
Victims of Terrorism: Access to Justice and Administration of Justice

Ines Staiger, March 2008

Individuals suspected of terrorist acts should be brought to justice

- Before competent, independent and duly constituted civilian tribunals
 - No arbitrary regulations (Guantánamo, Beslan)
 - No mitigations of punishment? (principal witness regulation)
 - Judgment within a reasonable time
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The position of victims of terrorism in criminal proceedings

- Witness or injured party?
 - Information rights
 - Protection rights
 - Right to assistance during legal proceedings
 - Participation rights: active or passive?
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Participation rights for victims of terrorism?

- Victim impact statements
 - *Partie civile* proceedings
 - ‘party-like status’
 - Full party status
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What do victims want?

- Control over outcome (Thibaut and Walker)
 - Control over decision-making process (Thibaut and Walker, Strang)
 - More active participation in criminal proceedings (Kilchling, Rohne)
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Victim impact statements

- Voice at sentencing only: outcome oriented
 - Roberts and Erez: focus on the communicative value of the statement
 - Davies and Smith: victim allocution
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Victim participation before the ICC

- Participation when personal interests are affected, Art. 68 (3) of the Rome Statute
 - Expression of views and concerns through statements, examination of witnesses or by filing submissions
 - Right to initiate procedures (ICC judgment of 18 January 2008)
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Status of parties to criminal proceedings

- *Partie civile* (civil claimant): restricted to interest of reparation
 - Accessory prosecutor: full procedural rights for safeguarding interest of satisfaction and protection: input and outcome oriented
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Status of accessory prosecutor for victims of terrorism?

- As a party, victims of terrorism could not be excluded from the trial, e.g. on grounds of national security
 - Aspect of vulnerability of victims of terrorism (EU)
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Victim participation and legal aid

- Legal aid in appropriate cases, i.e. specific criteria
 - Legal aid for a number of victims
 - Legal aid free of charge for vulnerable victims (with participatory rights)?
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Points to be addressed

- Civilian tribunals
 - Participation rights: active or passive?
(aspect of vulnerability of victims of terrorism)
 - Legal aid free of charge (aspect of vulnerability of victims of terrorism)
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The Legal Framework for Victim Participation

Civil vs. Common Law

Dr. Michael Kilchling - MPI Freiburg

Civil vs. Common Law

- **Post-victimization stage: *similarities***
- **Police/investigation stage: *(slight) differences***
- **Court stage: *(fundamental) differences***
- **Post-trial and correction stages: *similarities***
- **Pre-release stage: *similarities***
- **Post-release stage: *similarities***

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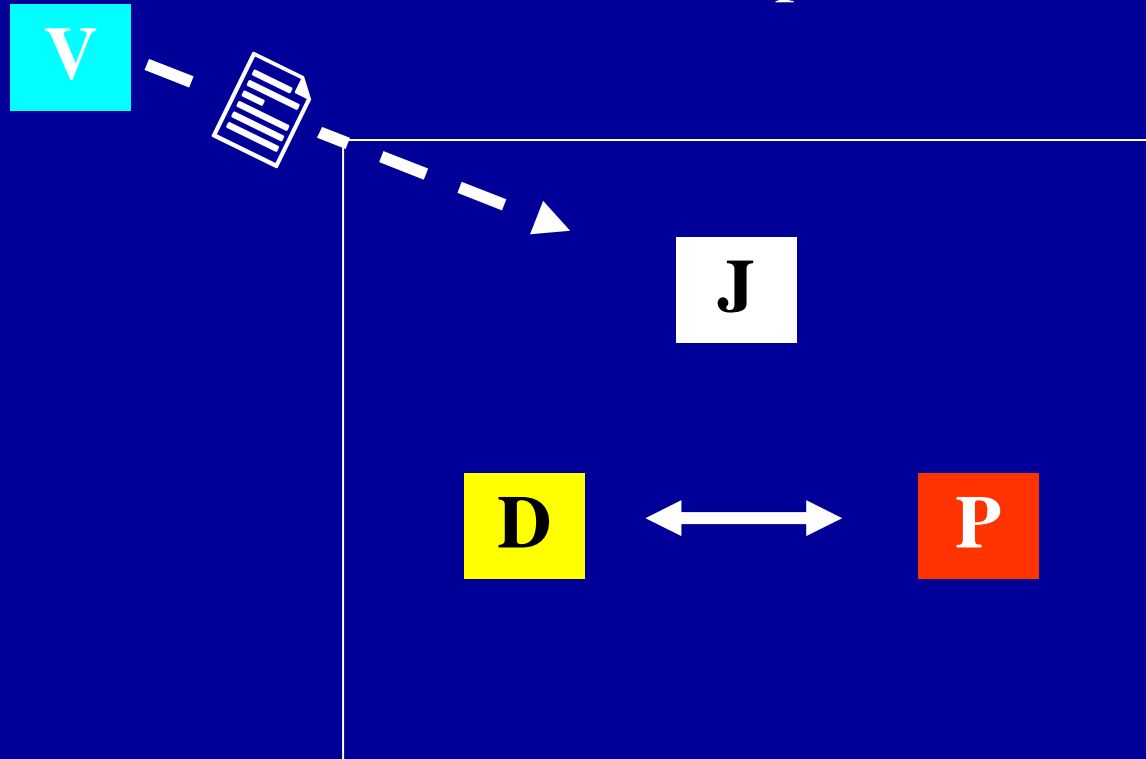
Different models of procedure

