

MEASURES TO PROTECT VICTIMS OF CRIME AND THE ABUSE OF POWER IN THE CRIMINAL JUSTICE PROCESS

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I. INTRODUCTION

In a paper presented at the Peace Centre, Castle Schlaining Stadtschlaining, Burgenland, Austria, Dussich¹ wrote, as objectives of his presentation:

1. To recognize that crime and abuse of power victimizations are significant human experiences, mostly the result of ineffective public policies, the adversarial justice model and cultural support for the use of violence in personal and collective problem solving.
2. To emphasize that crime and abuse of power victimizations have caused extensive and, significant pain, suffering and death, a condition which continues everyday.
3. To stress the importance of demonstrating social, moral and legal responsibilities toward victims and their families by the delivery of dedicated and professional services, assistance, and human compassion.
4. To bring victimization to the attention of policy makers in all countries through the translation (in all the official UN languages) and dissemination of the UN Handbook on Justice for Victims and the UN Guide to Policy Makers so that victimization is not ignored, and the seeds of future crime and abuse of power will be reduced.
5. To encourage the United Nations not only to continue, but to expand the inclusion of victim concerns in all standards and norms promulgated within the realm of crime and social justice and to include considering the widespread adoption of the restorative justice model.
6. To promote the awareness (by gathering victimological knowledge) that greater emphasis is needed to facilitate action on behalf of victim recovery especially in those areas of the world where currently there is a great paucity of such efforts and especially as it relates to children.
7. To recommend the establishment of the UN Victims' Fund; and, the creation of an Office for Victims of Crime and Abuse of Power within the United Nations not only to facilitate the implementation of the noble intentions of the UN Declaration of Principles of Justice for Victim of Crime and Abuse of Power of 1985, but also to periodically measure, monitor and report on the progress of those activities around the world and then recommend changes.

We fully share these views.

For centuries up to now, the plight of victims of crime and the abuse of power has been largely ignored.

Bassiouni reports that, in the 20th Century, 36 million persons have been murdered in conventional wars and close to 132 million in massacres at the hand of now, conventional wars and domestic massacres of despotic governments.

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¹ Dussich John P. Secretary General, World Society of Victimology, "On behalf of victims of crime and abuse of power", pages 207-208 in the Volume "The Application of the United Nations Standards and Norms in Crime Prevention and Criminal Justice", Peace Center, Castle Schlaining Stadtschlaining, Burgenland, Austria, 10-12 February 2003.

Dussich in the same article gave a list of some of the cases of genocide of ethnic minorities.²

From 1915 to 1916 and during World War I, the Turkish Nationalist Government oversaw the systematic deportation of about 1.1 to 1.8 million Armenians who were part of the Ottoman Empire and were subsequently massacred in Eastern Turkey by the Young Turks who ruled the Ottoman Empire (Schneider, 1982; Fein, 1998).

In 1917 the Bolshevik party of Lenin seized power, killing the Czar and his family and starting the Russian Revolution which lasted until 1922 (Ash, 1999); during this period 3,284,000 civilians were killed (Rummel, 1990). From 1923 to 1928 the New Economic Policy of Lenin caused the death of 2,200,000 civilians (Rummel, 1990). The rule of Joseph Stalin lasted from 1928 until 1953 in the course of which about 49,555,000 civilians were killed, with the most violent part being the Great Terror period of 1936 to 1938 where about 4,345,000 persons were killed (Rummel, 1991b).

In 1932, in response to an insurrection, after it was quelled and as punishment, the President of El Salvador, Maximiliano Fernando Martinez, had his army massacre about 30,000 peasants, mostly natives, in what was known as La Matanza (Woodward, 1998; interview, 2000).

In 1933 Adolph Hitler took power and started World War II in 1939 with Japan joining Germany in 1941; by the end of 1945, 77 million victims were killed (Friedman, 1998) of which only between 15,843,000 to 21,268,992 were military losses, seven million were Jews killed mostly in the extermination camps, about 500,000 were Roma (gypsies) (Encarta, 1998; separovic, 1999; Ash, 1999); the rest were civilians.

From 1949 to 1987 China went through the establishment of the People's Republic of China, the Totalization Period, the "Great Leap Forward" time, the Great Famine and Retrenchment Period, the infamous "Cultural Revolution", and the Liberalization period, all of which together produced 35,235,000 Government murders (Rummel, 1991a).

From 1954 to 1987 the Post-Stalin regime killed about 6,872,000 persons in the Soviet Union (Rummel, 1990).

From 1967 to 1970 the Nigerian Civil war broke out between the mostly Christian Ibo and the Muslim Hausa and Fulani Tribes who massacred about 10,000 to 30,000 Ibo. The Ibo were trying to form a secessionist State to be called the Republic of Biafra. This tribal conflict caused the loss of about 1,000,000 civilians mostly because of forced starvation (Encarta, 1998; Ash, 1999).

Starting around 1970, in Guatemala, Central America, tens of thousands of human rights violations (disappearances, tortures, and extra-judicial executions) occurred as a result of the conflict between the Government of Guatemala and the Guatemalan National Revolutionary Unity and mostly perpetrated by the Government forces. About 100,000 deaths, 40,000 disappearances and about one million people, mostly indigenous people, were forced out of their homes and into exile outside Guatemala as a result of the conflicts (Woodward, 1998; Amnesty, 1999).

In 1971 in a military coup in Uganda, Idi Amin Dada seized power and ruled until 1987. He murdered about 300,000 of his opponents, those who criticized him and members of competing tribes and expelled about 70,000 Asians (Encarta, 1998; Rummel, 1997b).

In 1973 in Chile, General Augusto Pinochet overthrew the Government of Salvador Allende and set up a military regime that lasted until 1988. He imprisoned tens of thousands without trial, perpetrated mass murders and extensively used torture. Many opponents simply disappeared (Rummel, 1997a).

From 1975 to 1979 about 450,000 Vietnamese Cambodians were expelled by the Lon Nol regime that was

² Contributors to the Sixth United Nations Congress on Crime Prevention and the Treatment of Offenders by the International Association of Penal Law, The International Penal and Penitentiary Foundation, The International Society for Criminology and the International Society For Social Defence, Edited by Centro Nazionale di Prevenzione e Difesa Sociale and The International Penal and Penitentiary Foundation, Bellagio, Italy, 21-24, April, 1980.

then ousted by Pol Pot, the guerrilla commander of the Khmer Rouge. Subsequently, approximately two million Cambodians from Phnom Penh were forced into the hardship of agricultural labour, about 1.7 million (about one fifth of the population) were killed or starved; of around 425,000 Chinese Cambodians only about half survived; the Vietnamese Cambodians who did not leave under the prior regime were tracked down and murdered; and of the 250,000 Muslim Chams 90,000 were massacred and the others were dispersed in the rural countryside. By 1979, 15 per cent of the rural Khmer and 25 per cent of the urban Khmer had been killed or starved to death. The worst slaughters took place towards the end of the purge period in the Eastern Zone near Vietnam where about 250,000 people were massacred (Rummel, 1994; Kiernan, 1998).

In April 1994 civil war broke out in Rwanda and 1.1 million Tutsi were murdered by their neighbouring tribe the Hutu (Encarta, 1998).

From 1992 to 1995 the Serbs killed about 288,000 Bosnian and Croat civilians as part of their practice of “ethnic cleansing” (Kreso, 1997).

All told, Government killings (democides) in the previous century have accounted for between 120,000,000 to 170,000,000 people (Rummel, 1997a; Idea, 2000).

In Argentina, just after the establishment of a military regime in 1976, it has been estimated that between 10,000 and 30,000 thousand Argentines and also members of other nationalities have been killed or victims of forceful disappearances, facing the indifference of these tragic events by judiciary authorities and the lack of disclosures by the press.

II. WHAT IS ABUSE OF POWER

I believe it is of extreme importance responding to this issue, the report presented in 1980 by the Four Associations.³

In speaking of power, and especially of abuse of power, it is vital to tackle the question of the legitimacy of that power. Consequently, it is not only necessary to distinguish between legitimate and illegitimate power, but also between the abuse of a legitimate power and the exercise of an illegitimate power, the existence of the latter, by definition, constituting in itself an abuse. Such distinctions imply the existence of norms and criteria permitting a judgment on the legitimacy of power. Political power is legitimate, one might say, if it derives from a mandate given by a community to serve the interests of that community. Access to such a power, and the exercise of it, take place within a well defined constitutional and legislative framework. Economic power, in its turn, may be considered legitimate when it is exercised by industrial or commercial enterprises whose legal basis of establishment is based on the laws of the State in which they operate.

According to the type of economic activity there is also a need to distinguish between an economic enterprise which was unlawful from the start and a legitimate economic enterprise deviating from lawfulness in the course of its normal operations. In the former case, one often sees an unlawful organization (such as organized crime) which attacks or penetrates lawful sectors and fields of activity, while the latter case often concerns a legitimate organization undertaking criminal or illegal activities.

A. The Concept of Abuse

Etymologically, the word “abuse” comes from the Latin “abusus” meaning a usage which is bad, excessive or unjust (see Larousse). Mr. Ottenhof rightly pointed out that wherever there is power there will be abuse of power. This is perhaps why it is difficult to define power other than by the abuse to which it may be subject. Thus we find common phrases speaking of “the inordinate thirst for power” and “misappropriations of power”, not to mention the famous “recourse for excess of power” (Ottenhof).

In the course of the debate, it became clear that the concept of abuse of power is both vague and vast. In a general way, the abuse may lie just as much in the aims sought by the exercise of power as in the means employed. One may speak of abuse when legitimate means are employed to achieve unlawful ends or when bad means are employed to achieve unlawful ends or when bad means are adopted in the pursuit of laudable

³ Contributors to the Sixth United Nations Congress on Crime Prevention and the Treatment of Offenders; op. cit., p. 4.

objectives. Often, however, the abuse lies in the use of violent, fraudulent or corrupt means to achieve dishonest or harmful objectives.

The practical operation of the concept of abuse of power should thus take basic account of three principal elements:

- 1) the purposes for which the power is exercised;
- 2) the means by which the power is exercised; and
- 3) the limits within which the power must be exercised.

1. The Purposes

The abuse of power is often characterised by the unlawfulness of the purposes it seeks to achieve. One might cite as typical cases the use of power to prevent the imposition of a legal control or criminal sanctions upon certain types of behaviour which occur at the higher echelons of socio-economic and political structures. Another example is the use of power to halt or suspend proceedings or judgments against malefactors in high positions responsible for conventional offences or simple breaches of the law.

2. The Means

Power may be exercised by illicit and unlawful means. Their variety is great, extending from conviction to constraint, from corruption to coercion, from threats to torture, from fraud to murder. One can even speak of abuse of power through negligence or carelessness. Abuse of power often takes the form of an omission, or a refusal or unwillingness to act (non-feasance).

3. The Limits

Abuse of power occurs when power is exercised beyond its legal or normative limits. Happily there are certain widely known rules which assign fairly precise limits to power. Thus, for instance, the "Human Rights" proclaimed by the United Nations represent a concept which in its European version even has the force of law. They transcend national power and represent a theoretical bulwark for the citizen (Kellens).

The introduction of *standards* -i.e. well established *norms*- can broadly assist in giving practical effect to the concept of abuse of power. Thus, such standards might represent the acceptable minimum of honest conduct in political, social or economic life. Other standards might be formulated to protect public health (against the sale and distribution of harmful substances or technical and chemical products), the environment (against pollution seriously and irreversibly harmful to the ecology), the consumer (against excessive prices, commercial trickery and unfair conditions), etc. (Tiedemann).

It goes without saying that the abuse of power is at the same time normative and relative. It is *normative* because it is closely linked to the system of norms and values and because it derives its content from the ideology to which people adhere. Thus, the differential criterion between the normal exercise of power and its abusive exercise varies according to the normative model adopted. According to whether you are a supporter or opponent of the conflictual model or of the consensual model in political theory, one or another employment of power will appear to you as good or bad (Kellens).

The abuse of power is also a *relative* concept, both in time and space. It varies equally from one country to another according to culture, ideology, political regime and economic system. That which is considered as abuse changes continually according to political, economic or social evolution. In particular, emphasis is placed on the differences between capitalist and socialist countries, countries with mixed economies and developing countries, also upon the differences between what Mr. Malinverni calls the regimes of political freedom and those of political subordination.

B. The Concept of Offence

The discussion here was a reflection of the traditional polemics in criminology on the definition of crime and the aims of criminology. Should the subject be limited to the forms of abuse of power already subject to criminal sanction or should it be broadened to include abuses which, although contrary to prevailing norms, are not, or are not yet, established as offences? Can one speak of "offence" if the abuse in question has not been proscribed by law? Can one, or should one, depart from the principle of legality when considering abuse of power?

While still adhering to the principle of legality, the general view was that the legalistic approach is too narrow, so that the general theme should include not only the offences of abuse of power but also those abuses not identified as offences but which should be criminalized. It is worth mentioning, for example, that in U.S.A. a mere 2% of all the sanctions imposed by the courts on the large corporations are for violations of a criminal nature (see the Report of the Inter-Regional Meeting held in New York in July 1979, at page 5).

In relation to typologies of abuse of power, the report acknowledges that the distinction between economic, political and social power is always difficult since they are all tied up, in a manner that is often quite difficult to distinguish them.

The report also acknowledged the need to distinguish among political, economic, social and religious power.

The collusion between economic and political forces assumes a number of forms, the simplest one when corporations bribe the administrators so as to secure an immunity from official sanctions for its profitable but illegal activities (Leijins) A second more complex model is when the corporations are guided not only for profits but by their own ideological pursuit supporting political parties or groups of the same persuasion to put them in power to dominate the political scene.

Finally, a third model, similar to the second, adds a new characteristic, the government and the corporation support a given sector of the population both financially and ideologically.

Abuse of power is not reflected in criminological research due to what Versele has called the gilded forms of criminality.

In Versele's words "It is essentially a case of political-economic conspiracies, political-financial collusions, subtle peculations, disguised misappropriations and practical abuses which are assisted by lacunae in the law more or less deliberately engineered, as well as by more or less conscious compliances".

The system of criminal justice Versele said, "is condemned to protect the inequalities if not the injustices of the established order".

Criminal justice, under conditions of abuse of power, tends to ignore basic principles of penal law in democratic societies: the principle of legality, and the principle of *nullum crimen sine lege* and not only these principles but basic international human rights protection.

1. International Principles

Art. 5 of the Universal Declaration of Human Rights provides that the *indubio pro-reo* axiom should be applied to the accused while his/her culpability is not established according to due process of law and with all necessary guarantees for his/her defence.

In the same manner, Art. 14, paragraph 3 of the International Covenant of Political and Civil Rights of 19 December of 1966 protects the freedom of the accused in answering penal charges.

Likewise, the American Declaration of Human Rights (May 2, 1948) establishes "that the accused is innocent, until proven guilty".

Moreover, the Pact of San Jose, American Convention of Human Rights guarantees the right against self incrimination and the right not to admit culpability.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, (4 November 1950) in Article 6 established the right to due process and the *in dubio pro-reo* protection.

In this manner, the international human rights clauses protect the dignity of human life over the search for the procedural penal truth.

In Bangkok, during the proceedings of the XI United Nations Congress on the Prevention of Crime and Criminal Justice, in document A/Conf/203/12 (21 March 2005), remarked on the importance of due process as central in the fight against terrorism.

Also, the right of victims in the penal process has been established in Art. 4 of the Pact of San Jose, American Convention of Human Rights.

In relation to the protection given by that provision in a case of murder committed on Argentine soil by the agent Arancibia Clavel of the DINA of Chile under the dictatorship of Pinochet, a case that came to my chamber for review, when an oral penal tribunal of Argentina has declared its incompetence to try the case.

Arancibia Clavel killed General Prats, and his wife exploding a bomb under their car.

The Chilean government has supported the claims of the victims to condemn Arancibia Clavel, the Director of the Dina and General Pinochet.

However, the Argentine Code of Penal Procedure has not established the possibility that any other sovereign state could join the complaints of the victims in this trial.

With my vote, I directly amended the Article in question and declared that Argentina had legitimate jurisdiction to try Pinochet, Arancibia Clavel, the culprit, and the Director of the Dina, and that all states have the right to protect victims and nullify all and every provision opposed to that protection.

As result of that, Arancibia Clavel was condemned and a procedure for extradition was initiated against Pinochet and the Dina Director.

2. Authors and Victims

(i) The authors

Mr. Ottenhof distinguishes four types of delinquent:

- a) the delinquent above the law, who is precisely the object of our Colloquium;
- b) the *marginal* delinquent who lives *alongside* the law and who, in a way, leads a life parallel to it;
- c) the delinquent *beneath* the law. He belongs to the "sub-proletariat" or the "fourth part of society" – i.e. to the social class which is dominated or exploited to a point where it has nothing in common with the dominant classes; and
- d) the delinquent *in* the law. This is the ordinary type of delinquent envisaged by criminal law and its target, to the point of inundating the functioning of the system of criminal justice.

Mr. Ottenhof is of the opinion that the delinquent above the law, the "gilded criminal", is neither a-social, nor sub-social, nor anti-social, but, on the contrary, is a hyper-social being. Yet one notes, as Mr. Canepa observed, that the "gilded criminal" is not super-socialised, is not more or better socialised than the others, and that he may be, according to the circumstances, ill-adjusted, anti-social or delinquent.

Since the traditional typologies of delinquents are of scant use for the particular subject of our Colloquium, and can only be applied with difficulty to the authors of abuse of power, it would be preferable in my view to develop a special typology not to proceed from the differential qualities and attributes which characterize the different types, but from the attitudes and social reactions vis-à-vis the different groups of delinquents. I therefore propose a classification of delinquents into four categories:

- a) *the sacrificeables*: these are the poor wretches so well described in Hugo's "Les Misérables", the scapegoats of society, the impotent, the under-privileged who commit conventional crimes and who form the bulk of those prosecuted and imprisoned;
- b) *the undesirables*: these are the deviants and the marginal types. They are neither dangerous nor harmful but lead a life whose style is deemed non-conventional and sometimes threatening;
- c) *the inaccessible*s: these are the delinquents who are reached with difficulty by the arm of the law, who, because of their skill, status or power remain sheltered from criminal sanction. They do not enjoy immunity, but they break the law with impunity. They are the delinquents capable of escaping detection, prosecution or judgment thanks to the lacunae which exist in the laws as well as to the skilful advocates that they are able to brief;

- d) *the untouchables*: these are the delinquents who are truly above the law, such as the Heads of State, those who enjoy immunity from prosecution, etc.

The preceding classification, although similar from many points of view to the one proposed by Mr. Ottenhof, avoids, partially at least, the paradox evoked by the term “delinquent above the law”, and which figures in the sub-theme of our Colloquium.

Mr. Bassiouni suggested distinguishing between the delinquents reached by the law, those reachable by the law and those beyond the reach of the law. This distinction could be useful on a practical plane. In the second case, it is a question of making the law more effective, of improving the functioning of criminal justice so that it can reach those who are able currently to escape punishment. In the third case, the practical aim would be to change the law and the system so as to abolish immunity, whether enjoyed *de iure* or *de facto*, by delinquents.

(ii) *The victims*

The sad lot, traditionally reserved for the victims of crimes, was again confirmed by the almost total absence of any discussion on those who suffer the consequences of the abuse of power. The victim of the abuse of power was only mentioned in a few passing comments. Thus Mr. Verin reminded us that the victim of the abuse of public or political power suffers a sadder lot than the victim of the abuse of private power in that he generally lacks any form of redress against the author of the abuse.

Ms. Melup commented that the wrongs done to the victims of abuse of power may be the object of collective systems of compensation which treat the victims as a group. The example she mentioned concerns the massive indemnities paid by the government of the German Federal Republic by way of compensation for the atrocities committed by the Nazi regime against the Jewish people. Ms. Melup added that the compensation of the victim must be looked upon as an alternative to the traditional sanctions or as a measure supplementary to them.

