domestic Violence Act), Bulgaria, Estonia (victim support centres), Ireland, "the former Yugoslav Republic of Macedonia", Norway (twelve support centres throughout the country), Portugal (support centres for the victims of domestic violence) and the United Kingdom.
75. The example of "children's houses" established in Iceland, Sweden and Norway as interdisciplinary and multi-agency centres aimed at enabling all professionals involved in the investigation of child sexual abuse cases to work and meet the child, thus limiting the aggravation of the trauma of the child, could be transposed to non-criminal environments and specialised centres aimed at providing assistance to those victims. More states should try to adopt the same approach, involving child-friendly facilities where the child would meet everyone involved in the provision of care and assistance.

Chapter 3. Vulnerable victims

76. The Group paid particular attention to the specific needs of vulnerable victims, as legislation and practices described in the replies dealt extensively with this issue.
77. Different categories of vulnerable victims were considered, such as children, elderly people, victims of domestic violence, victims of sexual crimes, victims of trafficking, "extremely poor" persons, minorities, persons with special needs, persons in environmental dependency, etc.
78. It should be noted that in parallel with the common needs of those various categories of vulnerable victims, some categories have specific needs and will require targeted remedies. This will include the specific needs of women and men.
79. This need for targeted measures appears in Article 3.4 of the appendix to Recommendation (2006) 8, which states that "victims who are particularly vulnerable [should] benefit from special measures best suited to their situation".
80. The Group wishes to recall the principle and common purpose which guide the various initiatives taken in respect of all categories of vulnerable victims: those victims should be able to report a crime, and at the same time receive an immediate social support and protection.
81. This support system should be available to victims even though they are unwilling to instigate criminal proceedings; they have to be able to speak about their problem without fearing any judicial consequences (case of children abused by their parents and who fear that their parents will be arrested, for instance).
82. The Group further underlines that in the event of conflict between the needs of the victim and the interests of the perpetrator, the well-being of the vulnerable victim should prevail.

3.1. Various remedies applicable to all categories of vulnerable victims

83. The main remedy available to vulnerable victims and aimed at protecting them is the range of orders available. There are different kinds of orders, which all respond to different purposes and can be of a temporary nature. Those orders which have a remedial nature can also to be used in a preventive manner, as some orders prevent the violent behaviour of the perpetrator, or prevent further threats for instance by requiring the perpetrator not

to approach the victim or the house of the victim. Other orders aim at evicting a violent person from the family home.

84. Vulnerable victims should always be allowed to pursue compensatory civil remedies.
85. Victim support services providing the necessary assistance and support for vulnerable victims are to be set up taking into consideration the importance of a comprehensive approach in order to ensure that the various needs of the victim will be dealt with. The range of services goes from providing legal assistance or psychological support to directing a person to the appropriate treatment and assistance, or also providing accommodation.
86. The Group underlines the important role to be played by the police in providing information to the victims regarding victim support services, and providing support services with information concerning victims of crime in order to allow them to approach the victim and provide the necessary aid and counselling (the police should respect the victim's refusal to disclose personal details to the victim support services, as mentioned in paragraphs 55 and 56 *supra*, page 18).
87. Professionals dealing with vulnerable victims need to have knowledge of the specific needs of such vulnerable victims. Since a large range of professionals have contact with victims, such as the police, social workers, psychologists, judges, etc., the Group underlines that it is necessary to provide training for all types of professionals involved with victims.
88. In addition to the existence of victim support services, the setting up of free national telephone helplines, aside from their immediate and direct accessibility, can be of particular use for vulnerable victims such as child victims, women victims of domestic abuse, victims of violence while under institutionalised care, who could fear the reaction of their abuser or the judicial consequences deriving from their need of assistance (prosecution of the perpetrator).

3.2. Specific remedies for certain categories of vulnerable victims

89. In parallel with the remedies and measures mentioned above, which are applicable to all categories of vulnerable victims, the Group specifically insists on particular categories of vulnerable victims and their needs.
90. The Group recalls the importance of specialised centres for the support of specific categories of vulnerable victims, as underlined in Recommendation (2006) 8, encouraging states "to support the setting up or the maintenance of specialised centres for victims of crimes such as sexual and domestic violence and to facilitate access to these centres". The Group also

recalls Council of Europe Recommendation (2002) 5 on the protection of women against violence and takes note of specific measures needed to support and protect women victims of violence as one category of vulnerable groups.

91. Specific categories of vulnerable victims will be dealt as follows:
    - victims who are vulnerable by virtue of their personal characteristics,
    - victims who are vulnerable by virtue of the circumstances of the crime,
    - victims who are vulnerable by virtue of their relationship with the offender,
    - victims who are vulnerable by virtue of various forms of intimidation.

3.2.1. Victims who are vulnerable by virtue of their personal characteristics

92. Under this category are to be considered the specific needs of children, persons with learning disabilities, elderly people, very poor people and victims living in institutions.

3.2.1.1. Children

93. This particular category of vulnerable victim has been referred to in many of the replies received.
94. Welfare of children has been paramount in the work of the Council of Europe and continues to be so, as for example in the programme on "building Europe for and with children" and the adoption during the 28th Conference of European Ministers of Justice of Resolution No. 2 on child-friendly justice.
95. This resolution calls upon member states to "respect the principle, in all justice matters involving children, that the best interests of children shall be a primary consideration".
96. The resolution states furthermore that "special attention and guarantees are required for child victims or witnesses of crime to protect their welfare". This is in line with the United Nations "guidelines on justice in matters involving child victims and witnesses of crime"[1] which are specifically aimed at ensuring that children who have been harmed by crime or who have witnessed crimes are protected and treated fairly in courts.
97. The Group also wishes to underline the child-sensitive approach of the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (CETS 201), which takes due account of the particular vulnerability of children and aims at ensuring that investigations and judicial proceedings are conducted in a manner which protects the

1. Economic and Social Council Resolution 2005/20 of 22 July 2005.

best interests and rights of children, and do not exacerbate the trauma already suffered.

98. Child victims of crime are often confronted with a supplementary difficulty and the Group calls on states to assess the access to justice for children and remove any existing obstacles they could be facing in exercising their rights. The question of their representation in judicial proceedings when there is a clear conflict of interest between the child's interests and the holders of parental responsibility or legal guardians should be considered and the possibility in such cases of having a special legal representative appointed examined.
99. Concerning examples of good practice, the Group noted a number of specific measures in the replies received, such as the introduction in Sweden and Ireland of a Children's Ombudsman and the creation of Support Centres for young crime victims, together with other measures dedicated to the specific needs of children and young persons (Children's Helpline and an e-mail address for "Children's Rights in Society").
100. The Group underlines the important advocacy role played by national Ombudsmen for children and encourage states to establish such an institution where it has not yet been done.
101. In Belgium, dedicated associations are providing assistance to children ("Vertrouwenscentrum Kindermishandeling", "SOS-Enfants" and "Child Focus").
102. In Finland, finally, the Group took note of the strong emphasis put on prevention and early intervention in child protection matters (entry into force in 2008 of the new "Child Welfare Act").

3.2.1.2. Persons with learning disabilities

103. Persons with special needs and suffering mental or physical disabilities have been considered by the Group as constituting another category of vulnerable victims, thus requiring additional protection.
104. The question of statutes of limitation could for instance be reviewed in their specific case, as the question of the legal representation and the possible conflict of interests between the victim and the perpetrator who is legally responsible for her/him.

3.2.1.3. Elderly people

105. Elderly people are often in a position of dependency, requiring care which they receive either in an institution for elderly people or at home from their children or other caretakers.
106. Physical abuse tends to be the most frequent form of abuse. However, the Group notes that financial abuse is increasingly recognised as a problem.

107. The Group took note of the two-year "study of abuse and neglect of older people" in the United Kingdom, launched in June 2007, and of the Norwegian pilot project which was carried out in the 1990s in order to raise public awareness on this problem and satisfy the specific needs of abused elders (need for a safe haven, psycho-social support, assistance and provision of information from someone they could trust, as practical help linked to disabilities or immobility).

3.2.1.4. Very poor people

108. Very poor people are a category of vulnerable victims requiring specific attention. The Group notes that the Council of Europe's Committee of Ministers has adopted Recommendation (93) 1 on effective access to the law and to justice for the very poor, understood to mean "persons who are particularly deprived, marginalised or excluded from society both in economic and in social and cultural terms".
109. The Group underlines the importance of this recommendation concerning the specific problems faced by the very poor with regard to the principles developed by the Court on procedural rights, more specifically the right to free legal aid and access to a competent court in order to effectively exercise their rights.
110. Other specific measures should be considered since such vulnerable victims often fear judicial authorities and law-enforcement agencies. The role of the non-governmental sector is crucial in providing information on their rights and assistance in exercising those rights. A pro-active approach by the police is also to be encouraged in the field of assistance to those deprived, marginalised or excluded persons.

3.2.1.5. Victims living in institutions

111. In the light of the number of cases of abuse of victims by their caretakers, the Group wishes to raise the awareness on this emerging problem which is often left aside, in particular concerning elderly people, and insists on the necessary training of professionals.
112. The Group notes, for instance, the benefits of codes of conduct in raising awareness among professionals dealing with elderly people (example of the "codes of conduct and practice for social care workers" distributed in England and Wales and aimed at informing social care workers of the level of standards of conduct which is expected from them in relation to the people they are taking care of).
113. The Group supports the setting-up of "visiting committees" or the involvement of voluntary visitors in residential institutions accommodating persons, whatever their age and personal characteristics are.

114. Such volunteers should be authorised to visit those institutions, spend time with the persons in care and have the means of reporting any irregularity in the care provided.

3.2.2. Victims who are vulnerable by virtue of the circumstances of the crime

115. Depending on the circumstances of the crime, victims' vulnerability can vary and the Group wishes to address the specific needs of victims, primarily women, of sexual crimes, crimes of trafficking in human beings, stalking and harassment.

3.2.2.1. Victims of sexual crimes

116. In the case of victims of sexual crimes, the Group wished to underline the particular emotional vulnerability of this specific category of victim, who should be granted longer periods to report the crime and seek compensation.
117. Concerning the case of child victims of sexual crimes, the Group states that such specific circumstances should be taken into consideration in the statutes of limitations, as it is recognised that many child victims of sexual crimes are unable to report such crimes before the age of majority.
118. In the case of sexual crimes, a number of specific measures can be taken to protect the victim from the offender, and to prevent the offender from re-offending, such as residency restrictions or registration policies.
119. The Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse contains a provision for the recording and storing of national data on convicted sexual offenders (Article 37).

3.2.2.2. Victims of trafficking in human beings

120. The Group wishes to underline the particular vulnerability of certain categories of persons, such as migrants and asylum seekers, who are furthermore exposed to trafficking and are easy targets for the traffickers, in particular non-accompanied minors.
121. Special protection measures should be accorded to victims of trafficking in human beings who are children; and unaccompanied children should be represented by legal guardians, organisations or authorities which shall act in the best interests of the victim.
122. The Group calls for further ratification of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS 197), which entered into force on 1 February 2008, and is aimed at designing a comprehensive framework for the protection and assistance of victims. Its Chapter III, which deals extensively with "measures to protect and promote the rights of victims, guaranteeing gender equality", covers a

variety of issues such as the problem of identification of victims, the protection of private life and identity of victims, the type of assistance required, the provision of information on relevant judicial and administrative proceedings, the right to compensation, the principle of prohibition of the deportation of a victim who has reported a crime of trafficking in human beings, or the deportation of a person who is considered to be a victim.

123. The child-sensitive orientation of this convention is also to be underlined.

124. The Group pinpoints as a good practice the recent extensive programme established in Bulgaria with respect to special remedies and special protection for victims of trafficking in human beings, which provides for a number of services and forms of support mentioned in the convention. The Group notes the existence of a specialised system which provides shelters for temporary accommodation and protection centres for victims (law on combating trafficking in human beings, 2003) and is more specifically dedicated at women and children (in conjunction with the law on the protection of children and related institutions) who are placed in protected places, who have to receive education and for whom actions are to be undertaken to find their families.

3.2.2.3. Victims of stalking and harassment

125. The Group also addressed the specific needs of victims of stalking and harassment perpetrated on various grounds, such as harassment linked to discrimination on the basis of race, colour, religion, ethnicity, national origin, disability, gender, age, sexual orientation, or homelessness.

126. Such crimes, which are characterised by their repetitive and extended nature, are committed against persons, property or society and are motivated by the offender's bias against a specific characteristic such as the ones previously mentioned.

127. The "anti-social behaviour orders" (asbos) used in the United Kingdom and in Ireland are preliminary civil injunctions particularly used for such types of crime, as a means of protecting the victim (who does not have to appear in court and may simply supply witness statements) and reducing the weight of evidence involved since there are lighter requirements of evidence than in the usual criminal procedure.