- **Adversarial procedure:**
 - *(interlocutory) two-step procedure: examination of guilt, sentencing*
 - *interaction of two parties: prosecution vs. defense*
 - *different addressees: jury, judge*
- **Inquisitorial procedure:**
 - *one conjunct trial*
 - *two- or multi-party setting possible: prosecution, defense, victim*
 - *one addressee: judge(s)*

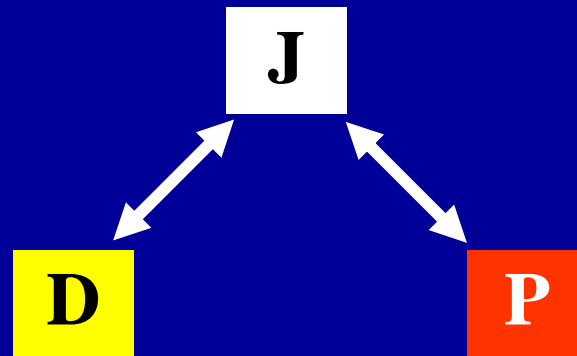
Different models of procedure

- **Adversarial procedure:**
 - *victim input through victim impact statement (VIS)*
 - *written or oral*
 - *sentencing hearing*
 - *'voice'*
 - *passive victim participation*
- **Inquisitorial procedure:**
 - *victim input through, e.g., partie civile, accessory prosecution (Nebenklage), acusacion particular, etc.*
 - *quasi party status throughout the whole process*
 - *oral (direct or indirect)*
 - *active victim participation*

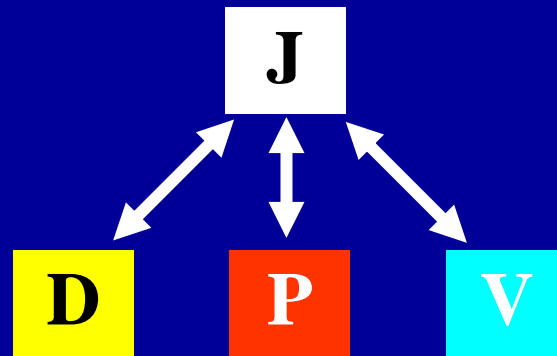
Adversarial procedure:



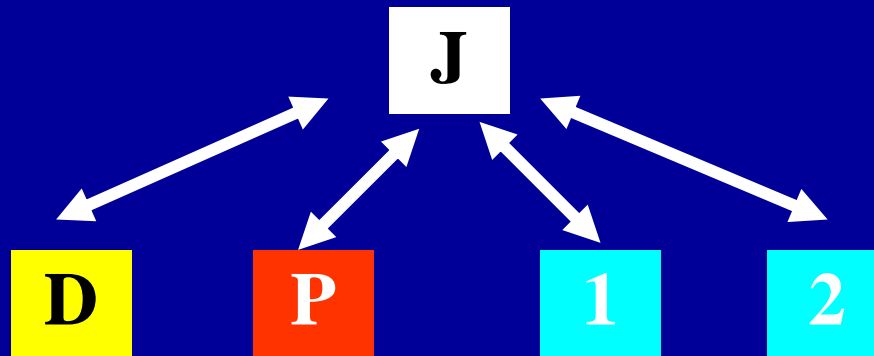
Inquisitorial procedure:



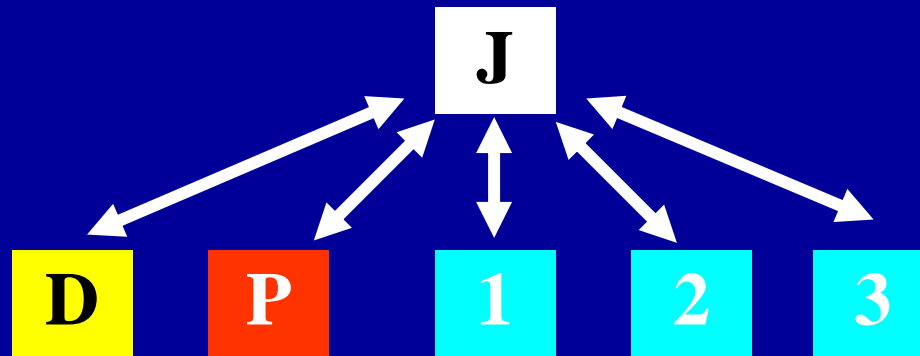
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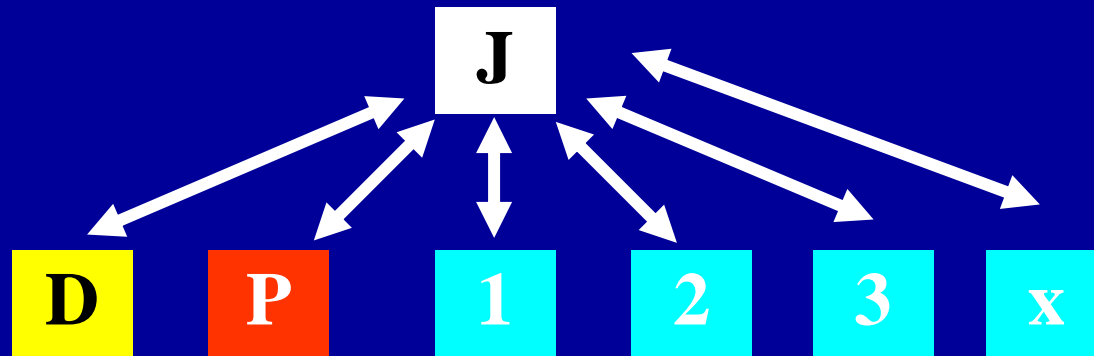
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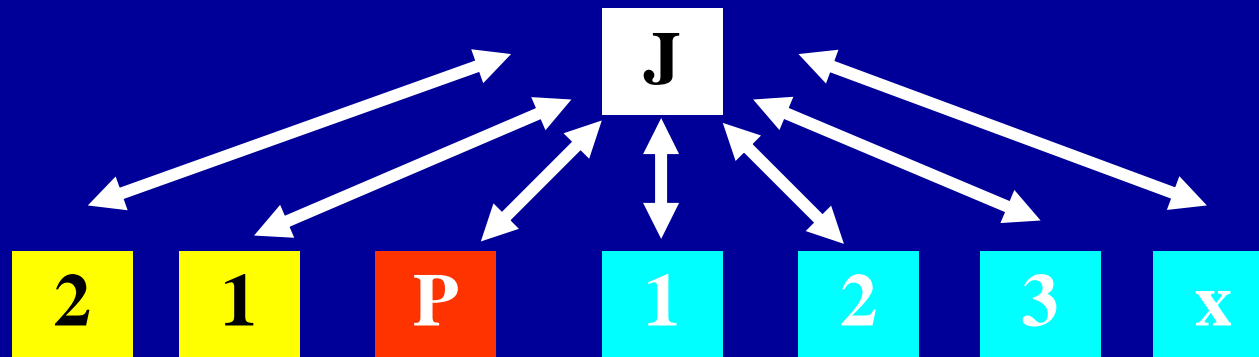
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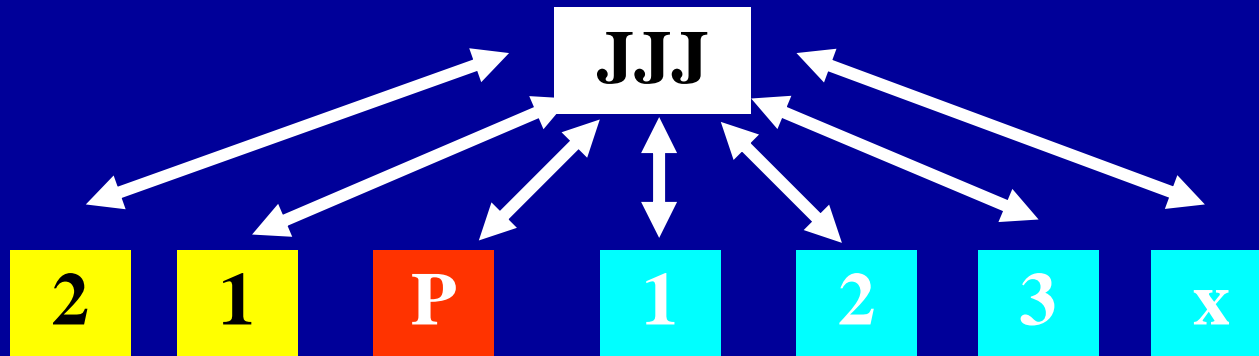
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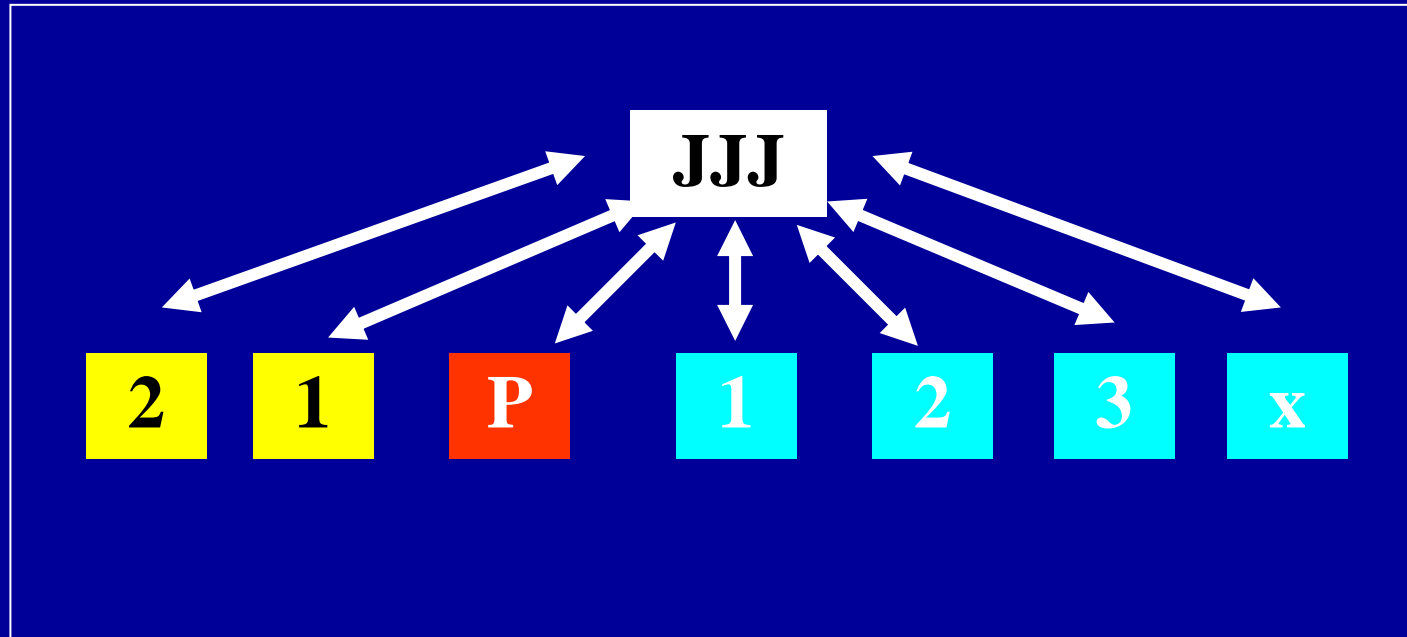
Inquisitorial procedure:



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Inquisitorial procedure:



E.g., Accessory Prosecution (*Nebenklage*)

- **Pre-procedural right:**
 - *full access to all case files*
- **Procedural rights:**
 - *legal representation*
 - *permanent presence*
 - *examination/cross-examination of the accused (offender), authorized experts, and other witnesses*
 - *questions*
 - *procedural motions*
 - *statements, in particular: final pleading*
- **Post-procedural right: remedy (appeal)**

Workshop Access to justice and administration of justice

(presenters: Ms. Ines Staiger & Dr. Michael Kilchling)

Miss Staiger presented the main findings of chapter 5 and the draft EU Recommendations for the Assistance to Victims of Acts of Terrorism. One of the main questions was to what extent terrorism victims should be able to participate in the criminal proceedings. She presented four manners in which the participation of victims in criminal proceedings can be shaped. The first and most 'passive' form is participation through the use of victim impact statements. The second is allowing the victim a *partie civile* status. In this model the victim is granted certain participation rights, but these are restricted to the interest of reparation. A higher extent of participation can be witnessed when the victim is given a 'party-like status'. As an example victim participation before the International Criminal Court was mentioned. Before the ICC, victims can participate when their personal interests are affected and this participation is constituted by the possibility to express views and concerns through statements, to examine witnesses, to file submissions or to initiate procedures. The final and most 'active' form of participation is the victim as an accessory prosecutor. Victims would have full procedural rights for safeguarding their interests. Furthermore, as a party, victims of terrorism cannot be excluded from the trial, for instance on the ground of national security. The justification for accessory prosecution might be found in the aspect of vulnerability. Victims of terrorism are regarded as particularly vulnerable in the EU and therefore deserve special rights.

Dr. Kilchling explained the differences between common law and civil law jurisdictions to clarify the possible problems with including a more far-sweeping form of victim participation in the existing structures in common law systems. The most fundamental differences between common and civil law emerge in the court stage. Because of the two-step procedure (examination of guilt and separate sentencing hearing), the adversarial procedure (prosecution vs. defence) and different addressees (jury and judge) most common law jurisdictions have restricted victim participation to victim impact statements only. In the civil law countries with their conjunct trial, their two- but also multi-party settings (the victim can have a party or party-like status) and the judge as the sole addressee, there are no fundamental problems against integrating victims as a real third party to the procedure. As an example of full victim integration dr. Kilchling discussed accessory prosecution (e.g. the German *Nebenklage*). As an accessory prosecutor victims have full access to case files; a right to legal representation; a right to permanent presence during the trial; a right to (cross)examination of the accused, authorized experts and other witnesses; a right to pose questions; a right to submit procedural motions; a right to final pleading and a right to appeal.

The discussion that followed after the presentations focussed on three main questions:

- 1) Should the recommendations specify that proceedings should take place in civilian tribunals (i.e. normal criminal courts as opposed to military courts)? In military tribunals, victims can easily be excluded. As opposed to the ICTY the victim position in the ICC was much stronger. Specification can furthermore have a symbolic meaning taking in mind secondary and tertiary victims. Everybody agreed on the specification.

- 2) Should participation rights be active or passive? Should we have explicit rules on the participation rights (in recommendation number 2) even if this is still a problem for some member-states? Especially accessory prosecution was very controversial. Some feared that this option would expose victims to retaliation. Others approved of active participation and stressed that having the broad array of options ranging from active to passive at the victims' disposal would be beneficial to them. Excluding the restriction out of recommendation nr. 3 ('where such a possibility exists') would enlarge EU influence. Taken into account the vulnerability of victims of terrorism (based on the Terrorism Framework Decision) special rights for victims of terrorism may be justified. Given the fact that this point was controversial and that on the current text consensus can easily be reached, it was decided to leave the text as it is.

- 3) Should victims have the right to legal aid free of charge? Recommendation 3 article 4 reads 'free legal aid in appropriate cases'. Should we delete 'appropriate cases'? There may be budgetary problems. In *Nebenklage* it is restricted to particularly vulnerable people. They get free legal aid irrespective of their wealth. Given the very narrow definition of victim under the current Declaration, there is already a restriction here. Perhaps we should refrain from further limitations like 'appropriate cases'. In France – where there is also free legal aid – this is very controversial. They complained about high costs and lawyers were discontent with their fees. In the UK you will not receive full free legal aid if you have a criminal record. Free legal aid only applies to 'un-blameworthy and innocent victims'. This would be an argument to exclude 'appropriate cases' to make sure that people with a record do get free legal aid.

Other points of relevance that emerged were the following:

- In terrorist cases there is often no individual offender - they are either dead, or there is not sufficient evidence - and no individual criminal procedure. Everybody agreed upon amending the recommendation under 4 (Continuing assistance) by adding a formulation that would point out that this is of particular importance to those victims where an individual offender cannot be tried.
- There might be a gap under headline number 5 (access to justice) under recommendation number 3. Should the right to judicial review on the decision to close a case also be available for victim associations? By 'duly recognised associations' (recommendation 3) are meant 'officially recorded formal organization that have a legal entity'. The idea behind the recommendation is public control and there is nothing wrong with giving this right to different associations. It may be problematic if different victims (with different nationalities) are differently associated. Or when states do not recognize the associations that have the victims' preference.
- In the preamble the words 'EU citizens' will be reconsidered. A lot of terrorist acts involve non-EU citizens, for example tourists and the Declaration should encompass these victims as well.