III. VICTIM PARTICIPATION IN THE JUSTICE PROCESS

A. Victim Compensation and Restitution

Goal: To acknowledge and validate the losses of victims through a system of financial reparation by the State or by the offender.

1. State Compensation

(i) *Purpose of state compensation programmes*

Crime victim compensation is one of the pillars of victim assistance. For many victims worldwide, it serves as the primary means of financial aid in the aftermath of victimization. While restitution laws requiring reparation to crime victims date back to the 1800s, there is one important distinction between the two sources of financial relief for crime victims: victim compensation does not require the apprehension and conviction of the offender to provide financial relief to the victims. While the physical and psychological impact of crime may be the most obvious toll taken by a crime, the financial impact can also be devastating.

(ii) *Models of state compensation*

Several models of state compensation programmes exist. Although the idea of victim compensation can be traced back as far as the Babylonian civilization before 2380 B.C. and indigenous groups in Latin America and elsewhere have utilized informal community justice procedures for hundreds of years, the New Zealand scheme of 1973 is often cited as an example for other jurisdictions to follow. It provides victims of crime with the same level of awards as the victims of industrial and motor vehicle crashes. Programmes such as the one in Quebec, Canada, provide the possibility of emergency payments pending final determination of the award. Poland has established a Foundation for Assisting Victims of Crime as a special public compensation fund.

The schemes vary in their coverage. In general, compensation for victims of crime is paid principally to the victims of violent crimes. Property loss is typically not covered, with the exception of eyeglasses, hearing aids and other medical devices. If a victim's losses are covered by insurance schemes or other sources of payment, compensation from the State may be reduced or denied. Some schemes specify exclusions applicable, for example, to relatives of the offender or members of

criminal organizations. Others are more liberal in their coverage and extend, for instance, to victims of domestic violence. The schemes in Finland and France also cover victims of property offences on a discretionary basis. In Quebec and in France, compensation programmes provide for emergency payments pending the final decision on the award, especially in the case of serious damages, including sexual offences or the death of the victim.

The European Forum for Victim Services has urged States to ensure that, in cases of violent crime, victims receive compensation from public funds for their injuries, emotional distress, loss of earnings and loss of maintenance as soon as possible after the crime has occurred, regardless of whether an offender has been identified. In addition, where death has occurred, compensation should be paid for bereavement, funeral expenses and loss of dependency for those most closely related to the victim.

The Council of Europe has adopted a Convention on the Compensation of Victims of Violent Crimes, which entered into force in 1988. The Convention sets minimum standards and seeks to promote international cooperation in this area. It is also open to non-members of the Council of Europe.

(iii) *Eligibility requirements*

In general, victims must be innocent of criminal activity and “contributory misconduct”, report the crime promptly to the police, cooperate with the criminal justice system and submit documentation of loss to the compensation programme. Some jurisdictions, such as Finland and France, have established the principle that victims are eligible for compensation regardless of nationality.

(iv) *Outreach*

As an essential and fundamental right of all crime victims, information on the availability of benefits, the application process and programme requirements should be widely publicized. State compensation programmes have sought to disseminate information about their availability; however, research suggests that this is an area where further work is needed. Because many state compensation programmes impose filing deadlines, it is critically important that all persons coming into contact with victims notify them of the possibility of compensation. Effective notification strategies and public awareness activities involve training for police, lawyers, social workers and all other relevant professionals, and public service announcements through various media such as radio, television, informational brochures, billboards and posters.

(v) *Application process*

While no amount of money can erase the trauma and grief suffered by victims of crime, financial assistance can be crucial in helping many through the recovery process. For some victims, these funds can help preserve the stability and dignity of their lives. To be considered for compensation, a victim or surviving family member must first file a compensation application with victim assistance providers, prosecutors, or medical and mental health professionals. For many crime victims, missing the application filing deadline is one of the most painful forms of “secondary victimization” in the aftermath of victimization. State programmes generally have policies on application filing periods and may not accept late filings. However, exceptions are made for crimes involving child sexual abuse and other situations based upon a finding of “just cause”. Some jurisdictions, such as the Netherlands, have extended application deadlines and may still consider applications after the deadline has passed.

The victim, or family member, is usually required to return the completed application form to the programme for consideration. After an application is received, the programme reviews the claim and verifies relevant facts such as the type of offence, the extent of victim injuries and losses and the availability of collateral resources.

(vi) *Claims processing and sound decision-making*

The length of time required to process a victim’s application for compensation varies greatly among State compensation programmes. In some jurisdictions, this process may take several years. In others, for example in Austria, two thirds of all claims for state compensation are settled before the criminal proceedings are concluded.

Many programmes process claims through a staff centralized in a single office. In order to qualify for compensation, certain eligibility requirements must be met by the individual filing the claim. Before

rendering a final determination, the compensation programme must verify victim eligibility and the compensability of victim losses. Although eligibility requirements vary greatly, the following general requirements are typical of most programmes:

- The victim must report the crime to the police within an established time-frame.
- The victim must cooperate with the police and prosecutors in the investigation and prosecution of the case. The apprehension or conviction of the perpetrator is not generally a prerequisite for receiving compensation.
- The victim must submit a timely application to the programme and provide other information as requested by the programme.
- The victim must be innocent of criminal activity or significant misconduct that caused or contributed to the victim's injury or death.

Expeditious claim processing should be a priority for all compensation programmes. The processing time can be greatly reduced if the programme has established policies and procedures for obtaining and reviewing the necessary documentation. For example, questions appearing on application forms should be framed in clear and simple language so that the victim can provide the necessary information with the application. In addition, programmes should establish mechanisms for requesting and receiving routine verification such as police reports, medical records and explanations of insurance coverage. Standardized verification forms and letters, as well as automated systems for collecting and tracking victim data, enable programmes to promptly generate requests for information.

(vii) *Maximums and limits*

Most programmes have established a limit on the maximum benefits available to victims. In addition, many programmes have lower limits for specific expenses, such as funerals and mental health counselling. However, several jurisdictions have sought to ensure full compensation for the victims of violent crimes.

(viii) *Compensation for special categories*

Several jurisdictions have instituted State compensation programmes that cover certain categories of victims, such as victims of terrorism in France, Italy and the United States, and victims of abuse of power. China recently adopted a Law of State Compensation, which established the State's responsibility for compensating victims of abuse of power by officials.

There is a growing trend towards reparation for collective victims and victims of abuse of power. The *Wiedergutmachung programme* of the Federal Republic of Germany for victims of Nazi Germany was emulated by the former German Democratic Republic. States in central and eastern Europe, such as Hungary, are beginning similar programmes to ensure justice as a basis for national reconciliation (as in Argentina, Chile, El Salvador and South Africa).

Compensation has been paid in the United States to Japanese Americans interned during the Second World War, in Canada to original peoples dispossessed of their land, in Rwanda to victims of genocide and in Brazil to the next of kin of "disappeared" persons and victims of torture.

See the 1996 *International Crime Victim Compensation Program Directory* for information about specific policies in countries that have compensation programmes. The *Directory* is available through the Office for Victims of Crime Resource Centre of the United States Department of Justice.

2. Restitution by Offenders to Victims and to the Community

(i) *Purpose of restitution*

Restitution should be used to provide a way of offsetting some of the harm done to the victim and to provide a socially constructive way for the offender to be held accountable, while offering the greatest possible scope for rehabilitation.

Restitution is an important tool in criminal justice. It is therefore critical for victims and for the purposes of justice that effective models be developed to enable the numerous professionals involved in the judicial process to carry out their responsibilities effectively. Restitution attempts to establish a relationship between the victim and the offender in an effort to raise the offender's sense of responsibility to the victim and to society. The idea of restitution is also to advance a sense of

personal accountability to the victim. Some jurisdictions utilize mediation programmes.

Restitution can be implemented in a number of ways at various points throughout the criminal justice process: as a fashion, it may be entered into voluntarily by the offender as well. Restitution to the victim of a criminal injury can be effective as a punitive measure as well as a financial remedy. If used as a punishment, restitution must come from the offender's own resources (either as money or as service) and it must be part of the criminal court sentence in that it is tied to the disposition of the case.

Several jurisdictions have made special arrangements to encourage early restitution by the offender, for example, by waiving further measures should restitution be paid. In the Netherlands, the prosecutor may request that the court impose a partially suspended fine calculated at 20 per cent more than the amount of the victim's loss. The fine is then suspended in full if restitution is paid.

(ii) *Assessment of victim loss*

Assessment of victim loss is a complex process that can take place in a variety of ways. In some jurisdictions, the prosecutor negotiates directly with the defence counsel, after substantiating all losses with the victim. In other cases the victim is generally required to present receipts or other evidence to substantiate the actual losses suffered. In Canada, the Criminal Code provides that restitution can be ordered as an additional sentence to cover "readily ascertainable" losses.

(iii) *Presentation of restitution claims in criminal proceedings*

As noted above, many jurisdictions allow for the consideration of civil claims in criminal proceedings, for example as a *partie civile* in many French-based systems or through *adhesion* proceedings in German-based systems. Such a combination of civil and criminal proceedings has several benefits for the victim and the jurisdiction, ranging from procedural economy to the fact that the responsibility for the collection of evidence and presentation of the issues lies largely with the authorities.

A criticism of this approach, however, is that in many jurisdictions it is the victim who is responsible for enforcement of the court order. If the offender does not voluntarily comply with the court order, the victim is left with a court order but no money. The victim can employ a collection agency to go after his or her money but will then have to pay the collection agency for its services. The execution of restitution orders, like fines, should be the responsibility of the justice system and not the victim. This is the case, for example, in Austria. One model would be for restitution or compensation to be paid directly from public funds to the victim, in which case the payment to be made by the offender would revert to the State.

(iv) *Types of restitution*

Financial restitution. Financial restitution refers to payment of money by the offender to the actual victim of the crime. This is how restitution is most commonly defined, and is probably also the type most widely used.

Individual service. Individual service by the offender requires that the offender perform a service for the actual victim. Examples of this type of restitution programme might include the offender personally repairing damage done to the victim's personal property through work or the completion of other specified services. This type of restitution usually involves some form of third-party mediation and obviously requires the consent of the victim.

Financial community restitution. Monetary community restitution involves the payment of money by the offender to some other entity, such as a community programme. Examples of this type of restitution include such mechanisms as court orders for payment to specifically designated charities.

Community service. Community service requires the offender to perform some beneficial community service. In this type of restitution, society serves as a symbolic victim and the practice is often referred to as "symbolic restitution".

Restitution fines. Restitution fines differ from actual restitution in that they are imposed and collected for the purpose of depositing money in a state fund for victim compensation and services. Once deposited, the money is then used to reimburse victims for financial losses through the state

compensation scheme, or to support assistance services.

In cases of victimization by economic or environmental crime, special difficulties arise from the fact that the harm is often spread over many people and may be cumulative, in both place and time. The increasing trans-nationalization of offences (for example, pollution and trans-border offences) has been accompanied by a growth in international litigation. The spate of claims lodged in several countries raises jurisdictional issues that are likely to proliferate further as crimes become more international in scope. In cases where potentially noxious activities are not yet criminalized, but legal opinion holds that the innocent victim must not be left to bear the loss or injury, monetary compensation or other reparations should be due to the victim.

(v) *Effective enforcement and supervision*

Merely ordering restitution does not ensure that it will be paid. A number of jurisdictions have developed various means of promoting payment.

In England, the law provides that if the court wishes to impose both a fine and restitution (a “compensation order”), but the offender apparently lacks the means to pay both, the court shall issue a compensation order only. In Scotland, the law provides that where both a fine and a compensation order have been imposed on an offender for the same crime, or for different crimes but in the same proceedings, the enforcement of the compensation order takes precedence.

In Canada, a restitution order can be filed as a civil judgement and enforced accordingly (e.g. through seizure of assets or garnishment of wages). In India, the Code of Criminal Procedure has, since 1973, provided for the possibility that the court can order the whole or any part of the fine imposed on the offender to be paid to the victim. Owing to lack of awareness about these provisions, to the cumbersome administrative procedures required and to various other factors, these provisions had not been widely applied. Recently, however, there has been an increasing interest among courts in making use of these provisions.

In some countries, including the United Kingdom, inmates of correctional institutions perform tasks to raise money for local victim support schemes. Elsewhere, in the United States, for example, the proceeds of crime, such as drug trafficking, have been seized and used for rehabilitation projects or as contributions to international anti-drug initiatives. Proposals have also been made for restitutionary courts and restitution by corporate entities for damage inflicted through economic offences.

(vi) *Restitution as a term of probation*

When restitution is ordered as a condition of sentencing, a corrections officer has the responsibility of monitoring payments and evaluating the rehabilitative progress of the programme. In most cases where a restitution order is entered, a payment schedule is established indicating the amount of monthly payments and the length of time necessary to pay the amount in full.

3. Funding Sources and Mechanisms

National funding sources and mechanisms

Compensation schemes receive funding from a variety of sources. There are two primary sources: funding from fees or charges that offenders pay and funding from general-revenue appropriations from legislatures.

For example, in the United States, at the federal level, fines and penalties are levied against federal criminal offenders. This money is deposited into the “crime victims’ fund”, which is used to help States support their victim compensation programmes. In addition, more than 40 of the 50 States in the United States gain most of their own income from offenders. A recent trend in funding victim compensation programmes has been for States to fund their compensation programmes entirely from fines and penalty assessments. A related funding trend facing compensation programmes today is recovering restitution from convicted offenders in order to help offset the cost of providing compensation benefits to their victims. This is often described as “fund recovery measures” and involves holding offenders liable for injury to victims and making them pay for the consequences of their crimes. Some state programmes are making special efforts to seek restitution from offenders and are working with prosecutors and judges to ensure that restitution is ordered and collected, as

well as monitoring restitution payments.

The second model of funding, from general-revenue appropriations, is more common worldwide. Such a model has the advantage of not being dependent on the ability of offenders to pay fees, charges or fines. In France, an individual contribution is levied on each personal insurance policy, a mechanism that results in considerable annual funding for state compensation programmes.

IV. NATURE AND EXTENT OF THE ADEQUATE RESPONSE

A. Technical Obstacles Which Sometimes Paralyse Public Action in the Field of Abuse of Power and Gilded Criminality

A number of technical obstacles make the discovery, investigation, prosecution and punishment of abuse of power rather difficult, so contributing to the gilded number of this type of criminality. Many of these obstacles were tackled both in the general reports and in the subsequent discussion. Here are a few examples:

- Absence of penal provisions covering the abuse in question.
- Complexity and technicality of laws and regulations governing areas in which abuse of power may occur. This is particularly true in the economic and fiscal sectors.
- Dispersion of legal texts governing economic and administrative activities.
- Ambiguity and imprecision of texts currently in force, which deal with the behaviour in question. Often the legal provisions lack clarity, are vague or are capable of varying interpretations.
- Very skilful advocates briefed and well paid by the guilty parties or by the companies involved.
- Problems of proof or procedure. Mr. Tiedemann observed that the traditional procedural guarantees often, for this type of offence, prove to be obstacles to ascertaining the truth.
- Skilful, subtle and sophisticated techniques employed by the delinquent parties. One notes here that the traditional criminal law is often a rigid and inflexible instrument, too hide-bound by the principle of precedents to be able to face up to the economic and technological realities which change and develop with great speed.
- The high political or social-economic status of the delinquent and the corruptive influence of the latter on the organs of justice. Mr. Malinverni commented that most of the difficulties which often prevent the discovery, prosecution, conviction and punishment originate in the same characteristics of the man of power. Such a person seeks to extend his dominion from the field fixed by the regulations to the organs which such regulations had in mind in order to prevent or suppress abuse. In these cases, the abuse of power already perpetrated, and which should be revealed and punished, is joined by another abuse of power precisely directed at avoiding detection and sanction. Apart from the obstacles mentioned above, Malinverni drew attention to the following obstacles:
- The formulation of subterfuges and cover-ups which make it very difficult to detect the abuse.
- The fact that there are no written or other sure proofs of the abuse (the relevant agreements are always verbal) or the relevant documents are deposited in the hands of third persons whose loyalty is assured.
- The solidarity of all the implicated people, keeping silent on the facts and preventing the acquisition of evidence which could be used against them.
- The negotiation and conclusion of agreements secretly without witnesses.
- The frequent absence of people who have suffered harm or realize the harm they have suffered (since it is usually communal rather than individual interests which are adversely affected).
- The fact that the police and the judicial organs are preoccupied with the conventional crimes of which society is more conscious.
- The lack of specialised personnel of authority, with the necessary expertise in each of the sectors in which the abuse occurs.

B. Strategies for Action

1. Research Strategies

Empirical research into the abuse of power comes up against a number of obstacles and is faced with various complex problems. However, the obstacles are not insurmountable nor the problems insoluble. Without demonstrating an excessive pessimism, the discussion seemed to indicate a greater consciousness of the limits facing research in this field than of the possibilities available. The following comments deal with a few of the problems which were mentioned and the solutions which were suggested.

2. The Competence of the Researchers

The abuse of power stands at the crossroads of political science, sociology and criminology. It is therefore not surprising that criminologists often feel themselves incompetent or badly equipped when they wish to undertake research across the range of this subject or in tackling the problem in its entirety. So as to give at least a partial solution to this problem, the following solutions were advanced:

- The creation of multi-disciplinary research teams comprising political-students, criminologists, jurists, sociologists, etc.
- The inclusion of courses on the abuse of power, economic criminality and gilded criminality in programmes for training criminologists.
- The elaboration of taxonomies and typologies of the abuse of power. The use of such typologies is to enable researchers to undertake empirical studies on certain homogenous forms of abusive conduct or on specific elements of the abuse of power.
- Campaigns of research in specific fields, such as the police or the prisons, so as to analyse in depth the various manifestations of the abuse of power in such sectors. It is possible, for example, to study the discretionary powers of the police so as identify and examine abuses occurring in their exercise: arbitrary arrests, searches without warrant, corruption, acts of brutality, excessive use of force, etc.

3. The Judiciary

There was no doubt on the need to ensure the traditional division of powers, a clear allocation of duties, responsibilities and obligations, as well as cross-checks between powers. A judicial system that is integrated and independent is the best safeguard against the abuse of executive and legislative powers. It is thus imperative to guarantee the total independence of the judiciary, especially in relation to the executive power. It would be desirable also to institute an independent authority or prosecuting body which is free from political pressures. In some cases, use might be made of a system permitting the appointment of a special attorney to enquire into the abuses, as occurred in the Watergate Affair in the United States.

Research has shown us that beyond the drama of the initial and lingering traumas of these victimizations is another type of long-term effect that all too often converts a large proportion of surviving victims into offenders. The impact of many forms of victimization gives birth to a wide range of emotions ranging from fear to anger. These feelings, when not exorcised through the assistance/recovery process become entrenched in the thoughts and behavioural patterns of the victim/survivors and all too often become manifest in the need to expiate long suppressed anger and hostility. A large proportion of adult offenders have significant histories of untreated trauma. Over the last 30 years or so, those who have worked with the various forms of crime victimizations have come to realize that "good victim assistance is good crime prevention". At the international level we have not yet fully acted on this reality. For the most part victim assistance has been justified on two fundamental points: the practicality of ensuring the cooperation of victims so as to have better witnesses in the prosecution of criminal offenders; and, the expression of collective compassion to reduce victim suffering and facilitate victim recovery. This link between victim assistance and crime prevention has been largely unrecognized or ignored by policy and programme developers.

The importance of recognizing and restoring the plight of victims is now at the centre of concern of the UN ad-hoc Tribunals and even more so, in the statutes of the International Penal Court.

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