128. The Group underlines that this accelerated procedure, however, raises concern, since although "asbos" are imposed under civil law, a breach of any of the conditions of an asbo is a serious criminal offence, entailing custodial sentences (while the proof which has been obtained in the civil procedure does not satisfy the requirements of the criminal procedure).

129. The Group notes that research and practical experience in the Netherlands has shown that a determining factor for the adequate handling of those cases is the prioritisation efforts of the police in intervening to avoid escalation of victimisation.

3.2.3. Victims who are vulnerable by virtue of their relationship with the offender

130. This type of vulnerability mainly concerns victims of domestic abuse and partnership violence.
131. In the specific case of women who are victims, the Group recalls the provisions of Recommendation (2002) 5 of the Committee of Ministers on the protection of women against violence, which deal extensively with violence perpetrated against women and comprise a specific section on additional measures with regard to violence within the family.
132. The Group also wishes to underline that the European Committee of Social Rights has examined the issue of domestic violence under Article 16 of the European Social Charter (ETS 163), and in the light of the principles laid down in Recommendation (2002) 5, stating that this article requires states to offer protection to women from domestic violence, both in law and in practice.
133. Protection in law entails ensuring that appropriate measures can be taken such as restraining orders, fair compensation for pecuniary and non-pecuniary damage and the possibility for victims to take their cases to court.
134. Protection in practice entails recording and analysing reliable data, training of professionals dealing with victims, and availability of services to reduce the risk of violence and rehabilitate victims.[2]
135. The Group notes from the replies received that states have been giving a lot of attention to this specific issue and will thus underline a large number of examples of good practice.
136. The comprehensive approach adopted by several states (Germany, Ireland "the former Yugoslav Republic of Macedonia") has been identified as a good practice, as well as the English "Multi-Agency Risk Assessment Conference" (MARAC) involving key agencies such as police, probation, education, health, housing, voluntary sector to comprehensively liaise on a case and share information.
137. The Group calls attention to a good practice involving physical protection existing in Austria (based on the Protection Against Domestic Violence Act) where the police can intervene directly at a scene where violence, or

2. Committee, Conclusions 2006, comments on Article 16.

the threat of violence, takes place and decide, without the consent of the victim, to evict the violent person from the home and its immediate surroundings and to bar that person from re-entering it (even if that person is the owner of the house). This measure will last for up to ten days and may afterwards be extended by the family court, when applied for by the victim. The victim will meanwhile receive the assistance of an intervention centre ("Interventionsstellen") of the non-governmental sector which, further to the fruitful co-operation established, has been contacted by the police.

138. The possibility given in a number of jurisdictions (Belgium, England and Wales, Netherlands) to obtain a simplified remedy of civil code injunction in case of domestic violence, as an emergency measure, has also been considered by the Group as being a good practice.

139. In France, the possibility of evicting the violent person from a house is, depending on the procedures, within the competence of prosecutors or judges seized by the prosecutors. In order to facilitate the concrete implementation of such decisions, some prosecutors have concluded accommodation agreements with accommodation centres and associations in order to ensure that the evicted person will have a place to stay.

140. Furthermore, the proactive approach adopted concerning domestic abuse and partnership violence led French prosecutors to ask for a systematic transmission of the registers kept by the police ("mains courantes") in order to detect cases of domestic violence for which the victim has not formed an official complaint. The prosecutor can decide to press charges, initiate an investigation and can refer the victim to support services.

141. In Norway, a number of protective measures are used to protect victims of violence exposed to further threats, such as the nationwide system of mobile violence alarms (1 700 alarms operating throughout the country in 2007, not restricted to victims of domestic violence). The 2004-2007 Action Plan to combat domestic violence reinforced the forms of treatment provided to women victims exposed to violence and sexual abuse and the existing nationwide shelters.

142. Portugal's Support Centres for victims of domestic violence are yet another example of specialised assistance. An interesting feature of the work of these centres is the possibility that female victims of domestic violence have of receiving vocational training (a similar provision exists for juveniles at risk, who can receive psychological and pedagogical assistance to promote their autonomy and their capacity to enter vocational and professional training).

3.2.4. Victims who are vulnerable by virtue of intimidation

143. Intimidation can occur in different contexts: victims and witnesses can be threatened or intimidated by defendants who hope to stop them giving evidence, victims of particularly violent offenders may feel intimidated whether or not they have been threatened, victims who are detained persons or prisoners, suffering various forms of maltreatment, harassment, violence or sexual abuse may fear to raise their voice because of their specific situation.
144. The Group reaffirms that vulnerable victims who furthermore suffer intimidation should be able to ask for help and assistance without having to necessarily involve the criminal justice system.
145. Victims may also be particularly vulnerable when they become witnesses and the Group wishes to recall the importance of providing additional civil remedies and protection to witnesses, where the fact of giving evidence is putting them in further danger.
146. Protective measures should be used before and after the judicial proceedings, as for instance the possibility of restricting the disclosure of the identity of the parties, which should not be given by the press in the case of young victims, victims of trafficking in human beings or victims of sexual crimes.
147. The example of the United Kingdom gives a wide picture of the possible measures – which should be applied to civil proceedings – such as screens in the courtrooms, exclusion of the public, use of audiovisual devices, use of intermediaries, etc.

Chapter 4. Victims of terrorism

148. The compensation of victims of terrorism was specifically outlined in the terms of reference of the Group as the latter was asked, further to the "progress report of the Committee of Experts on Terrorism (CODEXTER) on future priority areas for the work of the Council of Europe in the field of the fight against terrorism", to "analyse the specific situation of victims of terrorism offences with respect to compensation for damage sustained and identify good practices as regards the functioning of private and public insurance and compensation mechanisms for victims of terrorism".

149. The Group took note of the existing Council of Europe instruments concerning victims of terrorism, and more particularly the Council of Europe Convention on the Prevention of Terrorism (CETS 196), which is aimed at enhancing the efforts of State Parties in preventing terrorism and its negative effects on the full enjoyment of human rights.

150. Its Article 13 on the "Protection, compensation and support for victims of terrorism", which is the first internationally binding provision on compensation of victims of terrorism, requires State Parties to "adopt such measures as may be necessary to protect and support the victims of terrorism that has been committed within its own territory. These measures may include, through the appropriate national schemes and subject to domestic legislation, *inter alia*, financial assistance and compensation for victims of terrorism and their close family members."

151. The Group also took note of the Guidelines on human rights and the fight against terrorism (adopted by the Committee of Ministers on 11 July 2002), and the Guidelines on the protection of the victims of terrorist acts (adopted by the Committee of Ministers on 2 March 2005), as well as the relevant provisions of Recommendation (2006) 8 on assistance to crime victims.[1]

152. The reports, previously mentioned, prepared by Mr Bernhard A. Koch, also constituted a crucial source of information for the Group (see Appendix II, page 68).

1. In particular, Paragraph 9.3 of the Recommendation: "States are encouraged to promote the principle that insurance policies do not exclude damages caused by acts of terrorism unless other applicable provisions exist."

4.1. General considerations

153. In the opinion of the Group, the essential needs of victims of terrorism do not significantly differ from the needs of other victims of crimes: whether they are personally injured or whether their property is damaged, the result is the same irrespective of the motivation of criminals for their harmful conduct. This is in line with the information provided in the explanatory memorandum of Recommendation (2006) 8, which mentions that "the Committee was of the opinion that the needs of victims of terrorism were essentially the same of those of victims of other crimes".

154. There are nevertheless some aspects which deserve special attention:
- Terrorist attacks may harm more individuals in a single incident and cause massive losses, which leads to specific problems of handling and resolving claims for compensation. This applies equally to other crimes, however, which leave a larger number of victims injured or cause substantial damage. Special solutions developed to handle losses caused by terrorism may therefore be used as a model for addressing such other large-scale crimes. It is to be noted, however, that not all acts of terrorism fall into that category, but very often affect only single victims and/or cause merely limited material damage just as crimes with other motivations.[2]
- The specific intention behind a terrorist attack may leave victims in a peculiar situation that could be addressed by certain non-pecuniary measures such as memorials or other rehabilitation tools which may help to deal with the event and its causes. This will be addressed specifically below.[3]

4.2. Overview of existing regimes

155. The replies to the questionnaire show that the majority of member states have not yet developed any special regime designed for victims of terrorism specifically. This may be based upon a deliberate choice not to act, either because states decide that their general crime victim compensation regime should apply, or because they deny a specific need for any special solution due to lack of exposure to this risk in the past.

156. In those countries that have already provided specifically for victims of terrorism, the principle of solidarity towards victims and the specific role of the state with regard to such victims are often referred to. Generally speak-

2. See Europol (ed.), *EU Terrorism Situation and Trend Report 2007*, 17: "Altogether 498 terrorist attacks were committed in the EU in 2006. The vast majority of them resulted in limited material damage and were not intended to kill."

3. See *infra* Chapter 7 on the rehabilitation from crime suffered, paragraphs 257-258, page 50.

ing, any special solution developed by a state can be linked to its social and political culture as well as to its history and experience with terrorism.

157. Among the existing schemes of compensation, some are primarily financed by the state (such as in Moldova, Monaco, "the former Yugoslav Republic of Macedonia" or Ukraine); others are marked by a partnership between the state and the insurance industry; still others have developed primarily in the insurance world. Some examples of good practices can be noted:

- In France, for personal injuries, a state fund for victims of terrorism and other serious crimes (FGTI – *Fonds de garantie des victimes d'actes de terrorisme et d'autres infractions*) has existed for more than twenty years. Optional insurance products also exist (*garantie des accidents de la vie*), offering a very affordable way for individuals to take out further cover on the market. In respect of damages to property, insurers have been obliged to include terrorism risks in all property insurance contracts, but in turn the state has pledged to absorb all losses exceeding a certain threshold. The insurance industry has consequently created a pool with accumulated capacities for large commercial property and business interruption losses, and a variant thereof has been added recently for smaller risks. This pool "GAREAT" operates in several layers, and the state guarantees to intervene for losses exceeding the pool's overall capacity (2.2 billion euros in 2007).
- In Spain, a very wide cover (personal injury and damages to property) is provided to victims by a multi-layer compensation system – a general crime victim compensation scheme, a scheme specifically designed for victims of terrorism and for damages to property, as well as an insurance-based model initiated by the state. One of the state layers deserves special mention, as it provides for advance payments of what the terrorists would owe the victims under tort law (whose claims are thereby subrogated to the state).
- In Great Britain, the Criminal Injuries Compensation Authority (CICA) handles claims for compensation by direct or indirect victims of all violent crimes in England, Scotland and Wales. A comparable regime for personal injuries applies in Northern Ireland, where a specific state compensation scheme for property losses caused (*inter alia*) by terrorist acts was introduced in addition. Apart from these direct state regimes, a special reinsurance company ("Pool Re") was founded to cover terrorism risks on commercial property and business interruption insurance. Pool Re is itself reinsured with the state for all losses exceeding its capacity, so effectively the state acts as a reinsurer of last resort with (theoretically) no upper limit.
- In the Netherlands, personal injuries are covered by the general state-funded "criminal injuries compensation fund" (Schadefonds Geweldsmis-

drijven). With (limited) support by the state, the insurance industry furthermore has set up a special reinsurer for terrorism risks affecting private and commercial insurances (NHT). Its annual exposure is limited to €1 billion per event, and there is an annual indemnity limit of €75 million per policyholder and location.

4.3. Specific problems with respect to certain types of losses

158. As the Group noted, special compensation schemes for victims of terrorism have often been designed with an eye to including losses arising from damage to property or from business interruption, whereas the general compensation schemes tend in most countries to focus only on personal injury.

159. Concerning personal injury, in many European jurisdictions social security schemes and insurance companies already play an important role in the compensation of basic needs. On the contrary, the risk of damage to property triggered by terrorist acts, in particular its extent, appears to be more problematic to assess for insurers. This may be an argument for the state to intervene in order to stimulate or even enable insurers to provide adequate products on the market that cover such risks. This has been done in several countries, in some even in the form of an unlimited state guarantee (as the above-mentioned French or British example shows).

160. Where compulsory property insurance already covers large-scale risks and natural catastrophes it may be a logical next step to extend the cover to damages stemming from terrorist attacks. Including the risk of terrorism in such policies may, however, require support by the state, as witnessed in countries such as France or the United Kingdom.

4.4. Possible schemes

161. Taking into consideration the diverse cultures, histories, legal systems and national budgetary situations of the European states, but also differences in the insurance markets, the Group will resist recommending any specific scheme as a model preferable for all countries alike. The Group only wishes to underline that a "mechanism allowing for a fair and appropriate compensation, after a simple procedure and a reasonable time" should be available and easily accessible to victims, as stated in the Guidelines on the protection of victims of terrorist acts. Instead of following a universal model, it may be better to tailor such mechanisms to the situation in and the needs of each country.

162. If, therefore, a state should decide to design a specific compensation mechanism, it should be compatible with existing schemes, particularly in order to avoid inequalities among victims. Any *ad hoc* setting-up of mechanisms as a reaction to particular events should be avoided in so far as possible. This shall not prevent states from leaving large-scale events outside the scope of their *ex ante* planning, as it may prove to be impossible or undesirable in light of the State's situation to take care of all imaginable scenarios for the future. In the Netherlands, for example, apart from the abovementioned state participation in an insurance pool system, an *ad hoc* intervention of the government is already foreseen for insurance policies which cannot be brought under the new regime: should a large-scale loss scenario occur in the future, the state can order insurers to limit payouts on such policies in order to achieve equality and fairness under the circumstances.

163. When addressing the question of compensation, the problem of defining terrorism will inevitably arise, drawing limits to the intervention itself. States should be encouraged to strive for a harmonisation of terminology, at least within its national boundaries, so that for example definitions used by the insurance industry match the wording used by any applicable state regime in order to avoid any undesirable overlaps or gaps.

164. Furthermore, in the light of the fact that terrorist acts may often affect more than one country, the Group notes the need to define the territorial scope of compensation. Attention should be paid to the Guidelines on protection of victims of terrorist acts which state that compensation should be provided for victims of terrorism, irrespective of their nationality, by "the state on the territory of which the terrorist act happened". This shall not preclude states from offering cover to its citizens for damage sustained abroad, however, as is already being done in many countries.

165. Where specific regimes for victims of terrorism have already been set up, the Group wishes to underline the possible benefits of such schemes within that jurisdiction, such as the transparency and simplicity of the mechanism, the increased speed of procedures and fast payments. The Group can therefore well imagine that the added value of those schemes and the related benefits for victims of terrorism may be extended to victims of other crimes as well. The same attention should be given to all victims, thus mainstreaming the benefits available. The Group encourages states to take a proactive approach in assessing whether such mechanisms should include all victims rather than only a limited group.

4.5. Interaction of state and insurance industry

166. The Group underlines the importance of the role of the state with respect to indemnifying victims of terrorism, not only as a fund provider but moreover as a key partner and regulator of the insurance market (in particular for damages to property). Dialogue and exchanges between insurance companies and the state should be promoted, and the states should encourage insurance companies to join forces to absorb the potential risks.
167. The state should adopt a proactive approach in designing schemes, taking due account of the insurance market's potential, but also its needs. It is conceivable that state measures are designed only as temporary solutions aimed at aiding the insurance industry to develop and to establish suitable products which after a certain introductory period can be offered on the market without further state participation.
168. In order to enable a productive interaction of private and public schemes, the states should pay particular attention to the insurability criteria,[4] since the feasibility of insurance schemes depends on their adequate assessment, and this in turn may affect the need and extent of any state involvement.

4. For further details, see the OECD study Terrorism risk insurance in OECD countries (2005).

Chapter 5. Reduction of the risk of secondary victimisation

169. Paragraph 3.3 of Recommendation (2006) 8 on assistance to crime victims states that "victims should be protected as far as possible from secondary victimisation", which is "when victimisation occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim".
170. The Group, acknowledging the possible negative impact that the response of institutions and individuals to victims can have, which in a number of cases can exacerbate the effect of the crime and thus lead to secondary victimisation, noted that a number of procedural guarantees and other measures could be taken with a view to avoiding and preventing such situations.
171. Victims should on the one hand be protected from the offender and on the other hand be protected in their dealings with the institutions.

5.1. Procedural guarantees

172. In the Group's opinion, a number of criminal procedural guarantees could be transferred to the civil proceedings with a view to protecting the victim and avoiding secondary victimisation.
173. Protection status should not be linked to the type of proceedings – and thus limited to criminal procedure – but to the person concerned, i.e. the victim, and a number of factors should lead to the recognition and protection of victims in civil proceedings, as for instance the specifically sensitive nature of the case and the fact that there has already been a criminal conviction.
174. The importance of holding a criminal trial is linked to the fact that the case will have been proved and that the victim will consequently be recognised as such, and can claim compensation for the damage suffered.
175. Parties to a civil action, or their representatives, should be allowed to apply for procedural guarantees.
176. Such procedural guarantees aim in some cases at avoiding repeated exposure to the offender and confrontation (measures such as videotaped interrogation, separate waiting rooms and avoiding repeated interrogation), or for instance at obtaining appropriate privacy provisions.
177. Such procedural guarantees, which constitute an essential element of the assistance to be provided to victims, are to be distinguished from preven-

tive protection measures, like for instance CCTV alarms or other civil injunctions previously mentioned.

178. The Group underlines that a number of measures contribute to the reduction of the risk of secondary victimisation, such as the use of accelerated procedures to award compensation or friendly settlements.

5.2. Training for personnel in civil and administrative justice

179. The risk of secondary victimisation can also be reduced through measures linked to the training of a variety of stakeholders, as largely developed in Recommendation (2006) 8 on assistance to crime victims, which covers in its Section 12 the question of the training of personnel.

180. The recommendation states that "relevant staff" in a wide range of public services "should be trained to a level which is appropriate to their contact with victims". While it is recognised that the term "victim" may be more relevant to criminal justice proceedings, many personnel involved in the operation of civil and administrative justice regularly come into contact with people who have been victimised, often by other parties involved in the cases under consideration.

181. Examples include judges and other court personnel in domestic courts including child protection, courts dealing with restitution claims, those involved in the administration of public compensation schemes and in the provision of legal aid. Police officers and their administrative staff are also likely to come into contact with people who have been victimised, even when they are dealing with non-criminal issues.

182. Clearly, the attitudes and behaviour of these public officials are likely to impact upon victims in ways which could either contribute to or impede their recovery. Personnel dealing with domestic settlements or child protection need to be aware that the unbalance of power in a violent relationship and the fear of retaliation are likely to affect the way in which a victim is able to give evidence or respond in interviews. Those dealing with compensation should recognise the longer term effects of crime and the likely impact on future employment.

183. All those who come into contact with victims should be aware of the risks of causing secondary victimisation which can exacerbate the primary effects of a crime. This might include unintentionally insensitive comments, the use of inappropriate language, expecting the two parties to use the same waiting areas, etc.

184. While it may not be possible to provide specific services in the context of civil or administrative procedures, all staff should be aware of the services

which exist for victims in their local communities and be prepared to offer information and referral as appropriate.

185. It is suggested therefore that paragraph 12.5 of Recommendation (2006) 8 should apply equally to personnel responsible for civil and administrative justice:

186. "Such personnel should be trained to a level which is appropriate to their contact with victims. Training should include, as a minimum:

- general awareness of the effects of crime on a victim's attitudes and behaviour, including verbal behaviour;
- the risk of causing secondary victimisation and the skills required to minimise this risk;
- the availability of services providing information and support specific to the needs of victims and the means of accessing these services."

187. An example of good practice can be found in the Coroners' Courts of England and Wales, where the Coroner's Officer provides information and assistance to bereaved relatives before and during the proceedings.

188. The Group recalls the decision taken by the Ministers of Justice to "promote measures at a national and international level to improve assistance to victims and their protection from repeat and secondary victimisation as well as to ensure, as far as possible, their psychological, social and physical rehabilitation as well as adequate compensation for damage suffered".[1]

189. The European Forum for Victim Services in its policy document entitled "The social rights of victims of crime" also points out that the staff of public services and other agencies which come into contact with victims of crime should receive appropriate training, designed in co-operation with victim support services, in order to be able to give victims full information about what their rights are and how to obtain them and to recognise the psychological stresses experienced by victims and their families, as well as to assist them with any practical problems they encounter.[2]

190. The EU Framework Decision of 2001 states in its paragraph 11 that "suitable and adequate training should be given to persons coming into contact with victims, as this is essential both for victims and for achieving the purposes of proceedings."

191. "Through its public services or by funding victim support organisations, each member state shall encourage initiatives enabling personnel involved in proceedings or otherwise in contact with victims to receive suitable

1. Paragraph 19 of Resolution No. 1, entitled "Victims: place, rights and assistance", adopted in Yerevan during the 27th Conference of European Ministers of Justice, 12-13 October 2006.
2. Paragraph 2.a. page 4.

training with particular reference to the needs of the most vulnerable groups" applying "in particular to police officers and legal practitioners" (Article 14).

192. Traditional training programmes deal with "victims' issues" in general and the Group wishes to raise awareness of the need to go one step further than this classic approach and focus on the kind of knowledge which is needed from specific categories of personnel, such as medical officers, educators, employers, etc.

193. Furthermore, should such training programmes not be mandatory for those persons, all possible means to ensure that awareness of the necessity to undertake such training should be taken.

194. Educational staff, social workers and employers should be made aware of the issues concerning secondary victimisation and more specifically of the possible consequences of their own attitudes on a victim.

195. The Group reaffirms the importance of training of professionals dealing with victims, such as medical officers (e.g. health practitioners, emergency services of hospitals), who should for instance be trained to recognise and identify the after-effects of criminal acts (domestic violence, sexual abuse, etc.). A national programme for the healthcare sector regarding the care of victims of sexual crimes could be designed.

196. The question of the training of police officers, considered by the Group as non-specific remedy agents who have a large role in the community – outside the criminal sphere – is also to be addressed since police officers are often in the front line and their behaviour towards victims is a key element of the assistance to victims. (In France, police officers can register compensation claims thus avoiding the need for the victim to go to court.)

197. The Group suggests that there is a need for heightened awareness in psychology, human need and motivation, as well as victimisation, in particular for those dealing with civil remedies and family proceedings.

198. Notwithstanding the fact that it could be perceived as prejudging the case, the Group considers that there is a need for training of civil judges in the field of victims' needs.

199. The Group recommends that guidelines on training of professionals dealing with victims outside of the criminal justice system be developed.

200. The Group notes that several countries, including Sweden (which links training to research), have reported on training programmes for professionals in the criminal justice field and the Group recommends the extension to the civil justice staff of such training programmes.

5.3. Supervision of staff

201. The problem of secondary victimisation is also an issue in the field of supervision of staff, and the Group underlines the responsibility of managers in identifying secondary victimisation caused by their staff.
202. Managers should take the appropriate measures to ensure that this will not happen again. This specific point could be raised during training followed by the managers concerned.

5.4. Monitoring of complaints and media victimisation

203. The Group also notes that where complaint mechanisms have been established, the monitoring of such complaints is an essential mechanism contributing to the reduction of the risk of secondary victimisation since it enables identification of the causes of secondary victimisation, and consequently correction of the problem.
204. Secondary victimisation occurs not only directly but also indirectly (one step further), for example in the reporting of a case by the media. The Group appreciates the need for sensitive media reporting of civil cases and calls for guidelines or codes of conduct to be prepared where such documents do not exist. The Group notes, however, that in respect of victims of terrorism, raising awareness among the general public on the damage they have suffered may contribute to combating radicalisation since the fact of exposing the tragic human consequences of terrorist acts may prevent potential terrorists from executing such acts.[3]

3. See Recommendation (2003) 13 of the Committee of Ministers on the provision of information through the media in relation to criminal proceedings.

Chapter 6. Compensatory remedies

205. Pecuniary redress for the harm suffered can be sought from the offender who is liable (restitution), from private insurance companies, social schemes and/or from state-funded compensation: this chain of intervention can in some cases be terribly complex for victims.

206. The Group recommends that states that have not done so sign and/or ratify the European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116).

207. At the European Union level, Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims which applies between all member states of the European Union compels member states to ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.

208. This directive furthermore sets up a system of co-operation to facilitate access to compensation to victims of crimes in cross-border situations.

6.1. Subsidiarity of state compensation

209. The European Convention on the Compensation of Victims of Violent Crimes establishes a subsidiary obligation for the state to compensate – "when compensation is not fully available from other sources – […] those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence and the dependants of persons who have died as a result of such crime".

210. The Group wishes to underline the above mentioned principle of subsidiarity of state compensation, also recalled in Recommendation (2006) 8,[1] which illustrates the necessary comprehensive approach of compensation in full but not exceeding, thus avoiding duplication.

211. It was underlined that dialogue between the state and insurance companies in respect of compensation issues and liability should be encouraged,

1. Article 8.9: state compensation should be awarded to the extent that the damage is not covered by other sources such as the offender, insurance or state-funded health and social provisions.

and transparency and co-ordination amongst the multiplicity of stakeholders be sought.

212. An example of good practice in this field is the clear and transparent functioning of the system in Sweden, where the lines of intervention of the state compensation, perpetrator restitution and insurance payments are very clear.

6.2. Beneficiaries

213. Recommendation (2006) 8 on assistance to crime victims calls in its Section 8 upon states to provide compensation for "victims of serious, intentional, violent crimes, including sexual violence and the immediate family and dependants of victims who have died as a result of such crime."

214. The Group recommends that states adopt a broader approach, extending the notion of beneficiary to non-economic dependants and thus consider the emotional link, encompassing persons particularly close to the victim, for example close family members, who suffered from the crime.

215. The Group also raised the question of the indirect loss caused to someone assisting the victim.

6.3. Underpinning principles

216. A majority of compensation schemes are based on the principle of social solidarity.

217. The Group notes that compensation schemes described in the member states' replies to the questionnaire are state-funded schemes. It recommends that the funding of these schemes should be adequate, stable and reliable as well as accessible irrespective of the source of funding.

218. In this respect, the Czech approach to compensation is particularly interesting as it is aimed at overcoming the impaired social situation, and not aimed at compensating the damage, as this duty lies with the perpetrator.

219. Such schemes are generally funded by a proportion of the fines collected, as through the state's ordinary budgetary means. It can also be financed through the confiscation of assets of crimes, or as in France, through a tax imposed on insurance contracts. In respect of the funding, the principle should be that the compensation scheme be funded from the state budget first, and be supplemented by other sources.

6.4. Types of crime

220. Crimes leading to a possible intervention of state compensation are generally intentional crimes, of serious degree and against the person.
221. The European Convention on the Compensation of Victims of Violent Crimes places upon states that become a Party to it the obligation to compensate the victims of intentional and violent offences resulting in bodily injury or death.
222. Recommendation (2006) 8 on assistance to crime victims goes further in mentioning the possibility for states to consider[2] the compensation of damages resulting from crimes against property, not systematically covered in European jurisdictions.
223. In a number of states, specific crimes are mentioned such as sexual crimes and crimes in trafficking of human beings.
224. The Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), in its Article 15 on compensation and legal redress, states that "each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims".
225. Concerning the intentional nature of the crime, a number of exceptions have to be underlined: for instance in France, Estonia, and Switzerland, where specific compensation mechanisms apply to certain crimes committed through negligence (the case of road accidents caused unintentionally, for instance).

6.5. Types of damages covered

226. Recommendation (2006) 8 on assistance to crime victims refers to the types of damages traditionally covered by national schemes, either through the compensation mechanisms, private insurance companies or social schemes. Such mechanisms foresee compensation for the cost of treatment and rehabilitation for physical and psychological injuries, compensation for special damages such as loss of income, funeral expenses and loss of maintenance for dependants.
227. It furthermore invites states to "consider compensation for pain and suffering", which clearly is of particular relevance for a number of victims who

2. Article 8.8 of the appendix to the recommendation: "States may consider means to compensate damage resulting from crimes against property".

have not suffered any material injury but moral harm, such as victims of sexual crimes.

228. The Group notes that apart from the compensation for pain and suffering, the Swedish system expressly and independently covers serious violation of the victims "personal integrity" ("kränkning" sometimes referred to as "moral damage"), *inter alia* taking into consideration the humiliating nature of the crime, whether it was intended to cause serious fear for life or if it was directed towards a person with particular difficulties in protecting his or her personal integrity, if it involved abuse of dependence or trust or if the act was intended to cause public attention. A child who witnessed a crime without being considered as a victim *stricto sensu* will thus be entitled to compensation if this crime harmed the safety, confidence or trust of the child.

229. Concerning compensation of children, the Group furthermore wishes to address the question of the management of compensation awarded to children and recommends that specific regulations aiming at "freezing" the compensation amounts in trusts, which would become available when the child reaches the age of the majority, be taken at national level.

6.6. Scope of compensation

230. The Group notes the possibility of designing compensation schemes or commissions aimed at specific damages, such as the French example of a compensation fund for victims of asbestos, or the Swedish compensation scheme for victims of forced sterilisation. (A large number of people – about 63 000 – were sterilised in Sweden before 1976, under the authority of the sterilisations laws in force at the time. In 1999 an act on compensation from the state came into force, and claims are now handled at a special council.)

231. Concerning damages resulting from activities dangerous to the environment, the European Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS No. 150, opened to signature in 1993 and unfortunately not yet in force) contains a specific provision based on the 1992 "Rio Declaration on Environment and Development", according to which "states shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage". The Convention promoted the adoption of further measures to deal with grave and imminent threats of damage from intentional criminal acts.

6.7. Contributing factor: the behaviour of the victim

232. The impact of the behaviour of the victim should also be mentioned as it is a generally admitted principle that the eligibility to or level of compensation can be reviewed depending on the circumstances of the case.
233. As laid down in Article 8.1 of the European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116), "compensation may be reduced or refused on account of the victim's or the applicant's conduct before, during or after the crime, or in relation to the injury or death".

6.8. Procedural requirements

234. The Group noticed through the replies received to the questionnaire that a number of national schemes impose strict procedural requirements for eligibility to compensation.
235. Such requirements can be excessive when they affect the victim's access to the remedy, and member states should thus examine and assess their schemes in order to ensure that compensation mechanisms be as accessible as possible.
236. In a number of member states for instance, there are compulsory linkages between the criminal procedure and the state compensation mechanisms, and victims have to prove that they tried in vain to obtain restitution.
237. The Group underlines that compensation should be made available on the mere basis of the demonstration of the materiality of the offence and should in no circumstances be subject to the identification of the offender or, even worse, the conviction of the offender.
238. Another procedural requirement which can prevent the victim from receiving compensation is the time-limit applied for the registration of the compensation claim. The Group invites member states to establish longer time-periods for the application in the case of specific types of crime which are of a particularly emotional nature, such as sexual crimes, domestic violence or hate crimes.
239. The Group expresses concern as to the negative impact of the procedural requirements, which increasingly lead to the rejection of the compensation claim. This problem should be addressed and means of reducing rejection rates in each jurisdiction – essentially by simplifying the procedures and ensuring proper information of the victims – sought.
240. In this respect, the Group underlines the following examples of good practices:
    - in the Netherlands, the compensation claim can be prepared by victims' support services which keep the victim informed of the procedure;

- in Sweden, compensation can be requested using a simple form without the assistance of a lawyer and, as in France and Finland too, a simple notification made to the police initiates the compensation mechanism.

6.9. State compensation and subrogation mechanisms

241. The Group would like to highlight the French example of the "commissions for the compensation of victims of crime" (*Commissions d'indemnisation des victimes d'infractions – CIVI*), which are entrusted with the task of granting compensation to victims of crime who have suffered personal injury. The compensation mechanism is fully autonomous as it is based on the proof of the materiality of the offence and functions notwithstanding any criminal proceedings or any identification of the perpetrator. The compensation granted by the CIVI is paid to the victim by the "guarantee fund for victims of terrorism or victims of other crimes" (*Fonds de garantie des victimes d'actes de terrorisme ou d'autres infractions – FGTI*), which is financed from insurance premiums, and is subrogated in the victim's rights (it will thus be entitled to obtain reimbursement of the compensation paid from the perpetrator or anyone liable for the damage).
242. Such procedures of rapid payment of compensation by the state exist in a number of jurisdictions, as for instance in Austria and Spain (where the subrogation mechanism functions in cases of terrorism only).
243. The Group strongly recommends that a procedure aiming at enabling the rapid payment of state compensation to the victim be put in place, the state scheme being subsequently subrogated in the victims' rights.

Chapter 7. Rehabilitation from crime suffered

244. The Group acknowledged the breadth of the scope of rehabilitation, which can encompass any service provided to victims, from legal to social services, passing by mental and physical care.
245. Section 3 of Recommendation (2006) 8 on assistance to crime victims illustrates the variety of measures and aspects of the rehabilitation of victims, be it in the community, at home or in the workplace.

7.1. A wide variety of needs

246. Victims should be provided with assistance in the field of medical care, material support and psychological health services as well as social care and counselling. The specific needs of women and men must be recognised in this regard.
247. In order to provide this wide array of measures, states should ensure that general victims' services are established and function at a nationwide level. The key is to have a strong generalist victims' service, acting as a focal point for the variety of measures to be provided. Some jurisdictions have well-established generalist services, as for instance in France, the Netherlands and the United Kingdom, and there are emerging ones in Belgium, the Czech Republic and Estonia where recent developments have been witnessed.
248. Specific victims' services focusing on the particular vulnerability of victims of specific crimes should also be provided and linked with general victims' services.
249. Victims' needs vary over time and services provided to them should be tailored to those immediate, medium-term and long-term needs.
250. As clearly set out in the explanatory memorandum of Recommendation (2006) 8 on assistance to crime victims, "immediate assistance should consist of a preliminary medical assessment and first aid if needed, as well as general information on assistance available to victims". The French example of intervention of medico-psychological emergency units, or the German experience of trauma clinics set up in North Rhine-Westphalia to avoid or reduce the psychological trauma suffered by a victim through psychological and psychotherapeutic assistance, are illustrations of this immediate assistance.

251. In the medium term, a contact person able to understand and respond to the victim's emotional needs should be appointed in order to co-ordinate the range of services proposed, which could include educational, vocational and self-confidence training.
252. In the longer term perspective, services should remain available as long as needed.
253. Good practices underlined by the Group include the comprehensive and wide view of rehabilitation underpinning support services: in Estonia (victim support centres throughout the country, liaising with a network of local organisations offering assistance and services to victims, run by victim support co-ordinators who have all undergone systematic training); in Sweden (provision of assistance by local social services, police, support centres and specialised organisations); and in Norway (twelve counselling offices for victims of crime supplementing the public services and NGOs, as well as specialised services).
254. Portugal's Support Centres mentioned in paragraph 143, page 30, are yet another example of assistance orientated towards the rehabilitation of the victim.

7.2. The benefit of *ad hoc* measures

255. The Group underlines the benefit of various *ad hoc* measures, such as public acknowledgment of the crime, commemoration, memorial services or gardens, story-telling sessions, which can provide support and relief for victims and give them the opportunity to bring closure to the pain suffered, in particular for victims of particularly tragic events.
256. The importance of providing victims with types of assistance fully tailored to their needs can be seen, for instance, in the case of victims of terrorist acts, who require more than pecuniary compensation of the damage suffered.
257. Considering the particular nature of the crime, victims of terrorism could benefit from other forms of reparation such as receiving transparent and comprehensive information on the context and motives of the terrorist act.
258. Measures such as commemoration services, tributes, memorials or story-telling have proved to be of special importance for victims of terrorism in particular. The Irish example of the "Remembrance Commission" for victims of the conflict in Northern Ireland is a good illustration of this specific form of assistance that can be provided.
259. Concerning victims of gross and systematic violations of human rights, who should also benefit from tailored rehabilitative measures, the Group agreed that it was beyond its mandate to improve the entire set of stand-

ards developed in the United Nations' "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".[1]

260. In Ireland, victims of institutional abuse had the opportunity of explaining their personal situation and pain to a specialised tribunal, solely established to hear the grievances of the victims. Another *ad hoc* measure illustrating the need of a tailored response is the Irish state-funded scheme for the recovery of bodies of abducted persons.

261. The Group notes the celebration in European Union member states of 11 March as European Day for victims of terrorism and, in some countries, of 22 February as Victims' Day. Victims' Day was first recognised in Sweden on 22 February 1989. In the same year, a meeting of national victims' organisations in Europe agreed to form the European Forum for Victim Services (later to become "Victim Support Europe"), and to adopt 22 February as European Victims' Day. In Sweden, this date is important for everyone working in the field, from the authorities to NGOs which organise various events such as seminars, lectures and candle manifestations. Media awareness and interest in victims is increased and the relevant authorities use this opportunity to highlight recent victimological research, new legislation, initiatives and different projects aiming at improving the situation of crime victims. In the United Kingdom, the first Victims' Charter was published by the Home Office on 22 February 1990.

1. Adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005, also known as the "Van Boven and Bassiouni Principles".

Chapter 8. Organisations and persons, role of the authorities

8.1. Common trends to all systems

262. Recommendation (2006) 8 on assistance to crime victims invites states to "provide or promote dedicated services for the support of victims and encourage the work of non-governmental organisations [NGOs] in assisting victims" (paragraph 5.1). The role of the authorities in backing victim support services is crucial and should therefore not be neglected by the member states.
263. In this regard, the Group considers it important to underline the need for general services – which encompass all services at once and concern emotional, social and material support as well as provision of information – to operate at a nationwide level. Depending on the size of the country concerned, an approach promoting local development of services can also be needed and the "ideal model" will thus vary from a country to another.
264. The Group also supports the principle reflected in Recommendation (2006) 8 on the need to have both generalist support services and specialised centres in order to tackle adequately the needs of all victims.
265. Furthermore, whichever type of organisation is established, be it non-governmental, statutory, nationwide or local, the key principles are that the organisation be adequately funded and effective. Where funding problems occur and budgets are limited, priority should clearly be given to the provision of services to victims more than to any other action.
266. The Group underlines the importance of giving a dynamic to the system of support in order to ensure that services provided evolve with the victims' needs, for instance through the collection and processing of victims' feedback by satisfaction surveys or through the monitoring of victims' needs by the support services themselves.
267. Finally, the Group recalls the need for member states to "promote, support and, to the extent possible, fund or facilitate fund-raising for victimological research",[1] including international co-operation in the field of research and data collection.
268. A variety of systems of victim support exist throughout Europe, essentially following the statutory or non-governmental models, based on different

1. See section 17 of Recommendation (2006) 8 on assistance to crime victims.

histories, cultures, laws and starting-points, with slight differences in their legal and social structures.

269. The United Kingdom system is a non-governmental model, built on a strong tradition of networking.
270. The Swiss statutory model entrusts the local government (*cantons)* to provide at their level the needed support.
271. The Dutch system entrusts NGOs (which have a number of other responsibilities and missions) with the task of performing statutory functions on behalf of the state.
272. The Swedish statutory structure (Victim Compensation Agency) finances and promotes a variety of NGOs.
273. Regionalised systems relying on a national co-ordinating structure, working closely with local centres, exist in a number of countries, such as Bulgaria, Belgium and Norway, and also Estonia where, further to the Victim Support Act, the 25 trained "co-ordinators" are entrusted with the task of setting up the network of local offices throughout the country.

8.2. The particular role of NGOs and their relation with the state

274. The Group notes the important role of NGOs both in advocating on behalf of victims in the development of government policy and in providing services and assistance to victims.
275. Their independence and freedom of advocacy enables them to be more effective in influencing governments. The Group has noted that faster progress in the development of policies and services dedicated to victims has been witnessed where independent NGOs have been set up. Organisations representing victims and lobbying for victim policy decisions have been created in a number of jurisdictions and have proved to be a real asset for the development of victim services.
276. Where statutory services and non-governmental organisations co-exist, their co-ordination and co-operation is an essential component of the required effectiveness of the support.
277. Recommendation (2007) 14 on the legal status of non-governmental organisations in Europe encourages the formation of NGOs, provides guidance and encourages governments to give official recognition to NGOs.
278. Another important feature of the appropriate functioning of an NGO is its funding and support by the state. A balance has to be reached between the level of support provided and the independence needed to guarantee a greater advocacy in the support of victims.

Chapter 9. Alternative dispute resolution and codes of conduct

9.1. Mediation

279. The Group considers it important to draw attention to alternative dispute resolution, since such extra-judicial remedies, and more particularly mediation, can be of interest for the victims.

280. Mediation, as a diversion measure, is in itself a genuine non-criminal remedy and the Group thus agreed to deal with it.

281. Recommendation (2006) 8 on assistance to crime victims focuses on mediation in its Section 13 and recalls that "the interests of victims should be fully and carefully considered when deciding upon and during a mediation process. Due consideration should be given not only to the potential benefits but also to the potential risks for the victim" and that states should support the adoption of clear standards to protect the interests of victims. "These should include the ability of the parties to give free consent, issues of confidentiality, access to independent advice, the possibility to withdraw from the process at any stage and the competence of mediators".[1]

282. Mediation can take different forms, such as community mediation, neighbourhood mediation or domestic conciliation.

283. The common purpose is to bring together the two consenting parties, the victim and the offender, under the guidance and assistance of a mediator.

284. From the victims' point of view, this process is an opportunity to play an active role in the redress of the crime, to freely express their positions, have a control over the outcome and to take stock of the offenders' acknowledgment of the guilt.

285. Other benefits of mediation are clearly linked to principles previously mentioned, concerning the accessibility of the remedy and the risk of secondary victimisation. Indeed, mediation is a faster process than judicial

1. See also Recommendation (1998) 1 on mediation in family matters; Recommendation (99) 19 on mediation in criminal matters; Recommendation (2001) 9 on alternative litigation between administrative bodies and private parties; Recommendation (2002) 10 on mediation in civil matters; and the three Guidelines adopted by the European Commission for the Efficiency of Justice for a better implementation of the existing recommendations concerning mediation in penal matters (CEPEJ (2007) 13), family mediation and mediation in civil matters (CEPEJ (2007) 14), and alternatives to litigation between administrative authorities and private parties (CEPEJ (2007) 15).

proceedings, is not as expensive as judicial proceedings, it allows for more flexibility and is often less stressful than the judicial environment, thus reducing the risk of secondary victimisation (except in cases where the offender will not comply with the mediation agreement).

286. Situations of close links and intimacy between the offender and the victim will have to be carefully considered since mediation might, in such cases, not be appropriate as the victim's consent could be biased.
287. In Belgium, local mediation has been developed as an alternative dispute resolution tool for minor offences. The local mediator, working on the basis of an agreement between the parties, will submit its report to a magistrate in charge of the local mediation.
288. In Albania the Albanian Foundation for Conflict Resolution and Reconciliation of Disputes (AFCR) undertakes rehabilitation work for victims of human trafficking. It is a type of mediation involving the victims and their families to promote acceptance and reintegration of the women in the families and in the community.
289. In Slovakia, the Group notes that since 2004, victims have been able to benefit from the assistance of a network of mediators, present throughout the country and specifically trained to deal with civil matters.
290. Another interesting example of good practice concerns collective accidents and the French possibility of preferring – when a liable and solvent perpetrator is identified – friendly settlement proposals[2] to judicial procedures in order to avoid delays and differences in the management of the cases concerned. Committees (*comités de suivi*) are being established under the aegis of the prosecutor, with a concertative dimension and involving insurance companies, victims grouped in associations, victim support services, lawyers and any other key actor. They will agree on protocols for compensation by means of expertise schemes, thus facilitating and ensuring uniform compensation.

9.2. Codes of conduct

291. The Group also wishes to underline the benefits of codes of conduct and encourage states to prepare and disseminate such codes.
292. The example of the Dutch "code of conduct for handling personal injury claims" is noted. It has been prepared by victims' organisations, insurance companies, the main Dutch consultative body in the field and academics and is essentially aimed at assisting the victim, while also being used by liability insurers as "a guideline when developing internal procedures and as

2. See for instance the *AZF* or *Ville de Strasbourg – Château de Pourtalès* cases.

a touchstone for quality control". The Code outlines the best practices in handling personal injury claims, in twenty principles.

293. The Group hopes that similar initiatives will be reproduced and extended in other jurisdictions.

Chapter 10. Follow-up and conclusions

294. The conclusions and recommendations of the Group of Specialists on remedies for crime victims (CJ-S-VICT) are reproduced here, having been approved by the European Committee on Legal Co-operation (CDCJ)
295. The existing Council of Europe standards should be further promoted and disseminated and in particular:
   - the European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116);
   - the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196);
   - the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197);
   - the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (CETS No. 201);
   - Recommendation (2006) 8 on assistance to crime victims, which should be disseminated not only to the Ministries concerned but also to NGOs and other relevant bodies;[1]
   - Recommendation (2002) 5 on the protection of women against violence;
   - the Guidelines on the protection of the victims of terrorist acts (adopted by the Committee of Ministers on 2 March 2005).
296. In the light of the above-mentioned instruments and in anticipation of actions to promote them further, the CDCJ does not recommend at this stage that a specific legal instrument addressing non-criminal remedies be prepared.
297. However, the CDCJ emphasises the importance of appropriate training and awareness-raising activities in order to give full effect to existing Council of Europe standards.
298. The Report which contains examples of good practices should be disseminated to key stakeholders of the civil and administrative justice system and victim support services.
299. The CDCJ calls for awareness activities designed to highlight the fact that if crime victims are now well recognised in the criminal justice system and the social and welfare spheres, they are still confronted with a lack of recognition from the civil and administrative judicial systems. Remedies

1. The provisions of the Recommendation related to non-criminal remedies should be implemented, in particular Section 7 on the "right to effective access to other remedies", Section 8 on "state compensation" and Section 9 on "insurance".

other than the criminal justice ones are lacking in the traditional systems of protection of crime victims and the CDCJ considers it important that such systems of protection also encompass the civil, administrative and other remedies which should be provided to victims, as underlined in Recommendation (2006) 8 on assistance to crime victims, which deals with the "right to effective access to other remedies" in its Section 7.

300. Member states should publicise and disseminate information on the rights of victims in civil and administrative proceedings, and existing codes of conduct, victims' charters or leaflets focusing on the rights of victims in criminal proceedings should be updated to include non-criminal remedies.

301. The CDCJ strongly recommends that a procedure aiming at enabling the rapid payment of state compensation to the victim be put in place, the state scheme being subsequently subrogated in the victims' rights.

302. In respect of victims of terrorism and concerning compensation mechanisms, the CDCJ supports the need to encourage dialogue and interaction between states and insurance companies. The CDCJ also underlines that their needs do not differ significantly from the needs of other victims of crime.

303. Alongside the European Day for Victims of Terrorism (11 March), 22 February is already observed in some countries as European Victims' day. The CDCJ is of the opinion that this date could be a focus point to publicise the latest research and national policies and could be used as a launchpad for new initiatives in the field of victims.

304. A dedicated page on the Council of Europe website reflecting the cross-cutting and multidisciplinary nature of the victims' needs should be designed, enabling easy access to the relevant standards of the Council of Europe (including the explanatory memoranda where appropriate) and including contact addresses and website links to national contact points, NGOs and other stakeholders, etc.

305. To raise awareness of the needs of victims and to introduce new elements in existing practices, consideration should be given to launching a specific Council of Europe campaign, along the lines of similar campaigns, for which clear aims, objectives, messages, activities and a roadmap for implementation have been developed, involving Council of Europe member states.

Appendix I. Selected case-law of the European Court of Human Rights

I. The rights concerned

The rights entailing positive obligations which will be considered read as follows:

Article 2 – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence;
b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 – Prohibition of slavery and servitude

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term "forced or compulsory labour" shall not include:

a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention;
b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

d. any work or service which forms part of normal civic obligations.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

II. States' positive obligations

States' positive obligations towards victims underlined in the case-law of the European Court of Human Rights (hereafter referred to as the Court[1]) can in particular be examined under the following categories (several of them may be of relevance in a given case):

- Obligation of providing adequate domestic legislation to protect the victim;
- Obligation of protection;
- Obligation of carrying an effective investigation; and
- Procedural rights, i.e. the right to free legal aid, the right to an effective remedy, the right to a reasonable length of the (civil) proceedings and the right of access to a court (Articles 6 §1 and 13).

Obligation of providing adequate domestic legislation to protect the victim

In *Vo v. France* (8 July 2004) the Court, dealing with a case of violation of the right to life (Article 2), further to the *in utero* death of a child due to the negligence of the physician, reaffirmed the positive obligation of states to ensure that their domestic legislation adequately protects the person's rights. The Court considered that the absence of a criminal remedy within the French legal system to punish the unintentional homicide did not constitute a failure on the part of the state to protect by law the right to life, since an action for damages in the administrative courts, when there has been no intention to take a life, could be

1. Also covering, where appropriate, decisions of the former European Commission of Human Rights.

regarded as an effective remedy to prove the medical negligence alleged and to obtain redress for the damage.

In the case of *A v. the United Kingdom* (23 September 1998) the applicant suffered from ill-treatment and violence perpetrated by his stepfather on various occasions. The Court considered that the domestic legislation failed to protect the applicant from inhuman and degrading treatment (Article 3) since the law enabled (the perpetrator) to claim that such a treatment was a "reasonable chastisement".

In *X and Y v. the Netherlands* (26 March 1985) the Court held that the protection provided by the law in the case of the sexual assault on Miss Y was inadequate and ineffective. It noted that the victim was mentally handicapped and unable to file a complaint herself, which she was required to do by law since she was 16 years of age. A complaint was filed by her father but this could not be a substitute to the complaint she should have lodged and in the instant case, no one was thus legally empowered to file a complaint. The Court held that no sufficient means of obtaining remedy were available as the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y was insufficient, that effective deterrence was indispensable in this case and that it could be achieved only by criminal-law provisions, which did not contain any specific provision to the effect that it was an offence to make sexual advances to the mentally handicapped. The Criminal Code thus offered insufficient protection and this absence of adequate means of obtaining a remedy was one of the factors which led the Court to conclude that her physical and moral integrity, as enshrined in Article 8 concerning the right to private life, had been violated.

The Court sanctioned again the lack of adequate protection provided by domestic law in the case of *Siliadin v. France* (26 July 2005), where the applicant was fully dependent and required to perform forced labour, without remuneration. It was held that the state had failed to comply with its positive obligation, inherent in Article 4,[2] to secure tangible and effective protection against the practices prohibited by this article and to which the applicant had been subjected, since only a civil remedy had been provided and the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim.

2. Article 4 – prohibition of slavery and forced labour:
1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.

Obligation of protection

In the case of *Osman v. the United Kingdom* (28 October 1998) Ahmed Osman felt threatened by the behaviour of his teacher. Several incidents were reported and the authorities took measures following these minor incidents. However, a shooting incident led to the death of Ali Osman and the wounding of Ahmed Osman. The Court concluded that the authorities had complied with their positive obligation to protect the physical safety and life guaranteed under Article 2. The police had respected the presumption of innocence and there was no certainty that measures which could have been taken by the police forces (as claimed by the applicants) would actually have produced the needed result.

In *Kontrova v. Slovakia* (31 May 2007), following the death of the applicant's children at the hands of her abusive husband, the Court noted that the police had failed to adhere to various obligations under national law which existed to ensure the protection of lives. The Court reiterated that the first sentence of Article 2 §1 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

In the case of *Z and others v. the United Kingdom* (10 May 2001) the local authorities had been aware of the serious ill-treatment of four children over a period of years (from 1987), although they decided only in 1992 to seek care orders in respect of the children. The Court considered that the state failed in its positive obligation to provide the applicants with adequate protection against inhuman and degrading treatment (Article 3), as despite the abundance of evidence concerning the serious ill-treatment and neglect suffered by the applicants over a period of years at the hands of their parents, and despite the means available, the state failed to take any effective steps or protective measures to bring it to an end. However, in *D.P. and J.C. v. the United Kingdom* (10 October 2002) the Court found no violation because it had not been proved that the local authorities should have been informed of the ill-treatment of these children by their stepfather.

In *McGlinchey and others v. the United Kingdom* (29 April 2003) the Court reaffirmed the positive obligation of states to provide medical care during the execution of a custodial sanction (complying with the prohibition against inhuman or degrading treatment contained in Article 3). Judith McGlinchey was a drug addict and when detained in prison needed special care. The medical care she received in prison was considered insufficient.

See also *Batı and others v. Turkey* (3 June 2004), where the Court stated that vulnerable individuals, such as minors, have a right to the state's protection to ensure that detention conditions are compatible with human dignity.

In *López Ostra v. Spain* (9 December 1994), the Court concluded that the State failed to take the necessary environmental measures to protect the applicant's right to respect for her home and for her private and family life under Article 8. A plant for the treatment of liquid and solid waste near the López Ostra family home caused environmental damage during several years and health problems for the López Ostra family. Despite the requirements existing under domestic legislation, foreseen by environmental protection provisions, the local authorities failed to take the necessary measures.

Obligation of carrying out an effective investigation

In *Scavuzzo Hager v. Switzerland* (7 February 2006), further to the death induced by consumption of drugs and the fragile health of a person who was detained by police, the Court recalled that the obligation to protect the right to life (Article 2), combined with the positive obligation under Article 1 to respect human rights and to "secure to everyone within their jurisdiction the rights and freedoms" implies that an official and effective investigation must be conducted, even in situations where it is not established – as in this case – that death was induced by state officials. In the present circumstances the Court noted that the authorities took a decision on the case on the sole basis that the level of intoxication would in any case have induced death, without considering whether the force used, even if not deadly as such, could have induced or accelerated death. The investigation, to be effective, should have addressed this question.

In the case of *Dündar v. Turkey* (20 September 2005), following the death of the applicant's son for unknown reasons, the investigating authorities failed to gather the necessary evidence in order to find the perpetrators. The Court concluded that the authorities failed to carry out an adequate and effective investigation of the killing of the applicant's son, as required by Article 2 of the Convention. The Court pointed out that this obligation was not confined to cases where it is apparent that the killing was caused by an agent of the state.

In *Assenov and others v. Bulgaria* (28 October 1998) the Court found, for the first time, a violation of the procedural aspect of Article 3 of the Convention. One of the applicants was fourteen years old when he was arrested by the police. Since his allegations of ill-treatment could not be proved in the absence of an effective investigation by the competent national authorities, the Court found that the lack of investigation itself constituted a violation of Article 3.

Procedural rights

Free legal aid

In *Airey v. Ireland* (9 October 1979) the applicant wanted to obtain a decree of judicial separation in order to divorce from her abusive husband, which was a complex civil procedure before the High Court in Ireland. However, in the absence of legal aid, she could not afford representation.

The Court held that, in the context of a civil litigation, the right of everyone to have a claim relating to civil rights and obligations brought before a court or tribunal (Article 6 §1) may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to a court, either because legal representation is rendered compulsory, or because of the complexity of the procedure or of the case.

In *McVicar v. the United Kingdom* (7 August 2002) the Court reaffirmed the principles previously stated in the *Airey* case, considering that in contrast with the *Airey* case, the complexity of the procedure of the case was not sufficient as to require legal representation. The applicant had to defend himself in a defamation action brought against him. The Legal Aid Act 1988 barred those involved in defamation proceedings from legal aid and therefore he could not afford legal representation. However, during part of the procedure at the High Court case the applicant had received legal advice and the rules concerning the procedure were unambiguous and clear.

Right to an effective remedy

In the case of *Dündar v. Turkey* (20 September 2005), previously mentioned, the Court held that an effective remedy under Article 13 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 (relatives) to the investigatory procedure. The Court stated that because there had not been an effective investigation and the applicant had not had effective access to the investigatory procedure, the right to an effective remedy in respect of the death of the applicant had been denied, and had thereby been denied effective access to any other remedies, including compensation.

In *E and others v. the United Kingdom* (26 November 2002) the applicants had been subjected to abuse as children and lodged a civil action in negligence. However, they withdrew their claims after counsel's advice that their action could not be successful in the light of national case-law determining that local authorities could not be held negligent by failing to remove victims of abuse and neglect from their home. The Court concluded that the applicants did not have means of obtaining a determination of their allegations that the local authorities

failed to protect them from inhuman and degrading treatment (Article 3 together with Article 13). The Court arrived at the same conclusion in several other cases concerning similar issues (*Z and others v. the United Kingdom* cited above).

In the case of *Kontrova v. Slovakia*, previously mentioned, the Court reaffirmed that in the event of a violation of Article 2 – which ranks as one of the most fundamental provisions of the Convention – compensation for non-pecuniary damages (such as awarding just satisfaction, recognising pain, stress, anxiety and frustration) as rendering appropriate compensation for non-pecuniary damage flowing from the breach should in principle be available within the range of possible remedies. In the present case this remedy was not available for the applicant and the Court therefore concluded that there had been a breach of Article 13.

In *Doğan and others v. Turkey* (29 June 2004) the violation of the right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1) and the fact that the draft legislation on compensation for damage incurred as a result of acts of terrorism was not in force, constituted an element of the violation of the right to an effective remedy. The applicants were forcibly evicted from their homes and their properties destroyed. They were not awarded compensation as those responsible could not be identified in the absence of an effective investigation.

It should furthermore be noted that the subsequent decision on the admissibility of the application of *Aydın İçyer against Turkey* (Application no. 18888/02) stated that the authorities had taken several measures, including enacting the Compensation Law of 27 July 2004, with a view to redressing the issue of providing an effective remedy to persons who were denied access to their possessions in their villages.

In the case of *McGlinchey and others v. the United Kingdom*, previously mentioned, the Court concluded that the absence of a mechanism to examine the standard of care given and the possibility of obtaining damages constituted a breach of Article 13. The Court concluded that no action in negligence could be pursued in the civil courts where the impugned conduct fell short of causing physical or psychological injury.

Right to a reasonable length of civil and criminal proceedings

In *Sitkov v. Russia* (18 April 2007) the applicant, having brought a complaint for damages against the Bailiff Service (failed to take appropriate steps to find and seize property from the insurance company that had not paid the amount claimed by the applicant), complained that the length of the proceedings (from 1998 to 2002) had exceeded reasonable time requirements. This was acknowledged by the Court which considered that, whereas it was to a decisive

extent attributable to the supervisory review proceedings, this issue by itself gave rise to a finding of a violation under Article 6 §1.

In the case of *Marszal v. Poland* (14 December 2004) the length of the proceedings (from 1994 to 2001) concerned both the criminal and the civil proceedings; and the Court, noting the complexity of the case where civil proceedings were linked to the criminal proceedings, nevertheless considered that this complexity did not justify the overall length of the proceedings and concluded to a violation of Article 6 §1. The case concerned a claim for compensation and reinstatement by the applicant following dismissal from the job, in combination with a criminal charge for fraudulent financial operations. Though the case was complex, during the proceedings there was a substantial period of inactivity adding to the length of the proceedings.

Right of access to a court

In *Ciorap v. Moldova* (19 June 2007) the Court noted that the applicant's right of access to a court had been denied, as the public authorities disregarded his right to be exempted from paying a court fee due to the nature of his complaint, regardless of his ability to pay. The domestic law provided for a waiver of court fees for actions regarding compensation in cases of damage sustained as a result of bodily harm or other harm to health (the action concerned alleged torture).

In the case of *Osman v. the United Kingdom*, previously mentioned, the Court also concluded that the application of an exclusionary rule to protect the police from a civil action in negligence amounted to an unjustifiable restriction of the applicants' right of access to a court (Article 6 §1).

Appendix II. Indemnifying victims of terrorism

Preliminary considerations with a particular focus on the role of insurance

Professor Bernhard A. Koch[1]

I. Introduction

The following remarks are based upon previous research whose results were published in 2004[2] and 2006.[3] The findings of these comparative studies will help to evaluate the existing compensation systems in their respective national contexts, which in turn can give guidance to develop and to assess future models.

Insurance plays a key role in these redress schemes, which is why the following remarks will submit some more fundamental issues in this respect to further discussion.

Having said that, an important caveat has to be put up front, however: even without further in-depth analysis it is clear from the outset that there is no such thing as an ideal model suitable for all jurisdictions alike. Differences in the legal systems, their compensation culture, political and societal diversity, insurance market peculiarities, down to national budgetary constraints have to be taken into consideration when assessing to what extent possible guidelines can be applied to the conception of an individual solution suitable to any one given country, which is even more true for a harmonised regime designed for a multitude of jurisdictions.

1. European Centre of Tort and Insurance Law, Austria. The views here expressed are the responsibility of the author, and do not necessarily reflect the official stance of the Council of Europe.

2. B.A. Koch (ed.), "Terrorism, Tort Law and Insurance" (2004, in the following: *ECTIL-Study*).

3. B.A. Koch, "Indemnifying Victims of Terrorism", CDCJ-BU (2006) 19 (http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/cj-s-vict/CDCJ-BU%20(2006)%2019%20e%20-%20ECTIL%20Report.pdf; in the following: *CDCJ-Report*).

II. Defining terrorism

Any improvement to existing redress schemes, let alone the development of a new model, will have to face for its purposes the difficult task of defining terrorism. It would therefore be a major improvement in itself if one could agree on a harmonised definition for the future, even though one should not be too optimistic about the feasibility of this task since the only thing previous efforts to that end had in common was their lack of success.[4]

Any definition (as the term in itself indicates) will reduce the scope of the legislative or other measure building upon it, as could be seen in the past, when most formulas defining terrorism were primarily used to restrict the compensation scheme rather than to describe the phenomenon as such. Be it as it may, a harmonised definition could at least circumscribe common grounds from where further deviations could be demarcated more clearly, which would also improve the comparability of the various models. The higher the degree of harmonisation striven for, though, the more precisely the definition has to be tailored (and the less leeway permissible for national deviations).

Criteria

Looking back at definitions already in use, key elements to be considered also for a future concept include the following:

Intention behind the terrorist act

Definitions of the past unanimously included politically motivated acts such as attacks directed against a particular state or its officials, but also often more generally against certain forms of society. It may already be questionable, however, whether purely religious reasons should be covered as well, even though this is probably less doubtful since 9/11. It is much less clear, however, whether, say, fanatic environmentalists should be considered terrorists if they commit a crime whose type and consequences are comparable to attacks driven by political motives.

Means used by the terrorist(s)

In the recent past the most critical aspect of that element concerned weapons and other tools capable of mass destruction. A crucial point was (and still is) whether CBRN[5] weapons or WMDs[6] should be included. Obviously, if a

4. OECD Check-List of Criteria to Define Terrorism for the Purpose of Compensation (http://www.oecd.org/dataoecd/55/2/34065606.pdf) 2 (see also the table overview of definitions in Annex III thereto).

5. Chemical, biological, radiological, and nuclear.

dirty bomb were used for purposes covered this would not be less of a terrorist act than if a conventional bomb had exploded, even if the former kind is excluded from the list by definition. However, restrictions of the redress scheme may apply (or shift the matter into provisions for war scenarios), which makes the response (or rather non-response) to such attacks more foreseeable.

Geographical scope of the attack (both the intended and the actual target zone)

Geographical limits play a role with respect to cross-border issues such as jurisdiction or choice of law, but also in light of the typically restricted scope of state compensation schemes, which may only be applicable with respect to terrorist acts committed on the state's territory or to victims who are citizens of that state. A rather odd such limitation was introduced into the legislation responding to 9/11 in the United States, where a terrorist act must "have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest"[7] (which of course completely disregards and once more discriminates against the victims of the Oklahoma bombing, for example).

In the light of such limitations, it will be crucial whether, for example, an attack committed against a foreign embassy of a state that is the ultimate target also counts as an incident covered by that state's regime, or whether it should (cumulatively?) fall within the scope of the scene of the crime.

Harmful consequences of the attack

This element can be split into two partial aspects, i.e. the type of harm caused and the overall extent (or magnitude) of loss.

As to the former aspect, a compensation regime may be designed for the consequences of personal injury or death exclusively, or it may include property losses in addition (or instead). A special problem in that respect is whether interruption to business and related losses affecting not the bodily integrity of persons but rather the viability of enterprises or the economy at large will be addressed. Furthermore, other non-individual losses such as environmental harm may equally be at stake.

As to the second aspect mentioned, a redress scheme may require a certain minimum loss or (more likely) be capped at a certain maximum amount available for compensation, be it per victim, per event, per annum, or in a combination of such limitations. These limits naturally mirror the restricted pool of resources available to cover such losses. However, if one should choose to introduce such

6. Weapons of mass destruction.

7. 15 U.S.C. §6701 (the Terrorism Risk Insurance Act), sec. 102 (1) (A) (iv). This limitation may fall under the "Terrorism Risk Insurance Revision and Extension Act of 2007" (H.R. 2761) if passed.

caps, their application in case of more than one occurrence has to be defined explicitly.

The OECD Checklist

The OECD has published a checklist[8] of criteria to define terrorism for the purpose of compensation, thereby proposing essentially a model which would fit the requirements indicated earlier. In addition to the elements listed above, the checklist also includes aspects relating to insurability and to the potential for other ways of indemnification. However, not only is the proposal non-binding, but it is in itself very open.[9] It allows for deviations to an extent which seems to sacrifice the goal of a uniform standard for the sake of universal applicability, which in the case of defining terrorism effectively means no standardisation at all. However, the checklist at least provides for helpful tools to draw a more precise definition from its catalogue of criteria.

Further problems of definition

Even if one should come up with a definition of terrorism, it will further be necessary to define what is a single terrorist attack as contrasted to a series of such events. As could be seen in the case of 9/11, it was crucial for purposes of the policies covering the World Trade Center (WTC) whether the planes crashing into the twin towers constituted two separate occurrences or just one.[10] Such problems will always arise when two or more similar terrorist acts occur that seem to be linked not only in time.[11] While insurers can provide for solutions to such difficulties by using suitable clauses in their policies, lawmakers should equally use clear language to define caps and other limitations when drafting legislation covering victims of terrorism.

This is equally true for drawing a line to acts of war,[12] which is particularly tricky in light of the fact that victims of terrorism are sometimes granted benefits which were originally introduced for war victims.[13]

8. See footnote 4, page 69.
9. Its preamble notes "that this checklist is therefore illustrative, and can be adapted by the various parties concerned to meet the needs of their specific market and regulatory frameworks or policy objectives; recognising that certain countries may also wish to take other criteria into consideration, to help distinguish terrorism from other types of offence".
10. See *SR International Business Insurance Company Ltd. versus World Trade Center Properties, LLC, et al.*, 467 F.3d 107 (2nd Cir. 2006).
11. Consider, e.g., the four bombs hitting the London Underground system in July 2005.
12. Cf., e.g., D. Everett, "The 'War' on Terrorism: Do War Exclusions Prevent Insurance Coverage for Losses Due to Acts of Terrorism?" 54 *Alabama Law Review* (2002) 175.

III. Tort law

As explained elsewhere,[14] classic tort law does not pose any problems in identifying one or more persons liable to compensate losses caused by the acts of terrorists – they are "model" tortfeasors in this respect, after all, like all intentional wrongdoers who even brag about their deeds instead of denying them. Troubles start at a stage beyond the scope of tort law, when it comes to collecting awards reached on the basis of the law of delict.

These difficulties may backfire on the law of torts, however, if alternative payers are sought which – apart from their deep pockets – are not so obviously liable as far as their indirect involvement (if any) is concerned.[15] Still, as long as well-settled criteria are applied to solve such cases, there is no need to reconsider internally or intervene from an international perspective. However, one may fear that the exceptional features of a terrorist attack may stimulate judges and lawmakers alike to react in a correspondingly exceptional way,[16] which can lead to distortions of the law of torts (apart from obvious violations of the principle of equality).[17]

If there is any need to make adjustments in comparing the various tort laws throughout Europe, it is in those borderline areas where some jurisdictions are willing to cross the line and to hold airlines strictly liable for the kidnapping of their planes, for example, which others deny.[18] Particularly (but not only) in cases

13. For example France and Italy: B.A. Koch in *CDCJ-Report* (*supra* footnote 3, page 68) II.C.2. (a) (ii) and (iii).

14. B.A. Koch in *CDCJ-Report* (*supra* footnote 3, page 68) II.A.1 and 4.

15. Cf. B.A. Koch in *CDCJ-Report* (*supra* footnote 3, page 68) II.A.3 with further references.

16. This is not just a fear – such odd *ad hoc* behaviour could already be witnessed in the aftermath of 9/11, just think of the ridiculous intervention of the Austrian legislator who capped liability of the state for security deficiencies at airports at one million euros: See B.A. Koch, "Liability for Acts of Terrorism under Austrian law", in *ECTIL-Study* (*supra* footnote 2, page 68) 5 (no. 54 *et seq*.)

17. Essential reading in this context is M. Shapo, "Compensation for Terrorism: What We Are Learning", 53 *DePaul Law Review* (2003) 805, who states *inter alia* at 817: "Putting aside the nationally calamitous aspects of the attacks, one is entitled to ask whether an office worker's horror at seeing a plane coming at the ninety-seventh floor of the North Tower is greater than that of the motorist who sees an oncoming car jump the median and, for a few yards, literally fly at him or her. It seems reasonable to believe that, in their last moments, the victims in the Towers were not conceptualizing the insult to the national community of an attack on the homeland but rather coping with their own private hells. It is clear that in cold statistical terms, the annual accident toll in the United States dwarfs that of the attacks. Beyond that, viewing September 11th from the standpoint of the victims, it is not manifest that the awfulness of their deaths was qualitatively worse than that of the more than 90,000 of their countrypersons who died from accidents in 2001."

where terrorism affects international aviation, it is unsatisfactory that the existing diversity forces victims to seek compensation by way of forum shopping.

IV. Insurance schemes

Developments after 9/11

The events on and after the WTC attack have left a permanent mark on the insurance market, despite a certain cooling off in the years ever since. Both first- and third-party insurances were affected.

Liability insurers were primarily concerned about impending or at least discussed changes in the field of tort law, affecting in particular potential third-party liabilities of their clients.[19] The roller-coaster ride aviation insurance has taken since the WTC attack is a good example for this development.[20]

When it comes to first-party insurances, life and health insurance was apparently less problematic[21] than underwriting property and business interruption risks, which is not surprising as the potential loss in the former category remained the same, but dramatically increased for the latter types of insurances, not only with respect to its magnitude.

A comparison of the existing situation in the countries covered shows quite a wide range of possible solutions to adjust to this changed awareness of the risk of terrorism. Some countries have not interfered at all, others have done so to a larger or lesser extent, for example by assisting insurers in pooling the risk.[22]

18. Cf. B.A. Koch, "Comparative Analysis of Liability for Acts of Terrorism", in *ECTIL-Study* (*supra* footnote 2, page 68) 282 (no. 35 *et seq*.)

19. Liability towards passengers of airlines and customers of other industries remained quantifiable.

20. See, e.g., "Insurability of Terrorism Risk", in: OECD (ed.), *Terrorism Risk Insurance in OECD Countries* (2005) 29 (39-40); E. Hoeven, "Current State of the Coverage for War and Terrorism Risks in the Aviation Sector", in OECD (ed.), *Catastrophic Risks and Insurance* (2005) 73.

21. C. Lahnstein, "Liability Insurance for Acts of Terrorism?" in *ECTIL-Study* (*supra* footnote 2, page 68) 252 (no. 3); OECD (ed.), Terrorism Risk Insurance in OECD Countries (2005) 76-77. But see the US problems with respect to workers' compensation described by the *Workers' Compensation Terrorism Reinsurance Pool Feasibility Study* produced by the Tillinghast and Reinsurance businesses of Towers Perrin (available at http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2004/200404/WC_Terr_Pool_Study.pdf).

22. See B.A. Koch/St. Strahwald, "Compensation Schemes for Victims of Terrorism", in *ECTIL-Study* (*supra* footnote 2, page 68) 260; id. in *CDCJ-Report* (*supra* footnote 3, page 68) II.B.

Insurability criteria

The starting point for developing such models was the same everywhere, though: the standard criteria of insurability do not depend upon local peculiarities, differences show only (if at all) when assessing the risk with the help of these criteria.

The OECD study has summarised the conditions of insurability as follows:

- "*accessibility:* the probability and severity of losses must be quantifiable;
- *randomness:* the time at which the insured event occurs must be unpredictable and the occurrence itself must be independent of the will of the insured;
- *mutuality:* numerous persons exposed to a given hazard must join together to form a risk community within which the risk is shared and diversified;
- *economic feasibility:* for a risk to be insurable, private insurers must be able to charge a premium commensurate with the risk it covers (the 'actuarially justified premium'). …"[23]

At least at first sight, some of these points seem to be problematic with respect to the risk of terrorism, if only after 9/11: the likelihood of an attack has apparently increased, and the range of imaginable scenarios may now bar any *ex ante* assessment of potential losses.

Natural catastrophes v. terrorism

These problems seem to resemble difficulties in evaluating the risks of natural catastrophes,[24] for which insurance is readily available, however, at least for the time being.[25] It remains open to debate whether natural hazards are still so much easier to model as claimed by insurers.[26] While they do occur "randomly and without intent",[27] this does not seem to differ so significantly from the risk of terrorism, even though the latter is of course triggered by intentional acts: when

23. OECD (ed.), *Terrorism Risk Insurance in OECD Countries* (2005) 30. See also the eleven criteria of insurability listed (and categorised) in Swiss Re (ed.), *Innovating to Insure the Insurable*, Sigma No. 4/2005.

24. Cf. D. Lakdawalla/G. Zanjani, *Insurance, Self-Protection, and the Economics of Terrorism* (RAND Working Paper July 2004) 1, who argue that the "root causes of pricing and capacity problems in the terrorism insurance market mirror those in other catastrophe markets".

25. It remains to be seen how the insurance market will react to the experiences gained in recent years with more frequent and more dramatic natural catastrophes, apparently triggered by the climate change. Risk modelling has been adjusted already.

26. See also H. Kunreuther/E. Michel-Kerjan, "Insurability of (Mega-) Terrorism Risk: Challenges and Perspectives", in OECD (ed.), *Terrorism Risk Insurance in OECD Countries* (2005) 119 *et seq.* (in particular the table on page 122).

27. W. Schaad, *Terrorism: Dealing with the New Spectre* (Swiss Re Focus Report, 2002) 2.

assessing the likelihood of such an attack, the degree of randomness of the occurrence and the arbitrariness of the target seem to be comparable nevertheless. One may argue that natural catastrophes typically occur in *ex ante* ascertainable geographical areas, whereas terrorists tend to change the locale of their actions in an unforeseeable way. This is not entirely true, though – the new dimension of catastrophic losses due to extreme events in risk-prone areas has caught insurers cold despite the foreseeability of these occurrences as such, as have hurricanes in the eastern Atlantic which were unprecedented before. Terrorists tend to use targets where media attention will be high, so they will most likely not bomb the Sahara desert, which speaks in favour of at least some possibility to narrow the range of risk zones.

What is clearly different, though, is the degree of risk awareness in the minds of those for whom insurance products are offered: Those who live in the vicinity of a river or in a hurricane or avalanche zone are much more likely to take out first-party insurance than residents of a metropolitan area that may be targeted by terrorists despite a possibly comparable degree of risk, which causes adverse selection problems.[28] "In various OECD markets where the purchase of coverage is not mandatory, terrorism insurance take-up rates remain low, leaving large parts of the economy financially exposed to possible future attacks."[29] Potential buyers of insurance against terrorism risks have fewer incentives (and even fewer possibilities) to take precautionary measures against harm inflicted upon them by terrorists, whereas home owners in a flood zone will more likely consider making adjustments to the lower floors of their buildings (notwithstanding moral hazard problems, though).

It is further evident that risk modelling has a much longer tradition with respect to natural catastrophes.[30] "Compared to natural peril models, terrorism modelling is still in its infancy."[31] However, the former also had to be adjusted significantly after major events such as hurricanes Andrew or Katrina,[32] so their lead was not so significant after all, in particular in the light of the fact that the

28. Cf. H. Kunreuther/E. Michel-Kerjan (*supra* footnote 26, page 74) 108 (116-117); American Academy of Actuaries (ed.), *P/C Terrorism Insurance Coverage: Where Do We Go Post-Terrorism Risk Insurance Act?* (2004) 13-14.

29. OECD (ed.), *Terrorism Risk Insurance in OECD Countries* (2005) 20, 41-42 (with examples of the German and US markets).

30. Y. Tatge, *A Brief History of Catastrophe Risk Modeling*, http://www.converium.com/2112.asp.

31. P. Knutson, "Terror Risk in Uncertain Times", in: *The Review – Cedant's Guide to Renewals 2004*.

32. See, e.g., R. Murnane, *Science, Catastrophe Risk Models and Insurance*, http://www.geotimes.org/feb07/comment.html. Unfortunately for the modelling agencies, both types of model called for intensive research at the same time, since not only Al Qaeda, but also the weather were unexpectedly active in recent years.

first efforts to model terrorism for insurance purposes after 9/11 did not start from scratch, but could build upon the expertise gained with other large-scale occurrences.[33]

Even if one saw a clear dividing line between the insurability of natural perils and the risks of terrorism, a compensation scheme developed for the latter must not be in conflict with one installed for the former, and vice versa. While it is questionable from the outset to what extent such extraordinary cases really deserve extraordinary treatment, if they do, the principle of equality demands that the way such risks of society at large are treated should be in balance if compared at least on a national level.

Insuring terrorism risks today – the role of the state

Before looking at the insurability of terrorism risks from today's perspective, it is important to repeat that the key problems primarily concern property and business risks, whereas life and health lines of business seem to be less affected[34] (thereby disregarding potentially huge losses caused by CBRN attacks, however, which by their sheer volume can hardly be covered by the industry and are therefore typically excluded).

As equally indicated already, even for property and business risks, "terrorism insurance market conditions have substantially improved"[35] after the first shockwave of 9/11 has ebbed away: extensive research stimulated by this event has provided insurers with much more sophisticated tools to deal with the risk of terrorism. With governmental support, although not necessarily based on extensive *ex ante* planning, but rather triggered by the heat of the moment, insurers could jointly build up more capacity to deal with the new challenges, aided by the fact that there has been no terrorist attack of comparable dimensions since 2001.

Despite these developments, still no single insurer can alone absorb the consequences of a mega-event, be it a natural catastrophe or a large-scale terrorist attack.[36] In either case, the state will invariably again need to intervene in order to support the victims, particularly the uninsured. As in the case of natural hazards, however, this is not entirely satisfactory, especially if collateral benefits such as insurance awards are deducted from the amounts the state pays out,

33. Cf. G. Woo, *The Viability of Terrorism Risk Modeling: A Five-Year Retrospective*. It is not yet clear, though, how much the industry is really willing to rely upon the findings of such efforts; cf. e.g. a 2006 letter by the American Academy of Actuaries to the President's Working Group on Financial Markets published at http://www.actuary.org/pdf/casualty/tris_042106.pdf.

34. *Supra* footnote 23, page 74.

35. OECD (ed.), *Terrorism Risk Insurance in OECD Countries* (2005) 40 with further details.

which discourages those at risk to buy insurance in the first place. This already speaks in favour of teaming up capacities of private insurers and the state rather than leaving them as competing payers in the eyes of potential victims.

Another argument along those lines concerns the pricing of insurance products: the more uncertain a risk is, the higher the premiums will be that the insurers charge in order to cover for the unforeseeable loss.[37] This may turn out to be overly cautious *ex post* and lead to windfall profits in the pockets of the insurers, or leave them bankrupt if their predictions were too optimistic. Such inefficiencies under the given circumstances can ultimately only be avoided if the state intervenes by pledging to cushion the extreme consequences arising from mega-events, notwithstanding the possibilities of the industry to pool the less-than-extreme risks internally. A good example for such a solution is the French pool GAREAT where insurers have accumulated capacities themselves amounting to €2.2 billion in 2007 for large property and business interruption losses, with a state guarantee to step in for losses exceeding that amount via the CCR.[38] As could be seen in the German example of Extremus, on the other hand, even an insurance pool designed specifically for terrorism risks has a hard time surviving in the market if the state fails to provide sufficient backup, which is at least one reason why demand for the product remained low in light of the limited cover available.[39]

In the triangle victim – insurer – state, it is typically the latter who is best informed about current terrorist threats.[40] Furthermore, the state is also in charge of preventing such attacks and responsible for adjusting its measures corresponding to the actual circumstances.[41] The state therefore seems to be the cheapest cost-avoider from a law and economics perspective[42] and therefore a prime player in the distribution of losses caused by terrorists.[43]

In cases of personal injuries the state already assumes this task quite considerably: in those countries where social security plays a more than insignificant role in financing the recovery of injured people (which is the case at least in all

36. Cf., e.g., the data on the US standalone terrorism market and its capacity at the first quarter of 2007 published by Marsh: http://global.marsh.com/news/articles/terrorism/documents/StandaloneUpdateQ1-2007.pdf. The highest capacity of a single insurer is quoted 500 million to US$1 billion, compared to US$19.6 billion paid out by insurers after 9/11 (http://www.rand.org/pubs/research_briefs/RB9087/index1.html).

37. Cf. the letter by the American Academy of Actuaries cited in footnote 33, page 76.

38. See B.A. Koch in *CDCJ-Report* (*supra* footnote 3, page 68) II.B.2. (a) (i).

39. OECD (ed.), *Terrorism Risk Insurance in OECD Countries* (2005) 41: "In Germany, out of the 40,000 German companies qualifying for terrorism coverage under Extremus, only 1100, i.e. about 2.75%, had actually contracted with the … insurer by the end of 2004."

40. The fact that significant parts of that information will typically be classified is also an impediment to modelling the risk: cf. the letter by the American Academy of Actuaries cited in footnote 33, page 76.

European countries), the most immediate needs of the victims are already taken care of, shifting the question of who shall bear the loss into a secondary layer of potential recourse actions.

This is not to play down the advantages of private insurance, quite the contrary: the insurance industry is flexible enough to adapt to short-term changes and developments, not only by adjusting premiums to the exact needs of their clients in the light of potential losses whose likelihood can be evaluated very specifically. The state, on the other hand, will always lag behind market developments, and due to its much broader focus, any model developed on that level will necessarily have to be simplified and generalised, which disregards the special circumstances of individual victims both *ex ante* and *ex post*. Insurers' premiums and awards will be determined by market forces, whereas contributions to and awards by state systems will not necessarily reflect the real economic determinants, let alone any actuarial reliability.

Problems with the interplay of market forces may even be caused by state involvement, e.g. if the state requires its citizens to seek advance cover at least to some extent. Such mandatory insurance will invariably distort the balance of offer and demand, but can nevertheless play an important role in making the risk of terrorism insurable in the first place: after all, if the range of those who participate in a risk pool is expanded by statutory duties, the individual contributions to that pool will be smaller than otherwise, but the overall funds of that scheme will most likely exceed what individual underwriting could ever achieve.

Participation in an insurance scheme rather than assuming the task of covering losses directly certainly seems to be advantageous for a state which wants to avoid the so-called "Samaritan dilemma": if word spreads that the state will always pick up the bill at the end of the day, if only by way of an *ad hoc* effort, there

41. There is a "symmetry of non-information on the risk between those insured and insurers, where government is the most informed party": H. Kunreuther/E. Michel-Kerjan (*supra* footnote 26, page 74) 121. Again, one may wonder whether this is really so different from the natural hazards situation, where one may suspect that the government at least should know more about current threats and preventive measures against them, for example about the reliability of dams and levées against flooding caused by a hurricane. This is correspondingly true for avalanches – preparing slopes and opening them to individual skiers is a task typically fulfilled by commissions whose members are clearly attributable to the state.

42. Cf. E. Hoeven, "Current State of the Coverage for War and Terrorism Risks in the Aviation Sector", in OECD (ed.), *Catastrophic Risks and Insurance* (2005) 73, 79: "If government intelligence services are unable to prevent a WMD attack with all the resources available to them, then it cannot be expected that the aviation industry should bear the burden of such acts."

43. See OECD (ed.), *Terrorism Risk Insurance in OECD Countries* (2005) 69-70, 72, on the various modalities of possible government intervention; furthermore D. Jaffee, "The Role of Government in the Coverage of Terrorism Risks", *ibid*. at 189 *et seq*.

are hardly any incentives for those at risk to provide for cover themselves (e.g. by way of insurance).[44]

One should never forget, however, that it sounds easy to make the state the default or even the prime payer, but that there is no such deep pocket without limits – after all, it is taxpayers' money which has to be collected at some point (though not necessarily in advance), and – even more importantly – cannot be spent for other purposes (such as protective measures against further, maybe even bigger threats).

One possible limit to excessive public spending in this arena only would be to restrict state contributions to an *ex ante*-defined time-period, in particular in market situations where the private insurers could not establish a functioning system themselves. Some of the state actions after 9/11, for example, were limited in such a way, thereby only serving to reanimate a lifeless market.[45]

V. Conclusions

In comparing the various models of providing compensation to victims of terrorism in various countries, it is crucial to look at the overall picture rather than at any individual aspect in an isolated way. It is always the interaction of the applicable redress schemes that counts.

Seen from that broader perspective, the situation in France seems to be very much in favour of victims of terrorism: As far as personal injury is concerned, a state fund (FGTI) takes care of medical and additional expenses, and an optional self-insurance scheme covering *accidents de la vie* offers a cheap way for individuals to take out further insurance on the market. As far as property insurance is concerned, the pool GAREAT is able to keep the insurance market viable even for large risks, whereas mass risks are now equally covered by a comparable regime.

In England, the Pool Re regime has proven to be successful in building up capacities covering potential business losses caused by terrorists even on an "all risks basis" (including nuclear risks). Physical injuries are covered by a state compensation scheme, now even complemented by another charitable fund for smaller losses and interim relief.

Spain also has a multi-layer compensation system, covering bodily injuries under both a general crime victim compensation scheme as well as one designed for the specific circumstances of a terrorist attack. Property losses are governed by an insurance-based model, though – again – with substantial state support.

44. Cf. OECD (ed.), *Terrorism Risk Insurance in OECD Countries* (2005) 42.

45. Cf. D. Jaffee, "The Role of Government in the Coverage of Terrorism Risks", in OECD (ed.), *Terrorism Risk Insurance in OECD Countries* (2005) 204-205.

As could be seen, these apparently successful and fairly comprehensive schemes have all developed in countries with an unfortunately longer experience with terrorism, which is yet another argument in favour of a more optimistic approach towards achieving compensation models also in other countries which have just started to consider one.

Whatever system is chosen, it should not be a singular solution for victims of terrorism only inasmuch as it was incompatible with other compensation models in the respective jurisdiction. Starting with tort law, one should not invent excessive duties to provide for security against terrorists if other situations are handled much more generously. A strict liability regime only makes sense if comparable risks are covered in a comparable way, which is particularly (but not only) true with respect to crimes. After all, why should it make a difference from the perspective of indemnifying the survivors that a murderer wanted to kill someone because he or she represents a government rather than for private or personal reasons? Why should victims of mass car accidents not receive equal protection as compared to equally many victims of a terrorist attack with exactly the same bodily injuries?[46]

Looking back at the comparison of various national regimes, it is hard to identify an obvious winner in the competition for the status of an international model. After all, each redress scheme depends upon the intended scope of regime, the applicable national social security regime, the private insurance market in that jurisdiction, the compensation culture there, as well as on further national factors (such as the idea of national solidarity backing up many French solutions beyond terrorism). At least by a mere head-count, it is strikingly clear that a future model (whether national or international) will most likely not work without at least initial state support, particularly for large-scale losses, since this is what could be seen in all countries whose compensation regimes seem to be effective.

46. See footnote 17, page 72.

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