Victimization
in a
multi-disciplinary key:
Recent advances in victimology

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Selection of papers presented at the 12th International Symposium on Victimology, 2006, Orlando, USA

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Part A: Victims' Rights Explosion

1. Loopholes, Risks and Ambivalences in International Lawmaking; The Case of a Framework Convention on Victims' Rights

Willem van Genugten, Rob van Gestel, Marc Groenhuijsen and Rianne Letschert

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Part B: Victimological Mission: Expanding Evidence-based Knowledge

Part D: Spousal Assault Vulnerability[1]

[1] Construction of this part of the volume was supported by the Achmea Foundation Victim and Society (Stichting Achmea Slachtoffer en Samenleving).

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Contemporary issues:

Victims' rights explosion, expanding evidence-based knowledge, role construct revival, and spousal assault vulnerability.

The World Society of Victimology's (WSV) 12th International Symposium on Victimology, titled 'Enhancing the Mission', has taken place in Orlando (Florida, USA) in August 2006, and was hosted by the University of Central Florida. Following the suggestions, aimed at enhancing the mutual visibility of the various victim-focused organizations, made by the president, dr. Marlene Young, and the vice president, prof. Irvin Waller, of the International Organization for Victim Assistance (IOVA) – a co-sponsor of Enhancing the Mission – the WSV-symposium has been organized in conjunction with the Orlando- meeting of the US - National Organization for Victim Assistance (NOVA).

In line with new guidelines, adopted by the Orlando – Executive Committee of the WSV, the main responsibility for publishing an edited volume relating to the conference was attributed to the president of the Research Committee. A thorough analysis of the conference financial revenues, submitted by the WSV Treasurer prof. Paul Friday, to the 2007 meeting, hosted by WSV president prof. John Dussich at California State University, Fresno, unfortunately revealed that no budget was available for developing and publishing an edited volume. The Editorial team is therefore indebted to their affiliated institutes, including UNCC, TIVI, Intervict, and the Achmea Foundation Victim and Society, for providing them with the facilities

for engaging in their editorial responsibilities. Moreover, the editors are indebted to prof. Marc Groenhuijsen, general director of Intervict, for negotiating a contract with the current publisher. The chair of the research committee prepared a working paper for the Fresno meeting. This paper included suggestions on inclusion and exclusion criteria for manuscripts; the use of the APA style manual; a timeline, suggesting the 12th Mito Conference as the ultimate deadline for presentation, and a proposal to install a special editorial task force within the context of the Research Committee. Paul Friday, Gerd Kirchhoff, and Rianne Letschert were appointed member of this committee. These appointments were not the outcome of a random process. The selection reflects the revitalization of old standing working relations, that originated in annually organizing and co-directing the WSV postgraduate courses "Victimology, Victim Assistance and Criminal Justice" in Dubrovnik. The selection moreover reflects the desire for enhanced collaboration between representatives from the premier victimological institutes, particularly TIVI, founded by prof. Morosawa and directed by prof. Dussich, and Intervict, affiliated with Tilburg University. Discussions of the working paper within the editorial team revealed full consensus with regard to the suggestions made. However, the APA style manual was generally considered to be a too restrictive option for delegates representing victimology as a multi-disciplinary endeavor.

Taking the Vrije Universiteit Amsterdam WSV conference as a standard of reference, a number of significant advances have emerged during the last 10 years. Shortcuts to label these various lines of progress, used in this volume, include:

(a) *The victim' rights explosion,* referring to the (inter)national proliferation of both soft and hard law instruments, aimed at protecting the interests of victims. The Magna Charta of

victimology – the United Nations Declaration of basic principles of justice for victims of crime and abuse of power – currently spans only *6* pages within the international compilation, covering close to *290* pages, made by Groenhuijsen and Letschert (2008);

(b) *The victimological mission*: the academic and scientific standing of victim – related studies has long been a controversial issue. Research has varied on an underlying conceptual dimension, including victimagogics and victimology as bipolar anchors. These terms were coined by Van Dijk (1986). The former anchor refers to a fuzzy set of victim related ideas and notions, that loosely guide mainly policy-oriented and ideology-driven action research. The current state of the art reveals a substantial step in the direction of the second anchor: many current studies are focused on establishing and expanding the base of evidence-grounded knowledge;

(c) *Role construct revival:* The interest in (sociological and social-psychological) role theory has clearly revived. Role constructs have now been fruitfully used to study victimization and offending processes. Various studies have focused on temporal role-reversal, from offender to victim and vice versa. Post traumatic anger (Winkel, 2007) has been suggested as a key mediator of both temporal and concurrent (intra-individual) role-reversal. Other role constructs, including role transition, role overlap, assigned roles, and role clarity, may also be used as lenses to further study the dynamics underlying exposure to (and the expression of) violent behaviors.

(d) *Spousal assault vulnerability*: Spousal assault is now generally acknowledged as a major hazard to both the physical and mental health, particularly of female victims. To identify victims who are

at risk of re-victimization a number of checklists (and tests) have recently been developed with the financial support of the Achmea Foundation. These checklists also provide a basis for indicated prevention programs, aimed at counteracting re-victimization. Trauma-focused mediation, based on the principles of restorative justice, has been suggested as an innovative approach to special prevention.

Thematic relevance, creativity, and originality served as the main criteria for conducting a content analysis on the book of abstracts, forming part of the 12th conference. This analysis yielded an initial database that was extensively discussed in the editorial team. These discussions resulted in a final selection of abstracts considered for inclusion: the total number of inclusions corresponded with a rejection-rate of over 96%. Next, presenters were approached with a request to submit a full length article, based on their abstract. These submissions were subjected to an independent peer review process. All manuscripts were evaluated by two independent (non-affiliated with the author) reviewers, yielding an acceptance rate of 75%. Accepted manuscripts were then included in the present volume.

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Winkel, F.W. (2007). Post traumatic anger: Missing link in the wheel of misfortune. Nijmegen, The Netherlands: Wolf Legal Publishers.

1 Loopholes, Risks and Ambivalences in International Lawmaking; The Case of a Framework Convention on Victims' Rights*

Willem van Genugten, Rob van Gestel, Marc Groenhuijsen and Rianne Letschert[1]

1. Introduction

At the workshop organised by the World Society of Victimology, at the 11th United Nations Congress on Crime Prevention and Criminal Justice (2005), Prof. Sam Garkawe from Australia held a passionate speech about the need to transform the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereafter: 'the UN Declaration', the 'Victims' Rights Declaration' or 'the 1985 Declaration') into a Victims' Rights Convention. Garkawe listed a number of arguments in favour of a convention, including:

- A hard law document puts more pressure on countries to implement and enforce victims' rights.
- Courts will take a convention more seriously.
- The European Union Framework Decision on the Standing of Victims in Criminal Proceedings (2001) has shown that most

* The full text of this article is published in the *Netherlands Yearbook of International Law*, Vol. 37, pp. 109-154, 2006.

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principles in the UN Declaration are not so obscure, vague or uncertain that they cannot be codified in a hard law document.
- The ratification process of a convention urges States to motivate why they would not be supportive to hard-core legal protection of victims' rights.
- There is too much rhetoric in the implementation of the UN Declaration.
- The issue of poor treatment of victims throughout the world should be viewed as a matter of human rights protection; therefore there is no need to treat victims' rights differently compared to other fundamental rights, which are laid down in international conventions.[2]

Garkawe has an interesting way of looking at the protection of victim's rights. Pleading for a convention, one can even add that, to some extent, he plays a home game, knowing that, from the perspective of for instance lawyers and NGOs, conventional law is often preferred above (vaguer) declaratory law or above the gradual development of a soft law document into customary law. It is supposed to be a matter of fact that conventional law can be applied easier than a declaration, knowing that the legal status of the latter cannot always be determined that simple. In addition, adoption of a convention would definitely feel like a formal recognition of the position of victims, a psychological effect that should not be underestimated.

As a follow-up to Garkawe's call for a convention, the international victimology field started a discussion, leading to a draft called "Draft UN Convention on Justice and Support for Victims of Crime and

[2] Sam Garkawe, 'The Need for a Victims Convention', *The Victimologist*, Volume 9, Issue 2, August/September 2005, p. 4-5.

Abuse of Power".[3] Be that as it may be, to our mind seriously embarking upon the long road towards a convention is also a difficult and to some extent even risky enterprise which brings up several questions. How about the risk that relatively 'hard' elements of the 1985 Declaration might even loose their status of (being close to) international customary law? How about the risk that a strong convention with clear-cut and unequivocal language, looking good on paper, might scare off States in the process of ratification? How about creating an instrument that can count upon maximum support by the victims' rights protection field? To our mind there is a serious need to at least consider and possibly overcome these types of loopholes, risks and ambivalences, before States would be urged to work towards the adoption of a convention.

1.1. Research Questions and Set-up of the Paper

In this paper the following questions will be addressed:

- What is the current state of affairs as to the protection of victims' rights, as agreed upon in the 1985 Declaration? How about its content, legal character and the monitoring of its implementation and compliance? (Chapter 2)
- What can be learned from today's academic discussions regarding the character of international legal standards and from recent international debates on standard setting in fields somehow related to victims' rights? (Chapter 3)
- What legal instruments and which methods of international lawmaking might be most adequate in order to make progress in the field of the victims' rights protection? (Chapter 4)

[3] More information on its history and contents can be found in Chapter 6 of this paper.

- Once agreed upon the standards and the methods of lawmaking, what would be the best mechanism for monitoring implementation and compliance in the field of victims' rights? (Chapter 5)
- To what extent is the Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power meeting the standards as developed in this paper? (Chapter 6)

1.2. Background Notes to the Research Questions

Whatever the mode of (non-)codification of victims' rights is going to be, ultimately the success of any codification lies in the internalisation of the rules and principles in the behaviour of people and the willingness of States to implement the standards and guarantee compliance. Thereby, the words "implementation" and "compliance" may seem to speak for themselves, while they are often used interchangeably. However, for the present paper it is important to keep in mind that they refer to different things. In the words of Dinah Shelton, "implementation of international norms refers to incorporating them in domestic law through legislation, judicial decision, executive degree, or other processes", while "compliance includes implementation, but is broader, concerned with factual matching of state behaviour and international norms".[4] Compliance, in other words, refers to the question whether or not States do really

[4] D. Shelton, 'Introduction, Law, Non-Law and the Problem of "Soft Law"', in: D. Shelton (Ed.), *Commitment and Compliance, The Role of Non-Binding Norms in the International Legal System,* Oxford: Oxford University Press, 2000, p. 1-18, p. 5. Interestingly enough, in literature and case law in the field of European law normally no distinction is made between implementation and compliance. Here, implementation is usually the overarching term for both the obligation to transpose European laws (especially directives and framework decisions) into national legislation and the obligation to ensure that compliance is guaranteed on the national level. See S. Prechal, *Directives in EC Law*, Oxford: Oxford University Press, 2006.

live up to their obligations. In this paper the question will be raised what type(s) of legal instruments and which methods of international lawmaking would be needed in order to realize the highest attainable level of compliance.

Having said that, we would like to add from the very beginning that it would be an illusion to think that there is one single 'optimal solution' when it comes to the codification of victims' rights. To be able to determine the optimum presupposes that one can anticipate what the interested parties expect from codification. In general, most States will undoubtedly want to strengthen the worldwide protection of victims' rights in, for instance, criminal proceedings. However, such an overall consensus would not necessarily mean that there is consensus about every aspect: how strict would the legal protection of victims have to be, how can States best be held responsible for the upholding of these rights, and which methods and techniques for monitoring compliance and for financial compensation of damages caused by insufficient State action to protect victims' rights would be the most adequate ones?[5]

Further to that, striving for an optimum also suggests that the parties involved in the lawmaking process will come to rational decisions on the basis of clear and unequivocal evidence about the practical and legal consequences of different regulatory options. In short, rational approaches emphasise the importance of deterrence and explore the optimal level of sanctions required to sustain cooperation and compliance. These theoretical approaches explain compliance in instrumental terms, linking actor behaviour to the nature of the problem, the structure of the solutions chosen, and the

[5] The draft of the 2001 European Framework Decision on the Standing of Victims in Criminal Proceedings, for example, included a right of State compensation for victims of violent crimes. However, this right was soon dropped when it became clear that for most Member States it would involve more expensive systems than the existing ones to live up to the expectations that the right of State compensation raised.

costs and benefits associated with different behaviours.[6] In the international daily reality such rational evidence is often lacking or incomplete, while, on the contrary, aiming for deliberate ambiguity is not an uncommon practice in the negotiations over draft conventions and other legally binding documents.[7]

Finally, there is still fairly little knowledge about the pros and cons of using the instrument of a convention when it comes to the responsiveness to needs felt in daily practice. Experience so far in the field of victims' rights, both on the national and the international level, learns that a codification in order to be successful requires a complicated process of 'multi-level implementation' in which States, NGOs, judges, prosecutors, probation officers, police officials etcetera participate. All have to play an important role in safeguarding that the 'chain of protection' remains unbroken.[8] One should bear in mind that drafting a convention is only a small, though not unimportant, link in the total regulatory chain.

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6 Apart from rationalist approaches, there are also more norm-driven theories and liberal theories about state behaviour towards international law. For an overview, see K. Raustiala, 'Compliance & Effectiveness in International Regulatory Cooperation', *Case Western Journal of International Law* 2000, p. 387-440.

7 Vagueness and ambiguity of rules due to compromises between different Member States is also known within the European Union. See A.E. Kellerman, G.C Azzi, R. Deighton-Smith, S.H. Jacobs and T. Koopmans (Eds.), *Improving the Quality of Legislation in Europe*, The Hague/ Boston/London: Kluwer Law International, 1998.

8 This is even so on the national level as Pawson has pointed out in his study on the implementation of the US sex offender notification and registration programme, better known as Megan's Law. See R. Pawson, *Does Megan's Law Work? A Theory-Driven Systematic Review*, ESRC UK Centre for Evidence Based Policy and Practice, Working Paper 8, London, July 2002. The paper can be downloaded from: http://www.evidencenetwork.org/.

2. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

2.1. Introduction

The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power has been prepared in surprisingly little time. Plans to make a first draft originated only in 1982 and were executed by members of the World Society of Victimology, the world's premier organisation discussing and lobbying for victims' rights internationally. Three years later, the Declaration was unanimously adopted by the Seventh UN Congress on Prevention of Crime and Treatment of Offenders, held in Milan in August/September 1985. Later that year, on November 29, the General Assembly of the UN did the same.[9] In the present Chapter, the nature and contents of the Declaration will be further introduced, followed by an assessment of its legal character and ways the implementation and compliance are organised.

2.2. Nature and Content of the Declaration

The nature of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power is adequately reflected in its official reference. Alongside specific victims' rights, it also contains "basic principles of justice". Basic principles are usually formulated in a more abstract way compared to individual or collective rights. On the other hand, it is exactly this rather general nature, which made the provisions in the Declaration universally appealing. As a matter of fact, the adoption of the Declaration has been hailed as a

9 A/RES/40/34.

substantial moral victory. Many regard it as a *Magna Charta* for victims. [10] In our eyes as well, it is without any doubt a major contribution to international law, while it also inspired other international organisations than the UN to follow suit.[11] And while not being a legally binding document, the strength of the Declaration emanates from its inspirational power, its symbolic value being derived from its aspirational content.

Why is it justified to attribute this high praise to the Declaration? We feel this is the case because the Declaration strikes the right balance between idealism and realism. It sets standards worth aiming for, yet it also radiates awareness of the fact that full and instant compliance is unattainable. Having said that, it is useful to take a closer look at the means that have been used in order to achieve the Declaration's complicated and multi-layered objectives.

The key-issue here is language. It is the variety of wording in the relevant propositions that is essential for a proper understanding of the document and of the acceptability of it in the eyes of States. A few examples suffice to underscore this point. The principles are sometimes stated in a clear, uncompromising way. To illustrate: "Victims should be treated with compassion and respect for their dignity" (Par. 4). In other parts of the Declaration, the wording is slightly more cautious. This applies, for instance, to the provision on information. Victims have to be informed of their role, of the scope, timing and progress of proceedings and of the disposition of their cases, but this is put in perspective by the addition "especially where

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10 Zvonimir Paul Separovic, 'The Victim Declaration: A Substantial Moral Victory for Victims of Crime and Abuse of Power', in: Arlène Gaudreault & Irvin Waller (Eds.), *Beyond Boundaries. Research and Action for the Third Millennium*, Montreal: Association québécoise Plaidoyer-Victimes, 2000, p. 277-282.

11 In the same year, the Council of Europe issued its Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure (R(85)11).

serious crimes are involved and where they have requested such information" (Par. 6(a)).

In yet other instances the standards set by the Declaration are easy to accept for all the UN Member States because a qualifier has been inserted. Such is the case, *inter alia*, in connection with informal mechanisms for dispute resolution, including mediation. The Declaration suggests that these practices should be utilised "where appropriate" (Par. 7). A comparable technique has been used in Par. 8: "Offenders or third parties responsible for their behaviour should, *where appropriate*, make fair restitution to victims, their families or dependants (…)."[12] It is left to the discretion of the UN Member States to determine when this is the case.

Another technique to secure universal support is to merely demand that governments "consider" certain steps. An example is Par. 9, reading that governments "should review their practices, regulations and laws *to consider* restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions".[13]

As a final example, illustrating the character of the Declaration and its acceptability for States, we refer to the provisions on compensation. State compensation is by nature an extremely sensitive topic, since it may involve large sums of money, while many States either just do not have the required resources or are unwilling to prioritise funds for this particular purpose. Hence it is obviously difficult to reach consensus on State compensation on a global level. Again, the Declaration does comprise provisions on this issue, facilitated by the carefully chosen flexible wording: "(…) States *should endeavour* to provide financial compensation to (…)" (Par. 12).[14] And: "The establishment, strengthening and expansion of national funds

12 Italics added by the present authors.
13 Ibidem.
14 Ibidem.

for compensation to victims *should be encouraged*" (Par. 13).[15] Even poor and unwilling UN Member States could hardly object to this language.

These examples serve to explain why it has been possible to get the Declaration adopted, quickly and unanimously. However, the Declaration also consists of a series of provisions with a less open and flexible character. There are quite a few parts touching upon concrete, tangible rights and issues. We briefly mention the main components:

- Mechanisms should be established in order to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible (Par. 5).
- Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected (Par. 6(b)).
- Providing proper assistance to victims throughout the legal process (Par. 6(c)).
- Taking measures to minimize inconvenience, protect their privacy and ensure their safety from intimidation and retaliation (Par. 6(d)).
- Avoiding unnecessary delay in procedures (Par. 6(e)).
- Receiving the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means (Par. 14).
- Police, justice, health, social service and other personnel concerned should receive training to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid (Par. 16).

[15] Ibidem.

- In providing services and assistance to victims, special attention should be given to particularly vulnerable victims (Par. 17).[16]

All in all, the Declaration is a remarkable document. It mirrors and clearly articulates the conviction of the world community of States as well as NGOs that victims of crimes and abuse of power cannot be neglected in the framework of criminal justice. One of the striking features of the 1985 Declaration is that it covers such a broad range of issues. They vary from truly abstract principles of justice ("compassion and respect for dignity"), to very specific demands (like trainings for law enforcement officials). Some items concern the criminal justice system in general (for example, promoting alternative dispute resolution), while others involve details of the sanction system (like restitution as an available sentencing option).

2.3. The Legal Character of the Declaration

The UN Declaration has been adopted by a resolution of the UN General Assembly. Doing so, it should be kept in mind, that in United Nations practice a declaration is a special instrument, only suitable "for rare occasions when principles of great and lasting importance are being enunciated".[17] Although not legally binding, using that particular instrument creates "a strong expectation that Members of the international community will abide by it".[18]
In the 1980s, the drafters of the Declaration clearly did not intend to create legally binding obligations, and the subsequent practice of UN Member States so far does not give reasons to believe otherwise.

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16 For a number of reasons, the 1985 Declaration refers to "those who have special needs", but nowadays these categories would be labelled as "particularly vulnerable victims".
17 E/CN.4/832/Rev. 1, Par. 105.
18 Ibidem.

Exercising the rights of the Declaration is dependent upon national legislation – or international customary law; see below – as well as appropriate governmental policies and procedures. Thereby, it is again relevant to mention the fact that the Victims' Rights Declaration has been adopted unanimously. This at least implies that States accepted the content of the norms and were prepared to show commitment to the outside world towards the implementation of the norms in domestic legislation and policy and to comply with them in principle.

The value of political commitments to implement the norms should not be underestimated. Being adopted at the highest political level normally increases the status of the norms. The fact that they lack binding legal consequences therefore does not necessarily mean that States can easily neglect these norms or that they will not comply with them. The other way around, history shows that a formal commitment towards implementation does not automatically imply action in terms of adapting national legislation and creating the necessary infrastructure for bringing victims' rights into effect and, if necessary, enforce compliance. Even the implementation of the 2001 legally binding European Framework Decision on the Standing of Victims in Criminal Proceedings proved to be difficult, considering that most EU-Member States did not establish an integrative legal framework for the transposition of all the rights and duties into national law.[19]

In a pioneering study by Marion Brienen and Ernestine Hoegen, it was analysed to what extent 22 European jurisdictions belonging to the Council of Europe do practice the commitments following from

[19] Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, Brussels March 3, 2004, COM(2004) 54 final.

the 1985 Declaration.[20] It was established beyond doubt that in virtually all these jurisdictions it proved to be possible to make improvements in informing victims on their rights, on the processing and on the outcome of their case. Conversely, it turned out to be much harder to increase the proportion of victims actually receiving the compensation by the offender they are entitled to. Under the heading of "Treatment and Protection" Brienen and Hoegen discussed the difficult question how to assess whether officials have properly acknowledged victimisation and have paid due respect to the dignity of the victim. In evaluating the performance of the authorities in providing information, the standard to be applied usually was a simple dichotomy: a leaflet was either given to the victim or it was not; the victim was either informed of the time of the trial or he/she was not. Recognition and respect for dignity are by nature much more complicated, as is also made clear by Brienen and Hoegen.[21]

The study conducted by Brienen and Hoegen relates to European States. So far, however, there is no similar study at a global scale. For that reason, we can only *tentatively* discuss the question whether and to what extent the Declaration consists of standards that have reached the level of international customary law (especially the demand of a settled state practice). Doing so, we are using the standard criteria as developed by the ICJ: the acts concerned "must be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it" and "the States concerned must therefore feel that

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20 M.E.I. Brienen and E.H. Hoegen, *Victims of Crimes in 22 European Criminal Justice Systems*, Nijmegen: Wolf Legal Publishers, 2000.

21 *Ibidem*, *passim* (all country chapters have a section on "Treatment and Protection").

they are conforming to what amounts to a legal obligation."[22] Further to that, we have in mind the ICJ ruling that "the frequency, or even habitual character of the acts is not in itself enough", while acts should not be "motivated only by considerations of courtesy, convenience or tradition".[23] In addition, "State practice, including that of States whose interests are specially affected", should be "both extensive and virtually uniform (…)",[24] while "minor inconsistencies" are acceptable.[25]

Applying the 'customary law test' to the standards contained in the 1985 Declaration, the picture is mixed. On the one hand, the *opinio juris*-requirement does not appear to lead to major obstacles. As stated above, provisions like the one demanding treatment with compassion and respect for human dignity are in no way controversial; they are generally considered to be natural requirements of justice. The same status befits the claim to allow victims access to procedures that are expeditious, fair and inexpensive. Such rights are evidently not merely based on convenience or tradition, but they are fuelled by a clear sense of legal duty.

With respect to the more specific victims' rights, a more differentiated approach is warranted. We would argue that most of the more detailed rights included in the Declaration have a similar, generally accepted foundation. The right to information, the right to restitution by the offender, the right to have protection of privacy and of physical safety are all, *inter alia*, rooted in the belief that the rule of

22 North Sea Continental Shelf Cases, Judgement of 20 Febr. 1969, par. 77, *ICJ Reports 1969*.

23 Ibidem.

24 *Ibidem*, par. 74.

25 *E.g.*, Fisheries case, Judgement of 18 December 1951, *ICJ Reports 1951*, p. 138.

law cannot be sustained unless these demands are met.[26] Only in exceptional instances it must be doubted whether a specific right is embedded in such a firm way. An example might be Par. 9 of the Declaration, calling on governments to review their criminal justice system to consider restitution as an available sentencing option. It might be difficult to collect convincing evidence that this does in fact reflect the international consensus as to how the sanction system should ideally be constructed.

As to the second part of the 'customary law test' – on the settled State practice – we are facing serious problems. State practice should be both extensive and virtually uniform, including the practice of States whose interests are specially affected, so: virtually all UN Member States. We feel it cannot be credibly argued that this is the case with regard to the vast majority of the provisions of the Declaration. The (limited amount of) empirical data clearly indicates that compliance with the standards of the Declaration is neither extensive, nor virtually uniform. There are vast differences between States in this respect, and it is obvious that a very substantial number of jurisdictions hardly pay any attention at all to the specific provisions of the Declaration. It is either the cultural environment, the lack of infra-structural circumstances or of financial resources that prevent these States from complying with many of the aspirational standards they endorse in the abstract.[27]

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[26] The preceding observations can be substantiated by the fact that the content of the Declaration has been reaffirmed many times by the global community. On the UN-level, we refer to the 'Handbook on Justice for Victims' and the 'Guide for Policymakers", which will both be addressed in the next section of the present contribution; and in 2005 the Declaration was unequivocally endorsed in the so-called Bangkok-Declaration.

[27] In section 2.4 infra, more detailed information will be provided on the conditions that have to be met in order to achieve effective reform in this area.

We have identified three possible exceptions to this general rule. The first one is that informal mechanisms for dispute resolution (mediation, indigenous practices) must be utilized where appropriate (Par. 7). This is probably the case in most States. The second example is the requirement that victims should be informed of the availability of health and social services (Par. 15). It appears that those States having such kind of facilities in place are willing to refer victims to these services. And finally, Par. 6(e), calling for "avoiding unnecessary delay in the disposition of cases" is arguably being actually observed to the largest extent possible. In conclusion, it can be stated that the 1985 Declaration meets the standard of the *opinio juris*, but in many ways fails to meet the ICJ standard of the settled State practice, notwithstanding some exceptions.

2.4. Implementation of and Compliance with the Declaration

Declarations generally do not make any reference to a monitoring mechanism, as is also the case with the Victims' Rights Declaration. There is, however, no question that such a mechanism is needed for a serious application of the standards contained therein.[28] To its credit, the United Nations stand out as an organisation, which is keenly aware of the limitations of 'merely' adopting solemn declarations. Consequently, immediately after 1985, a full program was initiated in order to give worldwide effect to the provisions contained in the Declaration. In 1986, so-called "implementation principles" were developed, followed by a "commentary" on the basic

[28] What follows is a brief account of the implementation efforts after the adoption of the Declaration. More details are provided by Marc Groenhuijsen, 'Victims' Rights in the Criminal Justice System: A Call for More Comprehensive Implementation Theory', in: Jan J.M. van Dijk, Ron G.H. van Kaam and Jo-Anne Wemmers (Eds.), *Caring for Crime Victims: Selected Proceedings of the Ninth International Symposium on Victimology*, New York: Criminal Justice Press, 1999, p. 85-114.

rights and services with an outline of examples of best practices collected from different regions. Nevertheless, in 1993 the "Onati report" was issued, culminating in the following conclusion: "There was general agreement that despite the valuable work of the United Nations and the undeniable progress in many countries, the work on the implementation of the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, as well as related international, regional and national standards and norms, had been insufficient."[29] The next step, following that report, was to circulate an extensive questionnaire, covering all items in the Declaration, to be completed by the UN Member States in 1995. However, reactions were received from only 44 States, the lowest reply-rate in any UN survey on implementation in the field of victims' rights. These results were generally seen to be extremely disappointing and the data could not be considered as reliable.[30]

Two more steps, to be situated at the dividing line between implementation and monitoring, have to be mentioned here. In 1999, the "Guide for Policymakers on the Implementation of the UN Declaration" appeared, joined by the "Handbook on Justice for Victims: On the Use and Application of the Declaration".[31] The "Guide" was a brief booklet, developed to highlight programmes and policies that had been put into effect in various jurisdictions to implement the Declaration and to ensure that the effectiveness and fairness of criminal justice, including related forms of support, are

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29 This report has not been published but is distributed among experts in the field of victims' rights.

30 At its sixteenth session in April 2007, the UN Commission on Crime Prevention and Criminal Justice again discussed ways and means to enhance the implementation of the 1985 Declaration, based on suggestions put forward by an intergovernmental expert meeting being held in November 2006. The report of this expert meeting can be found at http://www.unodc.org/unodc/en/crime_cicp_commission_session_16.html

31 Available through www.victimology.nl under 'key instruments'.

enhanced in such a way that the fundamental rights of victims are respected. The "Handbook" is a much larger document, designed as a tool for implementing victim service programmes and for developing victim-sensitive policies, procedures and protocols for criminal justice agencies and other organisations and professionals that come into contact with victims. The Handbook has been drafted recognising that differences arise when its principles are applied in the content of different legal systems, social support structures and cultural settings. The Handbook is not meant to be prescriptive but to serve as a set of examples for jurisdictions to examine and test best practices.

In the meantime, the UN commonly speaks about 'implementation' of the Declaration, but in fact the level of implementation in different States varies considerably. Research in 22 European jurisdictions mentioned before has revealed a long list of victim-oriented legislative initiatives in the period before 1985 and in the period between 1985 and 1999.[32] Many of the provisions in the relevant statutes literally conform to the standards set by the Declaration. But we do not think that this is enough. Again: compliance is more important than implementation. Substance must prevail over form.

In assessing compliance with the Declaration, we suggest to adopt a consumer perspective. That is to say, the decisive criterion should be whether individual victims actually benefit from the rights and services they are entitled to. Implementation and compliance are not determined by the 'law in the books', but by 'law in action'. Fortunately, in the past decade at least a few empirical research projects as to the latter have been completed.[33] These studies have

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32 Brienen & Hoegen, *op. cit.*, p. 1172-1174.

33 For an overview, see Hans Joachim Schneider, 'Victimological Developments in the World during the Last Three Decades: A Study of Comparative Victimology', in: Gaudreault & Waller, *op. cit.*, p. 19-68; and Marion Brienen, Marc Groenhuijsen & Ernestine Hoegen, 'Evaluation and

resulted in a general set of criteria for predicting the effectiveness of legal reform on behalf of victims. Some main findings are:

- The likelihood of success is increased when a country has established a *powerful* '*steering group*', with all relevant stakeholders represented in its composition and being responsible for drafting a comprehensive strategy.
- The attitude of those responsible for rendering the services or for effectuating legal rights must be favourable to change. This applies to the *leadership of the authorities* operating the criminal justice system as well as to all those who actually have the face-to-face contacts with the victims.

Meta-Evaluation of the Effectiveness of Victim-Oriented Legal Reform in Europe', *Criminologie*, volume 33, no. 1 (2000), p. 121-144. Empirical research by the National Center for Victims of Crime in the US has, for instance, shown that strong legal protection – *i.e.*, legally binding rules, like State constitutional amendments – can make a difference in affording victims their rights to be involved and to feel that the system is responsive to their needs. They were especially more likely to be notified of relevant events in their cases, to be informed of their rights as crime victims and of services available, to exercise (some of) their rights to participate in the criminal justice process, and to give high ratings to the criminal justice system. On the other hand, the same research has proven that strong legal protection is often not sufficient. More than one in four victims from the strong-protection States were very dissatisfied with the criminal justice system. Nearly half of them were not notified of the sentence hearing, and they were as unlikely as those in weak-protection states to be informed of plea negotiations. Furthermore substantial proportions of victims in both the strong- and weak-protection States were not notified of other rights and services, including the right to be informed about protection and to discuss their case with the prosecutor. See D. Beatty, S. Smith Howley, and D.G. Kilpatrick, *Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims*, Washington, D.C., National Victim Center, December 20, 1996. For a summary of the findings: D.G. Kilpatrick, D. Beatty, and S. Smith Howley, *The Rights of crime victims – Does Legal protection make a Difference?*, National Institute of Justice, US Department of Justice, Research Brief, December 1998.

- Solid attitudes are indispensable, but not sufficient. Change can only be attained when the relevant personnel also has *adequate knowledge* of victims' issues. Hence training must be mandatory.
- New legal rights and expanded services bring about a heavier workload for the authorities. Common sense – corroborated by empirical research – dictates that this can only be adequately performed when *additional resources* are appropriated for this purpose.
- Named senior officials in the relevant ministries have to be charged with *express responsibility* for the identification and the promotion of policies for victims of crime.
- Service providing organisations should act as '*problem owner*' and maintain a sense of urgency.[34]

In conclusion: having analysed the 1985 landmark Declaration on Victims' Rights in terms of its contents and legal character, as well as the ways its is implemented and complied with, one can conclude that in twenty years much has been achieved. Further to that, it can be stated that the Declaration has positively influenced the interpretation of existing texts, and has contributed on its own terms to the creation of a series of other legally non-binding as well as binding instruments.[35] However, much more has still to be gained

[34] PHARE report, 2002, p. 57.

[35] See for instance the "Statement of Victims' Rights in the Process of Criminal Justice", issued by the European Forum for Victim Services in 1995, and the European Union "Framework Decision on the Standing of Victims in Criminal Proceedings" of 2001. On progress in the field of the protection of victims' rights in general, see Marc Groenhuijsen, 'International Protocols on Victims' Rights and some Reflections on Significant Recent Developments in Victimology', in: R. Snyman & L. Davis (Eds.), *Victimology in South Africa*, Pretoria: Van Schaik Publishers, 2005, p. 333-351. For a compilation of international victims' rights instruments, see Marc Groenhuijsen & RianneLetschert, *Compilation of International Victims' Rights Instruments*, Tilburg: Wolf Legal Publishers, 2006.

especially in terms of facilities and compliance monitoring. The core question then is whether such progress is most likely to be realised by a victims' rights convention. Entering that discussion, we start by some general reflections upon international lawmaking, relevant in order to answer that particular question.

3. Reflections upon International Lawmaking

3.1. Introduction

In handbooks on international law, one often refers to the divide between hard and soft law instruments. In academic discussions on the character of international legal standards, however, it is often made clear that this divide is at least problematic and not very helpful anymore. Without entering that debate in full, in this Chapter some references are made to specific contributions to that debate, being relevant in the present context. Further to that, this Chapter deals with some risks and problems of lawmaking in the UN context, followed by a discussion of a few specific cases of international lawmaking, namely the case of indigenous peoples and migrant workers, the case of the Draft articles on state responsibility and the attempt to come to a UN Forest Convention, which offers some "lessons learned" to the victimology field.

3.2. The Irrelevance of the Classical Divide between Hard and Soft Law

In the discussion on hard law versus – or alongside – soft law we see two levels or points of departure. The first relates to the notion that dividing standards in two categories is a tremendous reduction of the variety and complexity of international legal instruments. According to Dinah Shelton, for instance, international legal instruments can be typified by both their form (binding or non-binding) and content (normative or promotional inspiration), and taking form and content together would lead to four possible labels: 1) Law (binding legal instrument with a sanction in case of non-compliance); 2) commitment (a political or moral obligation); 3) hortatory (law with very weak obligations aiming for a change in mentality/

internalisation); and 4) freedom of action (no commitment at all).[36] Shelton has further categorised non-binding norms in "primary soft law" and "secondary soft law". She considers primary soft law to be "those normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization". A primary soft law instrument "may declare new norms, often as an intended precursor to adoption of a later treaty, or it may reaffirm or further elaborate norms previously set forth in binding or non-binding texts". According to her, secondary soft law includes "the recommendations and general comments of international human rights supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other *ad hoc* bodies, and the resolutions of political organs of international organizations applying primary norms".[37]

In addition to Shelton, among several other authors, Alan Boyle has argued that the content of treaties can be both hard and soft.[38] Sometimes commitments in treaties are rather soft, for instance because they consist largely of symbolic norms and principles. And compared to soft law, treaties are generally seen to be more readily enforceable through binding dispute resolution, but in some conventions disputes can only be referred to non-binding conciliation mechanisms.[39] It all supports the conclusion that at the end "it is axiomatic that neither the form nor the nomenclature of an

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36 See: http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=47.

37 Shelton, *op. cit.*, p. 449-451.

38 A. Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', *International Comparative Law Quarterly*, 1999, p. 901-913.

39 An example is the 1987 Montreal Protocol to the Convention on the Ozone Layer.

instrument is determinative of its legal status".[40] Other factors play a determining role, such as the intention of the parties and their subsequent behaviour and the subject matter and content of the instrument.[41]

The second level/point of departure relates to the practical usefulness of the divide between hard and soft law. Kenneth Abbott and Duncan Snidal, for instance, have argued, in line with, amongst others, Dinah Shelton, that in the realm of international law, the division has become so blurred as to become functionally irrelevant. They also claim that soft law has been widely criticised and even dismissed as a relevant factor in international affairs, while according to them one could even argue that in the absence of an independent judiciary with supporting enforcement powers most international law is in fact rather soft, at least compared to most domestic law systems.[42] Having said this, they have put forward a model of thinking about international lawmaking that exceeds the traditional binary approach. According to them it makes more sense to describe the status of international regulatory documents in terms of a function of Obligation (O) + Precision (P) + Delegation (D). In their theory, O refers to how binding the requirements of a regime are,[43] P refers to the level of detail that is prescribed regarding how parties should go about meeting their obligations, and D refers to the extent to which each State must allow international authorities to

40 C. Chinkin, 'Normative Development in the International Legal System', in Shelton, *op. cit.*, p. 21-42, p. 37.

41 Ibidem.

42 K.W. Abbott and D. Snidal, 'Hard and Soft Law in International Governance', *International Organization,* 2000, p. 421-456, p. 422.

43 Abbott and Snidal seem to interpret O as a synonym for the 'digital' aspect of legal-bindingness in terms of form instead of function. This is somewhat peculiar taking into account that they consider the divide between hard and soft law as too rigid. One would, therefore, expect a broader interpretation of the concept of obligation, including the intention to be committed, the level of aspiration of the rules and the scope of the rules.

play a role in the domestic implementation of the regime, and to the assurance of compliance. Abbott and Snidal use capital letters to indicate a high level of a given property, lower case letters for moderate levels, and dashes for (extremely) low levels. In other words: if a text is strong on all three indicators it is considered to be O, P, D. If, however, there is hardly any obligation, precision and delegation, they refer to it as (-, -, -). In that case according to them one cannot speak of law whatsoever.[44]

Alongside with and following Shelton, Boyle, Abbott and Snidal, scholars such as Robert Keohane, Andrew Moravcsik and Anne-Marie Slaughter have argued that each of the three dimensions of legalization (O, P, D) is a matter of degree and gradation and not of a rigid dichotomy. As a consequence the process of legalization encompasses rather a continuum, ranging from "hard legalization" in which case all three properties are maximized, to "softer" forms of legalization involving lower levels of obligation, precision and delegation and even non-legalization of certain issues.[45]

In line with the growing awareness of the fading relevance of the classical divide between hard and soft law, the concept of lawmaking itself is now also changing.[46] On the one hand, it is increasingly accepted and acknowledged that compliance with rules occurs for many reasons other than their legal status. Concerns about reciprocity of expectations, reputation mechanisms (naming and shaming) and other potential economic and political benefits or damages to valuable governmental institutions very often play a key role when it comes to the effectiveness of rules. On the other hand,

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44 Abbott and Snidal, *op. cit.*, p. 424.

45 K.W. Abbott, R.O. Keohane, A. Moravcsik, A.M. Slaughter and D. Snidal, The concept of legalization, *International Organization*, 2000, 54 (3) Summer, pp. 401-419 (available through: http://www.princeton.edu/~amoravcs/library/concept.pdf).

46 R. Keohane, Power and Governance in a Partially Globalized World, Routledge, New York 2002.

international lawmaking will also remain a process of political bargaining, framed by rules of sovereignty and other background legal norms concerning the political authority of State institutions. As a result of these two processes, the attention of international lawmakers might be gradually shifting towards subtle blends of law and politics, hard and soft law, as well as to regulatory regimes invoking varying degrees of obligation, precision and delegation.[47]

Finally, some scholars, like Sol Picciotto, have argued that the growth and changing character of all kinds of soft law mechanisms and the blurring of the public-private law divide indicates that conventional rulemaking in international law no longer fits the classical model of negotiated agreements on behalf of States.[48] International law increasingly allows regulatory regimes to be developed and applied by private parties instead of through diplomatic channels and foreign offices and represents a growing range of different types of obligations, institutions and compliance and enforcement mechanisms.[49] We will come back to that in Chapter 4.

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47 Especially Robert Keohane has continuously stressed the importance of shifts in governance and fundamental institutional changes in order to fight global issues. In his presidential address for the American Political Science Association in 2000, for instance, he held a passionate plea that political institutions in liberal democracies should foster persuasion instead of relying on coercion and interest-based bargaining. It looks inevitable that this should also result in a search for more flexible (legal) policy instruments. See R.O. Keohane, Governance in a Partially Globalized World*, American Political Science Review* 2001, Vol. 95, no. 1, p. 1-13.

48 S. Picciotto, *Regulatory Networks and Global Governance*, Presentation for the W. G. Hart Legal Workshop 2006, 'The Retreat of the State: Challenges to Law and Lawyers', Institute of Advanced Legal Studies, University of London 2006. See http://eprints.lancs.ac.uk/232/01/Reg_Networks_&_Glob_Gov.pdf.

49 W. Reinicke and J.M. Witte, 'Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords', in: Shelton, *op. cit.*, p. 75-100.

3.3. Risks and Problems of Lawmaking in the UN Context

Although in international law the existence of non-written law still is – and always will be – very important and while general principles of international law are playing a major role in legal decision-making, there is still a tendency to codify international law as much as possible. Especially since the coming into existence of the United Nations, States have done so in numerous fields, making use of a variety of forms. In the human rights field for instance, the United Nations Member States have adopted about 100 'instruments', about 50 % of which are conventions, while the rest is labelled as declarations, proclamations, codes of conduct, guidelines, basic principles, and the like.[50].

States have many reasons to work towards non-conventions. In words taken from Hartmut Hillgenberg, partly modified and paraphrased by us:

- Sometimes there is a need for mutual confidence building before a hard law approach can succeed.
- This need may result from the necessity to stimulate a policy development that is still in progress.
- The creation of a preliminary, flexible regime might possibly provide for a development in stages.
- A non-treaty agreement can be used as an impetus for coordinated national legislation.
- Officially non-binding (detailed) agreements may be easier to accept by States, because the consequences of not complying are sometimes less evident.
- International relations might be overburdened by hard law, with the risk of failure and deterioration in relations.

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50 See, *inter alia*, http://www.ohchr.org/english/law/index.htm.

- Soft law documents can show immediate evidence of international support and consensus about an agreement, whereas the effects of treaties depend more on reservations and the need to wait for ratification.
- Avoidance of cumbersome domestic approval procedures in case of amendments.[51]

The United Nations are not a group of States with a – at least in many ways – common orientation and common characteristics on issues like minority rights, human rights, the role of free markets etc., but are instead a collection of in principle all sovereign States of the world, almost without imposing membership criteria, in theory as well as in practice. Having that in mind, and fully accepting that States can indeed have different views of all kinds of issues given their economic position, their political and cultural history, their wish to be powerful, and so on, one can simply understand why negotiations at UN level in controversial cases often do not lead to more than declaratory 'typical UN-texts', full of compromises and legal weaknesses, in order to get at least somewhere. It is a reality that should be understood, before embarking upon a Victims' Rights Convention. The possible risks and problems of a codification of victims' rights into a convention will be illustrated by a few examples, taken from general international law and international human rights law, and – as far as the process of international lawmaking is concerned – from international environmental law. The examples are selected in order to show what kind of problems and side effects the

[51] See H. Hillgenberg, 'A Fresh Look at Soft Law', 10 *E.J.I.L.*, p. 499, p. 501, No. 11, 1999, who quotes Klabbers, Aust and Schachter. See also V. Nanda, 'The Role of International Organizations in Non-Contractual Lawmaking', in: R. Wolfrum and V. Roben (eds), *Developments of International Law in Treaty Making*, Springer, 2005, p. 157-182.

transformation of a soft law document, such as the UN Declaration on victims' right, into a convention might bring about.

3.4. Strong Conventions, but Lack of Ratifications: The Cases of Indigenous Peoples and Migrant Workers

In 1989, the International Labour Organisation adopted ILO Convention 169, concerning Indigenous and Tribal Peoples in Independent Countries. Adopting it, the ILO moved away from its assimilationist predecessor, ILO Convention 107 of 1957, thereby, one might say, understanding the signs of the 1970s and the 1980s of the need to give indigenous groups the right to preserve (parts of) their identity, while also participating in societies at large. The Convention was seen by many States as innovative, and was strongly supported by representatives of indigenous peoples and relevant NGO's, but those who expected a lot of ratifications, have become highly disappointed: so far the Convention has been ratified by only 17 States, the last one already in 2002. The main reasons of non-ratification are simply that the Convention is believed to be too strong on issues such as the right to self-determination and the use of natural resources.[52]

It is interesting to note that, more or less parallel to the discussion on ILO Convention 169, a lengthy discussion started on a draft Declaration of the Rights of Indigenous Peoples. This draft, the content of which resembles in many ways ILO Convention 169, was adopted in 1994 by a forum of (mainly) independent experts (the present Sub-Commission on the Promotion and Protection of Human Rights), followed by a debate amongst UN Member States, in June

[52] Willem van Genugten and Camilo Perez-Bustillo, 'The Emerging International Architecture of Indigenous Rights: the Interaction between Global, Regional, and National Dimensions', *The International Journal on Minority and Group Rights* 11, 2004, p. 379-409, *passim*.

2006 finally leading to the adoption of the draft Declaration by the newly established UN Human Rights Council (which itself is composed of (47) UN Member States). The Council did do so with 30 votes in favour, 12 abstentions and 2 votes against.[53] It was generally expected that by the end of 2006 the Declaration was going to be adopted by the UN General Assembly, but its Third Committee failed to do so.[54] Despite this non-adoption, it can be stated that the draft Declaration on Indigenous Rights has already played a pioneering and inspiring role in several national debates on strengthening the rights of indigenous people(s)[55] – the national level being *the* level *par excellence* where things should happen first and for all, without being hampered by the formal argument of a lack of ratifications.

A second example of a strong convention, which successively has not been ratified by many States, is the Convention on the Protection of the Rights of all Migrant Workers and Members of their Family. It is mentioned here because Sam Garkawe, in his contribution to *The Victimologist*, cited before, mentions it as an example from which the victimology field could learn some lessons. Garkawe is right that the Migrants Workers Convention came into force recently (2003), but he does not mention that it has been adopted already in 1990 and that the number of ratifications as of July 2005 – the moment he wrote his article – was only 30. For that reason one could doubt whether the Migrant Workers Convention is the right one to serve as an example.

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53 UN Doc. A/HRC/1/L.3 of 23 June 2006; resolution adopted at 29 June 2006.

54 See the article by A. Eide, published in this volume of the *Netherlands Yearbook of International Law*, more specifically par. .....

55 See Van Genugten and Perez-Bustillo, *op. cit.*, for several examples.

3.5. Endangering Declaratory Texts with a Customary Law Character: The Case of the Draft Articles on State Responsibility

Embarking upon a conventional route for the protection of victims' rights might also endanger achievements realised so far. An example of a non-treaty text, illustrating that problem are the "Articles of State Responsibility for Internationally Wrongful Acts", drafted by the International Law Commission and successively "taken note of" by the UN General Assembly (GA).[56] So far, the Articles on State Responsibility are an annex to a GA resolution only, and one of the questions is whether or not they should be transferred into a convention. In its 2001 resolution the GA stated that "it should consider at a later stage (…) the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic (…)".[57] The reality, however, is that many States are not in favour of a convention at all. One State warned for instance "against being too hasty and risking unraveling the gains of nearly fifty years work by upsetting the delicate balance of the text".[58] The Netherlands is against drafting a convention because of the risk of "jeopardizing much of the *acquis* in the text of the articles, the risk of a lack of ratifications and the intricacies surrounding the inclusion into the articles of a dispute settlement mechanism". In addition, according to The Netherlands, "the greater part of the articles reflects customary international law. The incorporation of this part in a convention would add little to the development of international

56 GA Res. 56/83 of 12 December 2001, adopted without a vote.
57 Ibidem.
58 UN Doc. A/56/589.

law".[59] Finally, it is worth recalling the opinion of de Finnish representative M. Koskenniemi, speaking on behalf of Denmark, Iceland, Norway, Sweden and his own country: "If they [the draft Articles on State Responsibility] were to take the form of a convention, they would be subject to the whims of politics and eroded by the compromises inherent in a diplomatic conference. But as a restatement of customary law, the articles and related commentaries would remain the authoritative text until superseded by future international developments, as customs changed to reflect new principles and priorities."[60] The quote reflects arguments that would have to be taken into consideration in the discussion on a victims' rights convention as well, without inevitably leading to the same outcome.

3.6. Dealing with Frustrations in International Lawmaking: The Case of the Forest Convention

At the UN Conference on Environment and Development (UNCED, Rio de Janeiro 1992), the protection of forests featured highly on the agenda. Nevertheless, governments were not able to agree upon a legally binding instrument. This was the case despite the fact that agreements were reached on closely related issues, like the Convention on Biodiversity and the Convention to Combat Desertification. The forests related outcome of the 1992 Summit was a set of non-legally binding "Forest Principles" and chapter 11 of Agenda 21,[61] Combating deforestation.[62] Afterwards, especially the

[59] Speech by the Dutch representative Johan Lammers of 31 October 2001, on file with the authors of this article. See UN Doc. A/C.6/SR.12, par. 27 for a summary.

[60] UN Doc. A/C.6/56/SR.11, par. 34.

[61] Agenda 21 is the working programme resulting from the Rio Conference. See http://www.un.org/esa/sustdev/documents/agenda21/index.htm.

Forest Principles have met with much criticism, amongst other things because they start off with affirming the sovereign right of States to "convert" forests to other uses in accordance with their socio-economic development needs.[63] Until today, actors engaged in the international forest policy dialogue are strongly divided into pro and anti-convention camps.[64]

Arguments pro convention are, for instance, that global forestry policies need the moral authority derived from an international legally binding instrument and a participatory, empowered central body or forum capable of providing policy adaptability and monitoring coordination. A convention is also believed to be able to provide a legal basis for addressing forest-related issues in a holistic manner in contrast with the current fragmented approach resulting from existing international policy instruments. Moreover, a convention is thought to be able to create a solid legal basis for financial assistance and technology transfer, monitoring, reporting and developing uniform compliance mechanisms.[65]

Forces that work against a convention are, for example, the fear that wealthy Northern States are going to dictate how forests within Southern States should be managed,[66] the inability to work out a fair

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62 The Charter is officially known as: "The non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests." GA doc. A/CONF.151/26 (Vol. III).

63 See the principles 1(a) and 2(a) of the Charter. See for instance: Friends of the Earth and the World Rainforest Movement, *The International Tropical Timber Agreement; Conserving the Forests or Chainsaw Charter?*, Friends of the Earth Report 1992.

64 T. Griffiths, *Consolidating the Gains: Indigenous Peoples' Rights and Forest Policy Making at the United Nations*, Forest Peoples Programme Briefing Paper 2001, p. 21. See for the full report www.forestpeoples.org.

65 For a list of other pro's and cons see the Report of the Ad Hoc Expert Group, New York, September 2004, UN Economic and Social Council, E/CN.18/2005/2.

66 G. Porter and J. Welsh Brown, *Global Environmental Politics*, Boulder: Westview Press, 1996, p. 115-129.

balance between nature conservation, socio-economic development, and the protection of free trade, and the fact that, according to NGOs, the international community already has a clear understanding of the problems to be addressed. In their eyes, negotiations about a convention would only delay the decisive action needed to halt the current alarming rate of deforestation.

A number of experts tried to find middle ground. They expressed their preference for a framework convention. Such an instrument could, according to them, provide for a flexible agreement of regional protocols appropriate to particular regions and differentiate between specific technical matters. However this attempt came too late. Governments have agreed to work towards a non-legally binding instrument on forests.[67]

Overall, the lengthy process of attempts to legalise forest management has left many policy actors, particularly NGOs, extremely frustrated. Disillusioned by the inter-governmental inability to put deforestation into action, NGOs have in the meanwhile turned to promoting self-regulation and certification programmes in forest management as an alternative means to pursue their goals.[68]

Linking the debate on a Forest convention to the possibility of creating a victims' rights convention, it is clear that a lot can be learned from the decision-making process. The battle over the pros and cons of a Forest Convention shows that much time and energy

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67 UNFF, Report of the sixth session, 27 May 2005 and 13-24 February 2006, UN Economic and Social Council E/CN.18/2006/18.

68 S. Bernstein and B. Cashore, 'Non-state Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?', in: J.J. Kirton en M.J. Trebilock (Eds.), *Hard Choices, Soft Law: Voluntary standards in global trade, environment and social governance*, Aldershot: Ashgate, 2004, p. 34-63. E. Rehbinder, 'Forest Certification and Environmental Law', in: E. Meidinger, C. Elliott, G. Oesten (Eds.), *Social and Political Dimensions of Forest Certification*, