

# The victim's role in cross-border situations in european and international law: a multilevel perspective\*

O papel da vítima em processos no âmbito do Direito europeu e internacional: uma perspectiva multinível

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**SUMMARY:** 1. Introduction. 2. The controversial concept of ‘victims’ and the general foundations of their legal protection. 3. The victim’s right to procedural and extra-procedural protection in cross-border cases. 4. The victim’s right to information, support and assistance outside and within the criminal trial in cross-border situations. 5. The victim’s right to be heard and personal participation in transnational criminal proceedings. 6. The victim’s right to compensation and their participation in restorative justice. 7. Concluding remarks.

**KEYWORDS:** victim; protection; right to information; right to be heard; personal participation; transnational criminal procedures; compensation.

**SUMÁRIO:** 1. Introdução. 2. O controverso conceito de “vítimas” e o conceito geral fundamentos da sua tutela jurídica. 3. Direito da vítima à proteção processual e extraprocessual em casos transfronteiriços. 4. O direito da vítima à informação, apoio e assistência fora e dentro do julgamento criminal em situações transfronteiriças. 5. O direito da vítima a ser ouvida e à participação pessoal em processos-crime transnacionais. 6. O direito da vítima à indemnização e a sua participação na reparação justa. 7. Observações finais.

**PALAVRAS-CHAVE:** vítima; proteção; direito à informação; direito a ser ouvida; participação pessoal; processo crime transnacional; indemnização.

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## 1. Introduction

Worldwide, there is a general acknowledgement of the need to protect the person who has suffered the consequences of a criminal offence, since crime is not only a wrong against society but also a violation of the individual rights of victims<sup>3</sup>. For a long time, however, victims played a marginal role in modern criminal justice, at least compared to the attention paid to defendants who were deemed to be the only individuals worthy of being protected from the detrimental effects of criminal proceedings on their fundamental rights<sup>4</sup>. Although they undergo various types of economic, physical, and mental harm, victims were not allowed to directly contribute to fact-finding and decision-making processes: at most, they were seen as nothing more than witnesses and passive observers to the proceedings. Moreover, there was no room in criminal trials for their emotions and their need to remedy the harm they had suffered.

In recent decades, however, this situation has progressively changed, and the aggrieved parties have become the focal point of important transformations at both an international and supranational law level. The protection of victims is primarily aimed at avoiding the so-called secondary victimisation, and the granting of more active participation than before during the whole criminal proceedings.

The achievement of these goals, today, appears to be a very complex task, but also truly necessary for several reasons. One might consider the free movement of persons and goods over vast areas, which entails that criminal phenomena may have a transnational dimension or even be borderless (for instance, in the case of offences committed by using the Internet). Furthermore, the enforcement of victims' rights could turn out to be truly challenging in cross-border situations, thus requiring the intervention of authorities from different countries, which would need to deploy human and economic resources to provide assistance, protection and information to the victims<sup>5</sup>. The main risk is the

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3 This contribution is the outcome of a joint investigation. E. Malino wrote sections 1, 2, 4 and 5. V. Di Nuzzo wrote sections 3, 6, and 7.

See Recital no. 9 Directive 2012/29/EU. As underlined by J. DOAK, *Victims' Rights in Criminal Trials: Prospects for Participation*, in *Journal of Law and Society*, 2005, p. 302, "in many international criminal justice systems and human rights fora, 'victims' rights' are therefore increasingly being construed as a form of human rights, worthy of legal protection within domestic systems".

4 See M. MONTAGNA, *I diritti minimi della vittima*, in A. GAITO (ed.), *I principi europei del processo penale*, Dike, Roma, 2016, p. 300, and already M. CHIAVARIO, *Il "diritto al processo" delle vittime dei reati e la Corte Europea dei diritti dell'uomo*, in *Rivista di diritto processuale*, 2001, p. 939. This author addresses the topic from the viewpoint of the ECHR, highlighting that the Convention focuses on the one who is accused of being the perpetrator of a crime.

5 A. KLIP, *Fair trial rights in the European Union: reconciling accused and victims' rights*, in T. RAFARACI, R. BELFIORE (eds.), *EU Criminal Justice. Fundamental rights, transnational proceedings and the European Public Prosecutor's Office*, Springer, Cham, 2018, p. 23.

defeat of complaints made by persons injured by a crime which is not committed in their country of residence, or which they are victims of when are located abroad.

This scenario requires a comprehensive overview of the international and supranational framework, in order to outline the victims' safeguards that must be granted in transnational situations. This analysis deals with the legal protection of victims in cross-border cases, in order to verify whether and to what extent the safeguards granted in domestic cases may also apply in transnational criminal proceedings.

## 2. The controversial concept of 'victims' and the general foundations of their legal protection

The main difficulties in protecting those who have suffered the negative consequences of a criminal offence in transnational situations is the absence of a shared legal definition of victim in an international law scenario. The very concept of victim has criminological roots, originating in a specific field of research, i.e. victimology, born in the 1950s, which deals with the study of victims and their reactions to sustained trauma, and also with their experience of the criminal justice system<sup>6</sup>. According to this branch of criminology, the victim is any person who has been harmed or has been wronged by others, who perceives himself or herself as a victim, and who shares the experience with others, by seeking help<sup>7</sup>. As can be seen, the definition is extremely wide-ranging<sup>8</sup>, making it unsuitable for a legal context, where technical and precise language is required<sup>9</sup>. Therefore, the first task of each legislative instrument has always been to provide a definition of the concept of victim<sup>10</sup>, with the opposite effect of making it more uncertain and problematic, because of the difference among several alternative definitions<sup>11</sup>. For example, according

6 M. RAUSCHENBACH, D. SCALIA, *Victims and international criminal justice: a vexed question?*, in *International Review of the Red Cross*, 2008, p. 442.

7 E. VIANO, *Vittimologia oggi: i principali temi di ricerca e di politica pubblica*, in A. BALLONI, E. VIANO (eds.), *IV Congresso Mondiale di Vittimologia. Atti della giornata bolognese*, Clueb, Bologna, 1989, p. 126, provided this definition, which has been translated here by the authors.

8 According to H. BELLUTA, *Quale ruolo per la vittima nel processo penale italiano?*, in *Revista Brasileira de Direito Processual Penal*, 2019, p. 76, "il percorso (definitorio) si rivela pieno di incognite perché influenzato dall'estrema elasticità del concetto di 'vittima di reato'".

9 G. TRANCHINA, *La vittima del reato nel processo penale*, in *Cassazione penale*, 2010, p. 4053.

10 Regarding the difficulty of this operation see E. FATTAH, *Victim's Rights: past, present, and future. A global view*, in R. CARIO, D. SALAS (eds.), *Oeuvre de Justice et Victimes*, vol. 1, Paris, 2001, p. 81.

11 E. N. LA ROCCA, *La tutela della vittima*, in D. CHINNICI, A. GAITO (eds.), *Regole europee e processo penale*, Milano, 2018, pp. 149-151.

to the first Article of the U.N. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>12</sup>,

“‘victims’ means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal law operative within Member States, including those laws proscribing criminal abuse of power”<sup>13</sup>.

The 1985 U.N. Declaration was a milestone in obtaining recognition of the role of victims by the international community<sup>14</sup>. But, in this context, a turning point was represented by the Rome Statute of the International Criminal Court of 1998<sup>15</sup>, which, for the first time, recognised, their participatory rights in criminal proceedings<sup>16</sup>. The Statute, however, did not clarify who a victim was. The *Rules of Procedure and Evidence* (hereafter, RPE) provided a definition of ‘victim’: according to Rule 85(a) RPE, in particular, “‘victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”<sup>17</sup>. It is apparent that this definition is also too broad, and may thus impinge upon the effectiveness of victims’ participation in international criminal trials<sup>18</sup>.

12 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly Resolution 40/34 of 29 November 1985 A/RES/40/34, available on <https://www.unodc.org/pdf/rddb/CCPCJ/1985/A-RES-40-34.pdf>.

13 Moreover, Article 2 of the Declaration affirms that “the term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.

14 M. RAUSCHENBACH, D. SCALIA, *Victims and international criminal justice*, cit., p. 443.

15 Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

16 M. COHEN, *Victims’ Participation Rights within the International Criminal Court: A Critical Overview*, in *Denver Journal of International Law & Policy*, 2009, p. 351. See also A. CASSESE, *The Statute of International Criminal Court: Some Preliminary Reflections*, in *European Journal of International Law*, 1999, p. 167.

17 Moreover, according to Rule 85(b) RPE, “victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes”.

18 The analysis of the problems linked to Rule 85(a) RPE is made by C. MELONI, *Victims in international criminal justice*, in L. LUPÁRIA DONATI (ed.), *Victims and criminal justice. European standards and national good practices*, Wolters Kluwer, Assago, 2015, pp. 52-57. For example, the provision does not clarify the nature of the ‘harm’.

Along with the acknowledgement by these international law instruments, both the European Council and the European Union have made significant steps forward in safeguarding the injured person<sup>19</sup>, albeit following two different approaches.

The European Convention on Human Rights (hereafter, ECHR) laid down no specific provisions regarding the victims of criminal offences: Article 34 provides a definition related to the right to access to the Court, by stating that ‘victim’ is “any person, non-governmental organisation or group of individuals who complains of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto”<sup>20</sup>. Under the Rome Convention, both the accused and the accuser can be considered as victims when complaining of the breach of a right protected by the Convention. Furthermore, the Council of Europe (hereafter, CoE) has played a crucial role in the development and implementation of safeguards of the individuals injured by criminal offences.

While the Committee of Ministers Council of the CoE has provided important soft law instruments for the victims of certain criminal offences or to those considered ‘vulnerable’<sup>21</sup>, the ECtHR has progressively developed a set of safeguards for the aggrieved parties and their next of kin<sup>22</sup>, operating in both substantial and procedural terms<sup>23</sup>.

19 E.N. LA ROCCA, *La tutela della vittima*, cit., p. 145. With specific regard to the U.N. sources, V. BONINI, *Il sistema di protezione della vittima e i suoi riflessi sulla libertà personale*, Cedam, Milano, 2018, p. 12, affirms: “le fonti O.N.U., anche se possiedono il merito di aver coltivato il germe della nuova considerazione della vittima, si connotano per una blanda forza normativa che spesso si traduce in un contenuto dai sapori solo vagamente prescrittivi”.

20 The difference between the two notions of victim is emphasised by M. CHIAVARIO, *Il “diritto al processo” delle vittime dei reati e la Corte Europea dei Diritti dell’Uomo*, cit., p. 945 ff.; E.N. LA ROCCA, *La tutela della vittima*, cit., p. 121 ff.; M. VENTUROLI, *La vittima nel sistema penale, Dall’oblio al protagonismo?*, Napoli, 2015, p. 86 ff.

21 Since the 1970s, the European Council has adopted numerous legislative instruments to protect victims, for example Resolution no. (77)27 on the compensation of victims of violent crimes; Recommendation no. (83)7 regarding the society’s participation in criminal politics; the European Convention on Compensation for Victims of Violent Crimes of 1983; Recommendation no. (85)11, concerning the position of victims in the field of criminal law and procedure; Recommendation no. (87)21 on victim assistance and the prevention of victimization; Recommendation no. (99)19 on mediation in criminal matters and Recommendation no. (06)8 on the assistance to victims of crime. See M. VENTUROLI, *La vittima nel sistema penale*, cit., pp. 86-95. The most recent are the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, signed in Lanzarote, 25 October 2007, and Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, signed in Istanbul, 11 May 2011.

22 The Court has adopted a broad definition of victim, which includes the so-called ‘indirect-victim’. Indeed, the ECtHR granted the status of victim to the mother of a man who died during detention, because she was “herself the victim of the authorities’ complacency in the face of her anguish and distress”. Cf. ECtHR, 25 May 1998, *Kurt v. Turkey*, appl. no. 15/1997/799/1002. See M. MONTAGNA, *I diritti minimi della vittima*, cit., p. 311 and S. QUATTROCOLO, *La Corte europea dei diritti dell’uomo fa il punto sullo status di vittima*, in *La Legislazione penale*, 2008, p. 158.

23 The safeguards of the victim are established in Article 6 ECHR, and from the so-called *core rights*, established by Articles 2 (right to life), 3 (prohibition of torture), 4 (prohibition of slavery and forced labour), and 8 (right to respect for private and family life).

Moreover, many rulings of the European Court paved the way for the most important legal instrument adopted by the legislative bodies of the European Union<sup>24</sup>, namely Directive 2012/29/UE<sup>25</sup>. According to this legal instrument, which may be considered the *Magna Carta* of victims' rights in criminal proceedings<sup>26</sup>,

“(a) ‘victim’ means: (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss caused directly by a criminal offence; (ii) family members of a person whose death was caused directly by a criminal offence and who have suffered harm as a result of that person's death”<sup>27</sup>.

As we can see, the lack of a uniform legal framework makes it difficult to identify a shared definition of ‘victim’. Nonetheless, international and supranational law have a common goal, that is the enhancement of the rights of the injured party in the field of protection, information, support, and participation in criminal proceedings. More specifically, several legal instruments provide for specific rules regarding the protection of victims with the two main purposes of avoiding serious consequences of the trauma caused by the crime and securing the evidentiary value of their statements<sup>28</sup>. In the

24 M. GIALUZ, *Victim's protection in the case law of the European Court of Justice and the European Court of Human Rights*, in L. LUPÁRIA DONATI (ed.), *Victims and criminal justice*, cit., p. 22; E. N. CATALANO, *La tutela della vittima nella direttiva 2012/29/UE e nella giurisprudenza delle corti europee*, in *Rivista italiana di diritto e procedura penale*, 2014, p. 1790.

25 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>. The 2001 FD represented the very first legal instrument adopted in the EU with the aim of securing minimum rights for crime victims. Unfortunately, implementation reports on the Council Framework Decision 2001/220/JHA, published in 2004 and in 2009, concluded that the EU legislation had not been effective in achieving minimum standards for victims across the EU. See *Report from the Commission on the standing of victims in criminal proceedings*, COM/2004/0054 final and *Report from the Commission on the standing of victims in criminal proceedings*, COM/2009/0166 final.

26 See F. DELVECCHIO, *La nuova fisionomia della vittima del reato dopo l'adeguamento dell'Italia alla direttiva 2012/29/UE*, in *archiviodpc.dirittopenaleuomo.org*, 2016, pp. 1-33, who emphasises the importance of this Directive, holding that it provides the basic guidelines for every ‘victim-oriented’ legal intervention.

27 Article 2 Directive 2012/29/EU specifies that “‘family members’ means the spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim”. However, the victim's definition provided by Directive 2012/29/EU does not include family members of the injured persons who have suffered harm to physical integrity or other key values.

28 Art. 6(d) of the Declaration of Basic Principles highlights the necessity of “measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation”. Cf. Art. 68 (“Protection of the victims and witnesses and their participation in the proceedings”) of the Rome Statute of the International Criminal Court; Rules 87 and 88 RPE. See also Convention of Lanzarote on the Protection of Children and Convention of Istanbul on Preventing and Combating Violence against Women.

light of such approach, ensuring the safety of aggrieved parties was essential in order to permit them to contribute with their statements to the ascertainment of facts and the identification of those responsible for the crime<sup>29</sup>.

### 3. The victim's right to procedural and extra-procedural protection in cross-border cases

From their first contact with the competent authorities, victims must be granted adequate safeguards in order to preserve their psychophysical wellbeing, avoid secondary victimisation and reduce the risk of intimidation or retaliation that would prevent them from testifying in the criminal proceeding. The phenomenon of secondary victimisation, in particular, implies the need to protect the aggrieved person both 'in' and 'from' the criminal process<sup>30</sup>.

The degree of protection, which victims and their next of kin must be granted in domestic inquiries, significantly increases in cross-border cases, particularly when the victims are foreigners or a large number of people have suffered any kind of harm<sup>31</sup>. In these situations, identifying all the victims may itself be truly challenging, and, therefore, judicial cooperation can play a pivotal role in helping national authorities to identify all the aggrieved persons and grant them proper protection<sup>32</sup>.

But what exactly does 'protection' mean? First of all, as acknowledged by international courts, it lies with national lawmakers to provide coherent criminal law provisions aimed at sanctioning all those conducts that put at risk or jeopardise fundamental values, such as life, personal freedom, and human dignity<sup>33</sup>. This protection intervenes preventively

29 Cf. G. ILLUMINATI, *The victim as a witness*, in L. LUPÁRIA DONATI (ed.), *Victims and criminal justice*, cit., pp. 67-68.

30 According to M. DANIELE, E. CALVANESE, *Evidence gathering*, in R. KOSTORIS (ed.), *Handbook of European Criminal Procedure*, Springer, Cham, 2018, p. 386, 'secondary victimisation' means "the psychological trauma often suffered by victims due to the re-enactment of the events". Recently, the ECtHR condemned Italy for the infringement of Article 8 ECHR. According to the Court, a mother could be exposed to secondary victimisation, when the civil tribunal revoked her parental responsibility, after she reported the violence suffered by her husband. Cf. ECtHR, 10 November 2022, *I.M. and others v. Italy*, appl. no. 25426/29.

31 Cf. Report on Eurojust's casework on victims' rights. A contribution to the European Commission Coordinator for Victims' Rights mapping exercise, February 2022.

32 In the event of a systematic lack of proper resources for victim protection, authorities are forced to come up with creative solutions to provide protection or reduce the risk of intimidation or retaliation. See European Centre for Constitutional and Human Rights, *Enhancing Victims' Rights in Mutual Legal Assistance Frameworks*, cit., p. 13.

33 On positive obligations, cf. ECtHR, 7 October 2021, *Zoletic and others v. Arzebaijan*, appl. no. 20116/12, para. 186; ECtHR, 9 June 2009, *Opuz v. Turkey*, appl. no. 33401/02, para. 150. See T. ABDEL-MONEM, *Opuz v. Turkey: Europe's Landmark Judgment on Violence against Women*, available at <https://www.corteidh.or.cr/tablas/r23564.pdf>. The Inter-American Court of Human Rights adopted a similar approach: the broad clause of Article 1 ACHR, which imposes on States the duty to respect the rights enshrined in the American Pact of San José, sets the general

and aims at avoiding primary victimisation<sup>34</sup>. Secondly, all competent authorities must adopt the necessary measures to avoid further harm as a result or consequence of the involvement in the criminal proceedings or caused by the accused person or third parties. The ECtHR has constantly underlined the obligation of contracting States to undertake all the necessary measures, both substantial and procedural, to safeguard the lives of the people under their jurisdiction<sup>35</sup>. Although the Court does not list all the available means to protect victims' life, it requires international lawmakers to establish the best procedures aimed at preventing further infringements of fundamental rights, after a crime has been already committed<sup>36</sup>. In sum, caselaw has strongly contributed to the enhancement of victims' protection before and during criminal proceedings, above all when key values are at stake, such as personal safety and freedom, the right to privacy and the right not to be discriminated against.

It is worth noting that most of the indications provided by the ECtHR regarding the safeguard and participation of the aggrieved party can be applied to cases with a transnational dimension. Indeed, even if the Court scrutinises the conduct of the domestic authorities of individual States, breaches of fundamental rights enshrined by ECHR law emerge increasingly often in proceedings that acquire a cross-border nature either because of the need to obtain evidence in a third country, or due to the nationality of the persons concerned. But even in these cases, States are called upon to ensure an adequate and effective protection of victims' rights and to facilitate their active participation in the proceedings.

In the context of this framework, Directive 2012/29/EU pays specific attention to the issues related to victims' protection, and pinpoints types of crimes (terrorism, violent crimes, human trafficking), most of which may be of a transnational nature, and categories of victims (children or subjects who are recognised as particular vulnerable after individual assessment<sup>37</sup>), which entail the adoption of specific measures of protection

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foundations for requirements for the protection of victims through criminal proceedings. See, for example, IACtHR, 29 July 1988, *Velásquez Rodríguez c. Honduras*, para. 166.

34 T. RAFARACI, *New Perspectives for the Protection of the Victims in the EU*, in S. Ruggeri, (ed.), *Human Rights in European Criminal Law. New Developments in European Legislation and Case Law after the Lisbon Treaty*, Springer, Heidelberg, 2015, p. 217.

35 ECtHR, 2 March 2017, *Talpis v Italy*, appl. no. 41237/24, paras. 99 ff.; ECtHR, 12 June 2008, *Bevacqua and S. v Bulgaria*, appl. no. 71127/01, para. 65; ECtHR, 5 March 2009, *Sandra Janković v. Croatia*, appl. no. 38478/05, para. 45; ECtHR, 14 October 2010, *A. v. Croatia*, appl. no. 55164/08, para. 60. Cf. IACtHR, 19 March 2009, *Poblete Vilches and others v. Chile*, para. 190; IACtHR, *Véliz Franco and others v. Guatemala*, para. 202.

36 ECtHR, 30 October 2012, *E.M. v. Romania*, appl. no. 43994/05.

37 Cf. *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 11 May 2020, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0188&from=EN>, p. 7, according to which in

by Member States when dealing with them. This Directive highlights the relevance of protection in order to allow victims to participate in the criminal proceeding without any further prejudice<sup>38</sup>. Among the protective measures listed as examples by European law, the video recording of interviews<sup>39</sup> and separate premises have the specific purpose of avoiding contact between victims and their family members with the alleged offender<sup>40</sup>.

In addition, Chapter 4 of the Directive on victims' rights provides specific indications regarding victims' right to protection from any kind of harm, while emphasising the need to avoid visual contact with the alleged perpetrators and to make special measures available for some categories of subjects that are particularly vulnerable<sup>41</sup>. Even though the Directive is mainly targeted at domestic criminal trials, we may argue that some measures may be extremely useful in cross-border investigations, particularly those regarding serious criminal phenomena related to human trafficking, terrorism, or organised crime. Remarkably, the Directive itself specifies that Member States must ensure the victim's protection regardless of their citizenship or nationality<sup>42</sup>.

Furthermore, the abovementioned Recital no. 51 deals with the case in which the victim has left the territory of the Member State where the criminal offence was committed, by stating that the Member State should only provide protection "for what is directly related to any criminal proceedings it is conducting regarding the criminal offence concerned, such as special protection measures during court proceedings". In this case, the State where the victim lives should provide any further assistance or protection

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several Member States the requirement to introduce the individual assessment of particular vulnerability is not implemented or is only partially implemented. This impacts the overall compliance with the provisions on specific protection measures under Articles 23 and 24 that rely on such an evaluation.

38 However, fewer than half of the Member States comply with this provision, since they systematically lack specific measures aimed at protecting family members. In a few Member States, these relevant measures are not available to all victims or the existing measures do not consider protection against the risks of emotional or psychological harm. *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU*, p. 7.

39 The *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU*, p. 8, highlighted that in several Member States communication technologies, despite their usefulness, are not deployed effectively during court proceedings as a means to avoid contact between victims and offenders.

40 Only few Member States fulfil this requirement with practical, non-legislative measures. Cf. *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/29/EU*, p. 8.

41 Cf. Articles 22 ("Individual assessment of victims to identify specific protection needs"), 23 ("Right to protection of victims with specific protection needs during criminal proceedings") and 24 ("Right to protection of child victims during criminal proceedings. See G. ILLUMINATI, *The victim as a witness*, cit., p. 70 ff.

42 Cf. Recital no. 10, which clarifies that the "Directive does not address the conditions of the residence of victims of crime in the territory of the Member States. Member States should take the necessary measures to ensure that the rights set out in this Directive are not made conditional on the victim's residence status in their territory or on the victim's citizenship or nationality".

when necessary<sup>43</sup>. The shield of protection should follow the victim across the Union, regardless of the Member State in which they live.

However, even if in 2012 EU lawmakers did not exhaustively address the problems related to the protection of foreign victims or victims that are not resident in the trial State<sup>44</sup>, one year before, Directive 2011/99/EU introduced a remarkable new measure, namely the European protection order (hereafter, Directive EPO), with the purpose of extending the safeguard of victims in all the Member States and allowing them to fully enjoy the right to freedom and free movement across the Union<sup>45</sup>. In sum, this legal instrument built a form of trans-border protection for the persons it was aimed at. An EPO, then, may be issued when a person who is under a domestic protection measure in the requesting State decides to reside or live in a different Member State, which must execute the order without undue delay, and adopt a measure that would be available under its national law in a similar case, with the aim of protecting the person in question. Nevertheless, the analysis of the practical application of the EPO Directive has shown that this legal instrument has not yet reached its full potential, since the number of orders issued and executed is quite low: according to the 2020 *Report* of the Commission, only 37 EPOs were issued and only 15 executed<sup>46</sup>. The most plausible reasons for this failure are: that the persons concerned were unaware they could avail themselves of such orders<sup>47</sup>; that national authorities had not been fully informed about how to activate cross-border protection; that other national protection measures were available<sup>48</sup>. In the same period,

43 As stated by Article 3(g) of the Directive, if victims “are resident in a Member State other than that where the criminal offence was committed”, they must be informed of “any special measures, procedures or arrangements, which are available to protect their interests in the Member State where the first contact with the competent authority is made”.

44 Victims in cross-border situations are likely to feel more vulnerable and face many difficulties exercising their rights. For instance, complaints made to competent authorities outside the EU, such as embassies or consulates, do not fulfil the obligations set out in the Directive. See *Commission Staff Working Document Evaluation of Directive 2012/29/EU*, cit., p. 34.

45 In this sense, see Recital no. 6 Directive EPO: “In a common area of justice without internal borders, it is necessary to ensure that the protection provided to a natural person in one Member State is maintained and continued in any other Member State to which the person moves or has moved. It should also be ensured that the legitimate exercise by citizens of the Union of their right to move and reside freely within the territory of Member States, in accordance with Article 3(2) of the Treaty on European Union (TEU) and Article 21 TFEU, does not result in a loss of their protection”.

46 *Report from the Commission to the European Parliament and the Council on the Implementation of Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:187:FIN>.

47 The implementation of some provisions of the Directive, such as the obligation to inform the victim, should be improved in some Member States. Moreover, some of them do not envisage any sanctions for a breach of measures adopted in execution of an EPO. This may have a deterrent effect on potential requests for this form of cross-border protection.

48 See T. WAHL, *Commission: Directive on European Protection Order Underused in Practice*, in *Eucri*m, 14 August 2020.

the Commission *Report about the implementation of Victims' Rights Directive* underlined that most Member States still have unsatisfactory measures regarding access to information, support services, and protection with respect to victims' individual needs<sup>49</sup>.

Notwithstanding the great number of legal instruments that have expressly recognised the need to protect the victims, this task still remains difficult for the competent authorities to fulfil<sup>50</sup>. In the context of the European Union, Eurojust can play a pivotal role in the identification and protection of victims, thanks to the sharing information systems, and especially in the field of transnational criminal justice enables timely and efficient coordination in cross-border cases involving victims<sup>51</sup>. Indeed, since some serious forms of crimes involve a huge number of victims, in such cases the protection of the victims' interests must be taken into account when establishing the competent jurisdiction<sup>52</sup>. Regarding this issue, Eurojust has provided assistance in determining the best place to prosecute, without neglecting the victims' position<sup>53</sup>.

Furthermore, cross-border crimes exasperate the difficulties of identifying and protecting the victims, negatively impacting such protection<sup>54</sup>. For this reason, mutual legal assistance and international judicial cooperation not only facilitate information sharing, but are extremely helpful in protecting victims of cross-border crimes<sup>55</sup>.

49 T. WAHL, *Commission Unsatisfied with Transposition of Victims' Rights Directive*, in *Eucrim*, 14 August 2020.

50 "The general assessment is that the Directive has significantly extended and strengthened victims' right to receive protection. Nonetheless, the evaluation found that there are still difficulties limiting the effective implementation of this right". See *Commission Staff Working Document Evaluation of Directive 2012/29/EU*, cit., p. 20.

51 *Report on Eurojust's casework on victims' rights*, cit., p. 6.

52 Recital no. 9 of Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings states that the competent authorities should take into account the place of the "significant interests of victims and witnesses". However, the Framework Decision's rules said nothing about this topic. Also Article 19(3) of the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA of 13 June 2002 on combating terrorism provides that the country of origin of the victims is a factor that must be considered when these crimes fall within the jurisdiction of more than one Member State, which are required to cooperate in order to decide which of them will prosecute the offence.

53 In 2002, an oil-tanker owned by a Greek firm and registered in the Bahamas, spilled 77,000 tons of heavy fuel near the Spanish coastline, forcing the closure of Spanish and French fishing grounds. Eurojust contributed to establishing the trial country and recommended that it was Spain, because it could have granted the proper safeguards to both French and Spanish victims. This conflict of jurisdiction was resolved by using the best interest of victims as the determining factor. See *Report on Eurojust's casework on victims' rights*, cit., p. 14.

54 As reported by Eurojust, "difficulties range from the identification of all victims to the complexity of organising their participation in different trials without running into the risk of secondary victimization". See *Report on Eurojust's casework on victims' rights*, cit., p. 19.

55 Cf. Recital no. 5 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, shows favour towards "close cross-border cooperation, including the sharing of information and the sharing of best practices, as well as a continued open dialogue between the police, judicial and financial authorities of the Member States, is essential. The coordination of investigations and prosecutions of cases of trafficking in human beings should be facilitated by enhanced cooperation

However, the 2022 *Evaluation of Directive 2012/29/EU* underlined some serious issues concerning “the lack of information on the existing cooperation mechanisms between Member States, the lack of efficient coordination and cooperation among Member States, and the lack of financial resources and/or necessary means to guarantee effective cross-border criminal proceedings”<sup>56</sup>.

#### **4. The victim's right to information, support and assistance outside and within the criminal trial in cross-border situations**

Despite the increasing attention paid to victims at different levels, the provisions regarding their procedural safeguards may be insufficient to ensure the development of their role in criminal justice. The concrete exercise of these safeguards could encounter various practical difficulties, mainly of a personal, economic, linguistic, and legal nature. Therefore, national and international lawmakers have attempted to remove (or reduce) such barriers by laying down specific duties for the judicial authorities to improve the victims' right to information, support, and assistance<sup>57</sup>.

Traditionally, domestic law has recognised these rights by considering the injured person from a criminological perspective, as someone who has suffered damages as a consequence of a criminal offence, and who because of this should be supported and helped<sup>58</sup>. Remarkably, original forms of ‘service rights’<sup>59</sup> provided to victims were psychological and medical assistance, which should be granted out of court, regardless of the aggrieved party's decision to cooperate with the competent authorities<sup>60</sup>.

In recent times, the approach followed by supranational law has changed, and these rights have acquired increasing relevance with a view to ensuring active and informed

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with Europol and Eurojust, the setting-up of joint investigation teams, as well as by the implementation of Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflict of jurisdiction in criminal proceedings”.

56 For example, video-hearing tools are not used in all the Member States, due to a lack of resources or a proper legal framework. In addition, recourse to collaborative platforms must be implemented in order to achieve satisfactory cooperation. See *Commission Staff Working Document Evaluation of Directive 2012/29/EU*, cit., p. 19.

57 The explicit recognition of those rights is not an innovation led by the recent legal instrument in the field of victim protection. Indeed, the 1985 UN Resolution provided the right to assistance, affirming that “victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means”.

58 V. BONINI, *Il sistema di protezione della vittima e i suoi riflessi sulla libertà personale*, cit., p. 27-28.

59 The expression is used by J. DOAK, *Victims' Rights, Human Rights, and Criminal Justice. Reconciling the Role of Third Parties*, Hart Pub Ltd, Oxford, 2008, p. 4.

60 Assistance and support for victims are independent in any legal instrument from their willingness to cooperate in the criminal investigation, prosecution or trial. Indeed, according to Article 18(4) of the Istanbul Convention, “the provision of services shall not depend on the victim's willingness to press charges or testify against any perpetrator”.

participation in criminal proceedings. The very first safeguard that the domestic authorities must grant victims is the possibility of understanding the content of the communication received. To this end, according to Directive 2012/29/EU, “Member States shall take appropriate measures to assist victims to understand and be understood from the first contact”<sup>61</sup>. This new approach is of paramount importance in cross-border situations because it lays the basis for the recognition of linguistic assistance<sup>62</sup>. Indeed, linguistic assistance plays a key role in enabling victims to actively take part in the proceedings. If victims are involved in proceedings conducted by a country in which they are not resident, they need to be provided with adequate interpretation and translation services<sup>63</sup>. The final Report of the *Study to support the evaluation of Directive 2012/29/EU* highlights the link between procedural safeguards and linguistic rights<sup>64</sup>, stressing that “the right to be heard was better enforced for victims in cross-border situations, with the help of translation and interpretation service”. In light of this, the Directive on victims’ rights grants the aggrieved party the right to present a charge using their own language, and the right to request the translation of a document considered fundamental. These provisions largely reproduce the contents of Directive 2010/64 on the right to interpretation and translation in criminal proceedings<sup>65</sup>. Nonetheless, some important features distinguish the two legal texts, and the protection ensured to victims seems to be weaker than that given to defendants. EU law, indeed, does not recognise an absolute right to linguistic understanding; rather, it makes constant reference to the victim’s “role in the relevant criminal justice system in criminal proceedings”<sup>66</sup>. Moreover, the 2012 legislation does not require the translation of all the procedural documents: it only

61 Article 3 Directive 2012/29/EU.

62 According to Recital no. 21 “Information and advice provided by competent authorities, victim support services and restorative justice services should, as far as possible, be given by means of a range of media and in a manner which can be understood by the victim. Such information and advice should be provided in simple and accessible language. It should also be ensured that the victim can be understood during proceedings. In this respect, the victim’s knowledge of the language used to provide information, age, maturity, intellectual and emotional capacity, literacy and any mental or physical impairment should be taken into account. Particular account should be taken of difficulties in understanding or communicating which may be due to a disability of some kind, such as hearing or speech impediments. Equally, limitations on a victim’s ability to communicate information should be taken into account during criminal proceedings”.

63 According to L. PARLATO, *La parola alla vittima. Una voce in cerca di identità e di “ascolto effettivo” nel procedimento penale*, in *Cassazione penale*, 2013, p. 3303, “affinché la partecipazione della persona offesa al procedimento sia effettiva, occorre che essa sia salvaguardata rispetto al c.d. rischio linguistico”.

64 Commission Staff Working Document *Evaluation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0179&from=FR>, p. 19.

65 L. PARLATO, *La parola alla vittima*, cit., p. 3293 ff.

66 For example, see Article 7(1) Directive 2012/29/EU.

ensures the right to obtain the translation of the “information essential to the exercise of their rights in criminal proceedings in a language that they understand, free of charge, to the extent that such information is made available to the victims”<sup>67</sup>. Thus, the domestic authorities are not demanded to translate the “passage of essential documents which are not relevant for the purpose of enabling victims to actively participate in the criminal proceeding”<sup>68</sup>.

Concerning this issue, Recital no. 30 of the 2012 Directive expressly refers to the decision “finding [...] guilt or otherwise ending criminal proceedings”, thus limiting the victim’s right to translation only to few cases. In addition, Recital no. 34 provides that Member States, depending on the role of victims in domestic legislations, can allow for interpretation and translation only “to the extent necessary for victims to exercise their rights”. Nonetheless, the reference to the exercise of victims’ rights could be read to enhance their right to linguistic understanding. Interestingly in the *Covaci* case, the CJEU delivered an extensive interpretation of the documents that should be translated<sup>69</sup>, even though this approach addressed defendants’ rights. In light of this, we can argue that, following the words of Recital no. 34 itself, that the victim could benefit from the translation of other documents when they are relevant for the effectiveness of their rights. The Directive neither clarifies the situation in which some information may be considered ‘essential’ nor which authority should make this assessment<sup>70</sup>. Therefore, the decision of the competent authority about whether information is essential or not does not seem to be open to discussion, since EU law does not ensure any chance for the victim to challenge the refusal by the domestic bodies to translate certain documents or parts of them. EU law leaves to the discretion of national legislators the introduction of appropriate instruments to tackle this issue<sup>71</sup>, thus jeopardising the effectiveness of linguistic assistance and, consequently, the concrete exercise of victims’ procedural safeguards.

Another serious difficulty in ensuring participation in criminal proceedings could be the lack of legal knowledge of the victim and his or her relatives. Such difficulties have

67 Article 7(3) Directive 2012/29/EU.

68 Article 7(5) Directive 2012/29/EU. See also S. RUGGERI, *Audi Alteram Partem in Criminal Proceedings. Towards a Participatory Understanding of Criminal Justice in Europe and Latin America*, Springer Cham, 2017, p. 385, who criticises this provision, because it leads to a paradoxical result: indeed, “if the guarantee of translation only concerns the documents essential to the exercise of the defence rights, how can there be passages that are not relevant to ensure the victim’s active participation in the proceeding?”.

69 CJEU, 15 October 2015, *Covaci*, C-216/14, paras. 45 ff.

70 S. ALLEGREZZA, *Victim’s statute within directive 2012/29/EU*, in L. LUPÁRIA DONATI (ed.), *Victims and criminal justice. European standards and national good practices*, cit., p. 12.

71 In this regard, the linguistic safeguards granted to the injured person appear more limited than those established by the Directive 2010/64. Indeed, Articles 2 and 3 require Member States to provide a mechanism or an appeal procedure to challenge such a decision.

a huge relevance also in cross-border cases, since the victims may not be aware of the legal system of trial State. Indeed, the aggrieved parties, even if adequately informed by the authorities, would not be able to effectively exercise their procedural safeguards by their own. Therefore, they may not have the financial resources to face all the legal expenses. Hence, Member States have to remove this economic and technical barriers by recognising the right to be assisted by a lawyer<sup>72</sup> and to access legal aid<sup>73</sup>. Nonetheless, the scope of this right appears to be somehow weak because it offers guarantees on condition that the victim, according to domestic law, has the *status* of a formal party to criminal proceedings, and the requirements under which the injured persons may access legal aid shall be determined by domestic law<sup>74</sup>.

As we can see, EU law legitimises the maintenance of divergencies in the relevant legislation among Member States, also in the field of victims' right of information, support, and assistance. Thus, after listing the information that Member States must provide to the aggrieved party<sup>75</sup>, the 2012 Directive, through recognising some innovative safeguards, still leaves a wide margin of discretion to national legislators.

This cautious approach, despite potentially having a negative impact on the effective enhancement of the victim's role in criminal proceedings, however seems to be understandable. Certainly, the improvement of the rights of assistance and support necessitates significant economic and social efforts, and sometimes national and international authorities struggle to find the resources and put such arrangements in

72 For example, Article 68 of the Statute of Rome allows victims to choose their legal representatives, who have a right to present their views and make submissions when their interests are likely to be affected.

73 Article 13 Directive 2012/29/EU.

74 Actually, even the exercise of the "right to reimbursement of expenses" depends on these two conditions. Indeed, the Article 14 affirms that "Member States shall afford victims who participate in criminal proceedings, the possibility of reimbursement of expenses incurred as a result of their active participation in criminal proceedings, in accordance with their role in the relevant criminal justice system. The conditions or procedural rules under which victims may be reimbursed shall be determined by national law".

75 According to Article 4 Directive 2012/29/EU, Member States must ensure that victims are offered the information related to "(a) the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation; (b) the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures; (c) how and under what conditions they can obtain protection, including protection measures; (d) how and under what conditions they can access legal advice, legal aid and any other sort of advice; (e) how and under what conditions they can access compensation; (f) how and under what conditions they are entitled to interpretation and translation; (g) if they are resident in a Member State other than that where the criminal offence was committed, any special measures, procedures or arrangements, which are available to protect their interests in the Member State where the first contact with the competent authority is made; (h) the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings; (i) the contact details for communications about their case; (j) the available restorative justice services; (k) how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed".

place. For example, in all five trials concerning the 1994 Rwandan genocide in Belgium, the national authorities enabled victims and witnesses to participate personally in the proceedings, by way of organising passports and visas, paying for local transport and flights, providing clothing, and arranging collective accommodation in military or police compounds or hotels<sup>76</sup>. Such measures entail important costs for domestic systems, but there could be cases in which similar efforts cannot be made. This situation is clearly more problematic in cross-border cases. Because of the economic efforts required to grant victims' right to be assisted, national authorities (investigators, prosecutors, courts) may not always consider such activities as part of their portfolio. Therefore, there is a strong need to identify the State responsible for the assistance of the victims when multiple States are involved. It was precisely in this regard that the 2012 Directive provided that

“if the victim has left the territory of the Member State where the criminal offence was committed, that Member State should no longer be obliged to provide assistance, support and protection except for what is directly related to any criminal proceedings it is conducting regarding the criminal offence concerned, such as special protection measures during court proceedings. The Member State of the victim's residence should provide assistance, support and protection required for the victim's need to recover”<sup>77</sup>.

## 5. The victim's right to be heard and personal participation in transnational criminal proceedings

In recent times, victims have increasingly requested to make their voices heard in criminal proceedings. In particular, the right to be heard lies at the core of the guarantee of participation<sup>78</sup>, even if it represents the minimum level of victims' involvement in criminal trials<sup>79</sup>.

76 European Centre for Constitutional and Human Rights, *Enhancing Victims' Rights in Mutual Legal Assistance Frameworks. Recommendations for the Convention on international Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes*, 1 May 2020. This is the reason why some scholars have criticised the excessive attention paid to victims' rights, since their participation in criminal proceedings, especially before the ICC, entails further delay in already complex cases. The enhancement of their role, indeed, requires significant efforts by the competent authorities in terms of resources and logistics. M. S. GROENHUIJSEN, *The development of international policy in relation to victims of crime*, in *International Review of Victimology*, 2014, p. 42.

77 Recital no. 51 Directive 2012/29/EU. See also Victim Support Europe, *Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe*, 2013, pp. 17-18.

78 A. KLIP, *Fair trial rights in the European Union*, cit., p. 22.

79 H. BELLUTA, *Quale ruolo per la vittima nel processo penale italiano?*, cit., p. 84.

Traditionally, international law did not grant the victims an autonomous right to be heard<sup>80</sup>. This caused a truly problematic situation, showed by the experience of the *ad hoc* international criminal tribunals (such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda): victims/witnesses could only be heard during the proceedings if called previously by the parties and within the limits of the questions presented by the prosecutor or the defence<sup>81</sup>. Therefore, their participation in criminal proceedings was purely accidental.

However, the limited chance to tell their stories affected both individual and general interests, impeding the achievement of an effective protection of victims' rights, while complicating the proper ascertainment of facts. Without a doubt, the statements of the people who have undergone the consequences of a criminal offence often play a key role in understanding how it was committed. Furthermore, the information that victims can provide sometimes represents the main, if not sole evidence in the trial, which explains why the injured party is often called upon to collaborate with the authorities<sup>82</sup>. In these cases, victims are granted with urgent protection measures because of their role as witnesses, since the main goal is to ensure that evidence may be used in the trial<sup>83</sup>.

Although the legal framework has significantly evolved and has progressively improved personal participation and the right to be heard, the approach followed by international and supranational law and case-law is still ambiguous, and reduces the effectiveness of victims' safeguards. At the EU law level, indeed, Directive 2012/29/UE addresses these issues cautiously<sup>84</sup>, and the Court of Justice has sometimes interpreted these rules restrictively. For example, while EU law allows the aggrieved parties to contribute to fact-finding with their statements, their right to be heard, according to the

80 Today, this right is enshrined by Article 68 of the Statute of Rome, Article 31(c) of the Lanzarote Convention, and Article 5(d) of Istanbul Convention. Moreover, it is expressly set out in the Article 10 of Directive 2012/29/EU, according to which "1. Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. 2. The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law". G. ILLUMINATI, *The victim as a witness*, cit., p. 68, pointed out the distinction between the two rights recognised by Article 10, affirming that they do not coincide "even if his or her own evidence is one of the main proofs that the victim can ask to present".

81 According to J. DOAK, *Victims' Rights in Criminal Trials*, cit., p. 312, "it is ironic that the person whose complaint was instrumental in bringing the case to court is denied the right to participate as a separate player in proceedings, but must instead play an extremely limited role in so far as they may only testify if called by prosecution, and may only relay information to the factfinder within the questioning parameters laid down by counsel". See also, G. ZAGO, *The role of victims at the international criminal court: legal challenges from the tension between restorative and retributive justice*, in *Diritto penale contemporaneo*, 2014, p. 4.

82 G. ILLUMINATI, *The victim as a witness*, cit., p. 67.

83 See H. BELLUTA, *Quale ruolo per la vittima nel processo penale italiano?*, cit., p. 86; C. EVANS, *Reparations for Victims in International Criminal Law*, available at <https://rwi.lu.se/app/uploads/2012/04/Reparations-for-Victims-Evans.pdf>, p. 6.

84 S. RUGGERI, *Audi Alteram Partem in Criminal Proceedings*, cit., p. 380.

Court, does not give the victims any power over the outcome of the proceedings. The CJEU underlined that they cannot influence the determination of the sanction and its amount, or the criminal effects of a conviction<sup>85</sup>.

Furthermore, EU legislation still grants Member States considerable leeway in deciding how to concretely ensure that victims have an opportunity to take part and right to be heard in criminal proceedings. The 2012 Directive also stresses that their involvement in criminal proceedings depends on several variables, in particular the different solutions provided for by national legislation in relation to the victims' formal *status*<sup>86</sup>. This Recital has been considered to be 'cryptical' since the constant reference to national law makes the effectiveness of procedural safeguards dependent on whether Member States grant the aggrieved parties the right to play an active role in criminal proceedings<sup>87</sup>.

In addition to this, Article 10 does not clarify when the injured person should be heard. Therefore, the fact that Member States could require the victims' hearing also at a later stage of the trial jeopardises the effectiveness of their rights. Article 20, which establishes the "right to protection of victims during criminal investigations", states that the interviews must be conducted without "unjustified delay after the complaint with regard to a criminal offence has been made to the competent authority"<sup>88</sup>. However, this right has to be granted "without prejudice to the rights of defence and in accordance with rules of judicial discretion"<sup>89</sup>. Once again, the approach of the EU legislator was overly cautious: the real safeguard of victims' procedural rights is entrusted to the discretion of each Member State. Although the final report of the *Study to support the evaluation of Directive 2012/29/EU* identified "a few similar good practises in several Member States"<sup>90</sup>, the *status*

85 CJEU, 9 September 2008, *Kuts*, C-404/07. See T. RAFARACI, *New perspectives for the protection of the victims in the EU*, cit., p. 218.

86 Indeed, according to Recital no. 20 Directive 2012/29/EU, "The role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system, and is determined by one or more of the following criteria: whether the national system provides for a legal status as a party to criminal proceedings; whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness; and/or whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings. Member States should determine which of those criteria apply to determine the scope of rights set out in this Directive where there are references to the role of the victim in the relevant criminal justice system". Thanks to this provision, although most Member States have transposed the right to be heard, "the extent to which victims may exercise that right does vary in national legislation". Cf. *The Victims' Rights Directive 2012/29/EU. European Implementation Assessment*, December 2017, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611022/EPRS\\_STU\(2017\)611022\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611022/EPRS_STU(2017)611022_EN.pdf), p. 55

87 S. RUGGERI, *Audi Alteram Partem in Criminal Proceedings*, cit. p. 380.

88 Article 20(1)(a) Directive 2012/29/EU.

89 Article 20 Directive 2012/29/EU.

90 *Commission Staff Working Document Evaluation of Directive 2012/29/EU*, cit., p. 19.

of the aggrieved party still remains different across EU countries. The discrepancies among the domestic legislations could be particularly problematic whenever the trial country does not ensure to the victim the same guarantees of his or her resident State.

Within ECHR law, the ECtHR has played a crucial role in the enhancement of victims' right to be heard during criminal investigations. The Court has recognised the need to immediately hear the victim of specific criminal offence, such as stalking and sexual harassment. Particularly, it has emphasised the duty for the investigating authorities to carry out all the necessary activities, including complete and timely investigations, and to protect the victims from the risk of further violations of their fundamental rights<sup>91</sup>. Hence, although EU law is less specific about when authorities should first interview the victim, the right to be heard – following the procedural obligation set by the ECtHR – should be granted already at the early stage of criminal inquires<sup>92</sup>.

Despite the potentialities of the recent ECtHR case-law, the concrete exercise of this right could infringe upon other fundamental rights of the victim. Indeed, experiencing a criminal trial could affect their physical and mental health, especially when they have to be cross-examined. In that specific situation, the aggrieved parties have to recall the criminal facts and to confront the accused, thus reliving their trauma. Therefore, judicial authorities must take the necessary steps to minimise this risk and to avoid further damage. According to EU legislation, they must keep to a minimum the number of interviews<sup>93</sup> and the contact between the defendant and the alleged victim<sup>94</sup>, but the achievement of these purposes could negatively impact on the guarantees of a fair trial. Especially in the case of vulnerable victims, judicial authorities frequently conduct their hearing and examination by means of protected measures. These methods of evidence gathering enhance the protection of the aggrieved parties to the detriment of the defence guarantees. However, the European Court does not consider them 'unfair', thus legitimising non-public hearings<sup>95</sup> and exceptions to the methods of 'cross-examination'<sup>96</sup>.

91 ECtHR, 16 June 2022, *De Giorgi v. Italy*, appl. no. 23736/19, paras. 67-68.

92 In the *Talpis v. Italy* case the Court found a breach of the procedural obligation because the alleged victim was questioned for the first time by the police seven months after she had lodged her complaint. According to the Court, "such a delay could only serve to deprive the applicant of the immediate protection required by the situation. Admittedly, as submitted by the Government, during the period in question the applicant was not subjected to further physical acts of violence by A.T. However, the ECtHR cannot disregard the fact that the applicant, who was being harassed by telephone, was living in fear while staying at the shelter". Cf. ECtHR, 2 March 2017, *Talpis v. Italy*, appl. no. 41237/14, para. 114.

93 Article 20(1)(b) Directive 2012/29/EU.

94 Article 19(1) Directive 2012/29/EU.

95 ECtHR, 12 July 2007, *Kovač v. Croatia*, appl. no. 503/05.

96 ECtHR, 19 July 2007, *W.S. v. Polonia*, appl. no. 21508/02. Instead, in the case *P.S. v. Germany*, the Court found a violation of Article 6 ECHR, because the accused was not allowed to ask questions to the girl that had suffered sexual abuse. ECtHR, 20 December 2001, *P.S. v. Germany*, appl. no. 33900/96.

At any rate, both the ECtHR and the CJEU have repeatedly stressed the need to balance the protection of victims with the accused's rights, thus contributing to an extensive meaning of the rights enshrined by Art. 6 ECHR and promoting an overall fairness that takes into account all the individuals involved in criminal proceedings<sup>97</sup>. In particular, the European Court evaluates the fairness of the entire proceeding by taking into account the safeguard of victims' rights and the counterbalancing factors granted to the accused, when they are not allowed to have a confrontation with the injured person that made statements against him or her. This issue is also relevant in transnational cases, in which a direct confrontation between accuser and accused is truly complicated to be granted whenever the victim does not live in the trial State.

In recent times, moreover, the European Court has emphasised the potential of the resources provided by technological and scientific progress, such as video recordings<sup>98</sup> and remote hearings. On several occasions, the Court has encouraged the videorecording of the victims' interview, especially when carried out during the pretrial phase of the proceeding, because of the chance to show it later in court. Thanks to this technological tool, the defence could verify how the questioning was carried out. Moreover, both the defence and the deliberating judge could (in)directly observe the behaviour of the victim during the examination to check the reliability of the alleged injured person. The possibility of providing a video record of the victim's examination could entail a strong safeguard of the accused in a transnational evidence-gathering procedure, since this solution grants the accused an opportunity to challenge the testimonial evidence obtained abroad at a later stage of the criminal proceeding<sup>99</sup>. However, it cannot be considered sufficient to ensure the right to confrontation of the accused, who is only allowed to passively watch the recording of the interview. Some scholars have proposed dealing with this problem through the use of a remote hearing procedure, in which the

97 ECtHR, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom*, appl. no. 26766/05 and 22228/06, para 146; ECtHR, 26 March 1996, *Doorson v. Holland*, appl. no. 20524/92, para 70. See also CJEU, 16 June 2005, *Pupino*, C-105/03, para 57 ff. The Grande Chambre highlighted that "the Framework Decision must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected" (par. 59).

98 ECtHR, 9 September 2013, *Gani v. Spain*, appl. no. 61800/08; ECtHR, 27 April 2009, *A.L. c. Finland*, appl. no. 23220/04. According to M. GIALUZ, *Victim's protection in the case law of the European Court of Justice and the European Court of human rights*, cit., p. 28, thanks to the possibility to show it in the court, videorecording "always allows the defence to verify (and possibly dispute) the methods used to carry out the interrogation".

99 ECtHR, 29 March 2016, *Pačić v. Croatia*, appl. no. 47082/12, para. 47. This solution represents an innovation rather than the possibility of requesting that certain questions are put by an impartial authority, such as an investigating magistrate to the witness abroad. ECtHR, 31 October 2001, *Solakov v. The Former Yugoslav Republic of Macedonia*, appl. no. 47023/99, paras. 62-67; EComHR, decision of 13 July 1987, *P.V. v. Federal Republic of Germany*, appl. no. 11853/85. See in this volume A. FALCONE, C. ORLANDO, *The Right to Confrontation and the Taking of Witness Evidence in the Field of Transnational Criminal Justice*.

people involved in the proceeding do not gather in presence at the same venue but are linked by means of ICT tools<sup>100</sup>. Video and audio connections have great potential in the field of victims' participation and right to be heard safely, and prove extremely useful in transnational proceedings, allowing the subjects involved to participate even when they are not physically present in the trial State. Indeed, a public hearing and cross-examination can be a truly stressful experience for victims, and eye contact with the accused can inhibit them from testifying. Technological instruments, therefore, have been frequently used to facilitate remote attendance in courtrooms in cases of serious offences or to protect certain categories of people, for example in order to reduce the risk of reprisals perpetrated by the suspect or third parties against the victims' and their families. Recourse to video and teleconferencing has increased at the international and transnational level: the International Court allows remote participation, while the individuals involved in transnational criminal proceedings have increasingly been allowed to be present by means of videoconferencing methods. Regarding the International Criminal Court, Articles 68 and 69 of the Statute of Rome establish an exception to the principle of public hearing set by Article 67. Indeed, "the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means"<sup>101</sup>, including videoconferencing or technologies that change their voice or reveal only their silhouette<sup>102</sup>. Nonetheless, Article 17 of Directive 2012/29/UE suggests the use of videoconferencing and telephone conferencing to hear victims who are resident in a different State to the one where the criminal offence was committed. Anyway, as far as the transnational level is concerned, the rules at stake do not regulate the transnational gathering of victims' statements<sup>103</sup>. Moreover, at the European level, the Convention on Mutual Legal Assistance specifies that member States can use teleconferencing when performing cross-border witnesses and experts' hearing, but "only if the person to be heard agrees that the hearing takes place by that method"<sup>104</sup>. Most recently, EU law has

100 A. FALCONE, *Online Hearings and the Right to Effective Defence in Digitalised Trials*, in S. RUGGERI, L. BACHMAIER WINTER, *Investigating and Preventing Crime in the Digital Era. New Safeguards, New Rights*, Springer, Cham, 2022, p. 190.

101 Article 68(2) Statute of Rome. The Article also states that "such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness". Moreover, according to Article 69, "the Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology".

102 A. FALCONE, *Online Hearings and the Right to Effective Defence in Digitalised Trials*, cit., p. 198.

103 M. DANIELE, E. CALVANESE, *Evidence gathering*, cit., p. 386.

104 Article 11 of the *Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the member States of the European Union*, 12 July 2000, C 197/3,

strengthened the possibility to use videoconferencing when gathering evidence from the victim, by establishing that an European Investigation Order can be issued for the hearing of a victim in the territory of the executing State<sup>105</sup>. It is worth observing that the EIO Directive does not take into account the victim's position in either the issuing or in the enforcement phase. Hence, some scholars have doubted that victims' rights are properly granted in the EIO procedure<sup>106</sup>, despite the fact that this order could affect a wide range of persons, such as victims and witnesses<sup>107</sup>.

ICT tools entail clear advantages in the development of the protected hearing of victims. Yet, unquestionably, there is a little doubt that these technological means could impinge upon the principles of a fair trial, especially on the principle of immediacy and the right to confrontation<sup>108</sup>. Therefore, judicial authorities must achieve a proper trade-off between conflicting interests, trying to balance the rights of the accused and the protection of the victims<sup>109</sup>, without any further prejudice for the persons concerned<sup>110</sup>.

## 6. The victim's right to compensation and their participation in restorative justice

In spite of the enhancement of procedural safeguards, the participation of victims in criminal proceedings leads in most domestic legislations to nothing more than economic compensation for the injured person. Some scholars have argued that "compensation is

.....  
available on [eur-lex.europa.eu](http://eur-lex.europa.eu).

105 Article 10(2)(c) Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 Regarding the European Investigation Order in Criminal Matters. Moreover, this measure applies to those that "always have to be available under the law of the executing State".

106 M. KUSAK, *Crime's Victim and the Procedure of Executing the Freezing Order and the European Investigation Order*, available at [https://repozytorium.amu.edu.pl/bitstream/10593/12125/1/Projekt\\_10.pdf](https://repozytorium.amu.edu.pl/bitstream/10593/12125/1/Projekt_10.pdf), p. 233.

107 "An EIO may affect a wide range of persons. In order to uphold the right to fair trial, it is necessary to provide effective access to courts for all these persons. The adoption and execution of an EIO requires specific safeguards in order to ensure that the rights of victims and also those of witnesses are effectively protected". Therefore, States are under an obligation to ensure that the interests of victims and witnesses are not unjustifiably endangered. Cf. *Opinion of the European Union Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order*, available at [http://fra.europa.eu/fraWebsite/research/opinions/op-eio\\_en.htm](http://fra.europa.eu/fraWebsite/research/opinions/op-eio_en.htm).

108 For the analysis of the concerns related to the use of videoconferencing, see A. FALCONE, *Le udienze online nel processo penale: tra "principio di presenza", diritto di difesa ed efficienza della giustizia penale. Riflessioni a margine della recente "Riforma Cartabia" in materia di partecipazione a distanza*, in course of publication.

109 To this aim, nowadays, the European Court admits mitigation of the right of confrontation provided that the entire criminal proceeding passes the overall fairness test. On this point, see C. ORLANDO, *Presenza dell'accusato, diritto al confronto e giudizio di equità processuale nella giurisprudenza di Strasburgo*, in *Ordine internazionale e diritti umani*, 2022, pp. 224-236; ID., *Testimonianza de relato e diritto al confronto tra ordinamento interno e giurisprudenza europea*, in *La Legislazione penale*, 2 April 2021.

110 See European Commission for the Efficiency of Justice (CEPEJ), *Guidelines on videoconferencing in judicial proceedings*, June 2021, available at <https://rm.coe.int/cepej-2021-4-guidelines-videoconference-en/1680a2c2f4>, p. 7.

a form of victim assistance in meeting financial, physical, emotional and social needs of victims, and has played a vital role in victim recovery<sup>111</sup>. It is also for this reason that the aggrieved parties should be heard in court, since their statements can impact on the determination of the right amount of compensation.

Both international and European law have recognised the relevance of the victims' right to compensation, by providing a specific form of reparation to the injured person when replacement or recovery is not possible<sup>112</sup>. This right was acknowledged by the UN *Declaration of Basic Principles of Justice*, whose Article 12 requires States to provide for financial compensation whenever the accused person cannot fully comply with it<sup>113</sup>. Only two years before, the European Convention on the Compensation of Victims of Violent Crimes imposed the Parties to establish minimum provisions in this field, in order to improve the protection of victims, above all when the alleged offender could not be prosecuted or punished, taking into account also international cooperation in such situations<sup>114</sup>. However, the Convention did not explain concretely how States should enable compensation to victims in cross-border cases; it limited itself to stating that "the competent authorities of each Party shall, at the request of the appropriate authorities of any other Party, give the maximum possible assistance in connection with the matters covered by this Convention".

Regarding EU law, more specific measures were introduced by the so-called 'Compensation Directive'<sup>115</sup>, with the purpose of enhancing the victims' right to fair and

111 M.A. YOUNG, *The Role of Victim Compensation in Rebuilding Victims' Lives*, available at <https://www.iovahelp.org/About/MarleneAYoung/RoleOfVictComp.pdf>, p. 1.

112 More specifically, restitution aims at restoring the victim to the original situation before the criminal offence occurred, and includes the restoration of rights and property, but it is extremely rare that victimisation has merely reversible consequences. Compensation is the financial reimbursement for losses, both pecuniary (such as wages, medical and hospital expenses) and non-pecuniary (psychological harm). Compensation of either kind can be forthcoming from the offender or from a third party such as private insurance or the State. See J-A. WEMMERS, *Reparation and the International Criminal Court: Meeting the Needs of Victims. Report of the Workshop held January 28<sup>th</sup> 2006 Organized by the Research Group Victimology and Restorative Justice, International Centre for Comparative Criminology*, Montréal, June 2006, p. 19 ff. For instance, IACTHR emphasises the importance of civil compensation for damages resulting from the crime, but it highlights an extended notion of reparation, including the effectiveness of criminal justice. At the European level, cf. ECtHR, 26 March 1985, *X. and Y. v. The Netherlands*, appl. no. 8978/80, para. 27.

113 Article 12 of *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, cit. Not only victims, but also their families can receive compensation if the victimisation resulted in death or loss of physical or mental capacity [Art. 12(b)].

114 European Convention on the Compensation of Victims of Violent Crimes. Strasbourg, 24 November 1983, ETS. No. 116.

115 Council Directive 2004/80/EC of 29 April 2004 relating to compensation for victims of crime.

appropriate compensation<sup>116</sup>. The most relevant aspect concerns the rule set out in Article 1, according to which Member States

“shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State”.

In other words, the injured person can submit an application for compensation in the residency State, which must forward the request and all the necessary documents to the competent authority “as quickly as possible”<sup>117</sup>, because “compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed”<sup>118</sup>. The aim of this Directive was to build a coherent system of cooperation to facilitate the access to compensation when victims are involved in cross-border crimes<sup>119</sup>. According to EU law<sup>120</sup>, Member States must ensure efficient and effective compensation schemes for victims, regardless of their nationality; furthermore, decisions on this matter should be delivered in a short span of time and communicated to the victim without undue delay<sup>121</sup>.

The relevance given to this issue by European institutions is evident also by looking at the Victims Directive, whose Article 16 enshrines the right to obtain a decision on compensation owed by the offender within a reasonable time during criminal

116 See Recital no. 6 and Article 12 Compensation Directive. However, there are no specific indications about what constitutes fair and appropriate compensation. In this sense, see Victim Support Europe, *Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe*, Bruxelles, 2013, p. 59, according to which compensation, in order to be appropriate and proportionate to the crime and the circumstances, should take into account: physical and mental harm; lost opportunities, including employment, education and social benefits; material damage and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

117 See Article 3 Compensation Directive.

118 These are the words of Article 2 Directive 2004/80.

119 For this reason, Member States should ensure “the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories” (Article 12 of Compensation Directive).

120 EU law also includes other references to right to compensation, even in cross-border situations: for instance, Article 26 of Directive 2017/541/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA affirms that Member States shall ensure information, support and assistance to victims residents in Member State other than the one where the terrorist attack was committed, in order to obtain compensation. See also Article 17 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

121 Article 10 Compensation Directive.

proceedings<sup>122</sup>. In addition, it asks for Member States to promote measures aiming at encouraging offenders to provide adequate compensation to victims.

Nevertheless, victims of serious international crimes still have to face significant obstacles when they apply for financial compensation. In particular, when the criminal proceeding is carried out by another State, the injured person who suffered the consequences of a serious international crime could not be allowed to access State-funded compensation. And even if the victims successfully access compensation and obtain a decision on this matter, the risk is that the offender has no means to fulfil such obligation<sup>123</sup>. The discomfoting result is that only few victims of serious international crimes prosecuted on the basis of extra-territorial jurisdiction have ever received compensation from the accused person<sup>124</sup>.

Maybe a more active participation of victims, even with a view to gaining proper compensation or reparation for the harm suffered, can be pursued through restorative justice, which in recent decades has proved useful in some contexts, such as in post-conflict Countries. The most valuable feature of restorative justice is the opportunity for victims to have their voices heard and to pursue their interests<sup>125</sup>. Howard Zehr defines restorative justice as “an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offence or harm to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible”<sup>126</sup>. In other words, it aims at healing the pain caused by the crime that affects not only victims but also entire communities. Therefore, among the values of restorative justice we may mention the reconciliation that involved parties could achieve through communication<sup>127</sup>, the amends made by the offender, and also the healing process of victims and society. In this way, differently from the traditional criminal justice system, the injured person can

122 Article 16 (“Right to decision on compensation from the offender in the course of criminal proceedings”) of Victims’ Rights Directive.

123 “Offenders who do possess assets often avoid paying compensation due to the difficulties associated with enforcing such awards, particularly where assets are located abroad and therefore require enforcement proceedings in a foreign jurisdiction”. See *Enhancing Victims’ Rights in Mutual Legal Assistance Frameworks*, cit., p. 12.

124 In addition to this, it is even more difficult to grant fair compensation in complex cases, such as cyber-related crimes, in which a large number of victims are involved. Investigation and prosecution of such criminal activities entail a discrepancy in terms of “human resources and skills allocated to their investigation and prosecution”. See *Report on Eurojust’s casework on victims’ rights*, cit., p. 8.

125 A. CUPPINI, *A Restorative Response to Victims in Proceedings before the International Criminal Court: Reality or Chimaera?*, in *International Criminal Law Review*, 2021, p. 313. Cf. M. RAUSCHENBACH, D. SCALIA, *Victims and international criminal justice: a vexed question?*, cit., p. 444. Besides, it is crucial in the field of restorative justice to know victims’ expectations and needs.

126 H. ZEHR, *The Little Book of Restorative Justice*, Good Books, USA, 2015, p. 48.

127 Cf. H. ZEHR, *Changing Lenses: A New Focus for Crime and Justice*, Herald Press, Scottsdale, 1990, pp. 200–203.

communicate how he or she felt experiencing the crime, understand the accused's reasons, and contribute to achieving a constructive outcome<sup>128</sup>. As far as offenders are concerned, they are able to feel responsible for the criminal offence and apologise for what they have done. In light of these benefits, the 2005 UN *Guidelines on Justice in matters involving child victims and witnesses*<sup>129</sup> and the 2012 EU Directive on Victims' Rights<sup>130</sup> underlined the need to grant effective participation and reparation as benchmarks of good practice<sup>131</sup>.

However, also in the context of restorative justice programs, victims must be granted the same participatory rights they enjoy in criminal proceedings, such as information, assistance and protection, in order to avoid secondary victimisation, and the opportunity to give their consent consciously<sup>132</sup>. The EU framework, especially the Victims' Rights Directive, has enhanced the minimum standards of victims' protection, as well as enlarged their scope, by charging Member States with the task to ensure some procedural safeguards during criminal proceedings, but also to establish "guarantees for the delivery of support services, and specific safeguards to be applied in the context of restorative justice"<sup>133</sup>.

As an alternative to traditional criminal justice, restorative justice deserves to be exploited, at least for some forms of crimes for which it could result in a positive outcome. Nonetheless, this aim is even more difficult in cross-border situations, and requires more than only legal instruments, thus necessitating a real cultural change<sup>134</sup>.

128 Some scholars have underlined the difficulties of applying the RJ principles in criminal proceedings before the ICC. See A. CUPPINI, *A Restorative Response to Victims in Proceedings before the International Criminal Court*, cit., C. GARBETT, *The International Criminal Court and restorative justice: victims, participation and the processes of justice*, in *Restorative justice: an international journal*, 2017.

129 ECOSOC No. 2005/20 of 22 July 2005, *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crimes*.

130 As highlighted by M. TOULLIER, *Restorative Justice in France: Status Artis and Future Perspectives*, in L. LUPÁRIA DONATI (ed.), *Victims and criminal justice*, cit., p. 144, "none of the five chapters that make it up is expressly dedicated to restorative justice"

131 Cf. also ECOSOC No. 1999/26 of 28 July 1999, *Development and implementation of mediation and restorative justice measures within the sphere of criminal justice*, and No. 2000/14 of 27 July 2000, *Basic principles about the use of programs of restorative justice in criminal matters* and No. 2002/30 of 24 July 2002, *Basic principles on the use of restorative justice programs in criminal matters*.

132 Regarding free consent, cf. Article 11 Recommendation No. R (99)19 of the Committee of Ministers to Member States concerning mediation in penal matters

133 C. FOUSSARD, G. MELOTTI, *Restorative Justice for Victims in the Eu. Reparation to the Victim in the European Juvenile Justice Systems: Comparative Analysis and Transfer of Best Practices*, available at [https://www.oijj.org/sites/default/files/archivospaginas/restorative\\_justice\\_for\\_victims\\_in\\_the\\_eu-ijjo\\_paper.pdf](https://www.oijj.org/sites/default/files/archivospaginas/restorative_justice_for_victims_in_the_eu-ijjo_paper.pdf), p. 13

134 "Cultural change requires practitioners and managers to adopt new ways of working with each other and with the citizens for whom they are responsible". See I. MARDER, *The new international restorative justice framework: reviewing three years of progress and efforts to promote access to services and cultural change*, in *The International Journal of Restorative Justice*, 2020, p. 404.

## 7. Concluding remarks

The analysis conducted here highlights that victims today deserve multilevel protection, and that the development of the safeguards due to this subject is still far from being completed. The interest shown in this topic at both international and supranational level has led to the adoption of various legal instruments aimed at enhancing the safeguards of the aggrieved parties and their next of kin, pursuing the main objectives analysed above, and gathered in the text of Directive 2012/29/EU. The latter represents a significant innovation in the field of victims' safeguards in criminal proceedings, aimed at implementing harmonisation among national systems. Indeed, if, on one hand, the presence of numerous, widely-differing legal sources has contributed to the strengthening of victim protection, on the other hand, it has created a fragmented picture. For this reason, the approach followed by EU legislators appears 'minimalist'<sup>135</sup>, since on several occasions the Directive refers to national discretion, thus compromising the achievement of the purpose of minimum standards set out by the 2012 legislation. This situation could negatively infringe upon the effectiveness of victims' rights, due to the different approaches followed by domestic legislation in the implementation of this Directive.

*A fortiori*, when it comes to cross-border crimes and transnational inquiries, the lack of a high level of alignment can be perceived even more than at a domestic level. Indeed, the victim's protection conflicts with difficulties in communicating in another language, explaining what happened when reporting the facts in a non-residence State, and, above all, the differences existing between the legal systems involved in the judicial cooperation<sup>136</sup>. All of this can determine probable and undue delays<sup>137</sup>, prejudice the interests of the injured party, and cause secondary victimisation. Even if criminal cases that require international cooperation are no longer a rarity, "the procedure has not adapted to this new reality and still considers transnational proceedings almost exclusively from the point of view of the issuing, transfer and executing of cooperation requests"<sup>138</sup>. The creation of a wide area of free movement of people and goods makes the duties of judicial authorities more complicated, since they cannot exercise their jurisdiction also outside national frontiers

135 E. N. CATALANO, *La tutela della vittima nella direttiva 2012/29/UE e nella giurisprudenza delle corti europee*, cit., pp. 1811-1812.

136 L. BACHMAIER WINTER, *Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law*, in *Utrecht Law Review*, 2013, p. 127.

137 On the relevance of prompt and effective investigation, cf. ECtHR, 21 September 2021, *Carter v. Russia*, appl. no. 20914/07; ECtHR, 31 August 2021, *Estemirova v. Russia*, appl. no. 42705/11; ECtHR, 7 January 2022, *Zoletic and others v. Azerbaijan*, appl. no. 20116/12; ECtHR, 4 April 2022, *M.H. and others v. Croatia*, appl. no. 15670/18 and 43115/18.

138 L. BACHMAIER WINTER, *Transnational Criminal Proceedings, Witness Evidence and Confrontation*, cit., p. 127.

and have to cooperate with foreign authorities, in order to provide victims with adequate and effective protection.

Nonetheless, being the victim of a cross-border crime and involved in a transnational proceeding cannot negatively affect protection. In light of this, international and European legislators should address the matter of judicial cooperation and mutual legal assistance and recognition of decisions with more stringent legal instruments, aiming at improving the effectiveness of victims' rights in such contexts and finding concrete solutions to develop procedural rights. To this end, in the EU legal scenario, some scholars have proposed, *de jure condendo*, that victims may “benefit from two legal counsel – one of them in Member State where the crime was committed or to which the victim wishes to move –”, since dual defence could be useful to overcome the difficulties related to the transnational dimension of criminal proceedings<sup>139</sup>.

To conclude, the challenges of criminal justice have changed significantly. Recalling the words of Professor Jonathan Doak expressed almost twenty years ago, “the task of redefining the developing relationships between the victim, the accused, and the state” should take into account “current trends in human rights and criminal justice discourse towards a more inclusive model of criminal justice”, with an eye to the issues raised by transnational investigations<sup>140</sup>. The legal debate concerning the victim entails risks for some fundamental principles of modern criminal justice, starting with the presumption of innocence, since generally the existence of a victim is strictly linked to the commission of a crime, at least in its essence as a historical event, regardless of the ascertainment of any subjective profile of criminal liability. Therefore, the competent authorities must treat the accused as an innocent person until the facts are ascertained and any guilt is proven. The most difficult challenge is to strike a proper balance between the accused's rights and the victims' safeguards in the course of preliminary inquiries, because at this stage the investigating authority formulates a criminal hypothesis, in light of which also the injured person should be considered as a hypothetical victim. Maybe this is the reason why their protection is still weak during this phase, and above all in cross-border situations that entail the enhancement of international judicial cooperation.

139 L. LUPÁRIA DONATI, J. DELLA TORRE, *Victims of Crime in the Area of Freedom, Security and Justice*, in S. IGLESÍAS SÁNCHEZ, M. GONZÁLEZ PASCUAL (eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice*, Cambridge University Press, Cambridge, 2021, pp. 328-329.

140 J. DOAK, *Victims' Rights in Criminal Trials*, cit., p. 316.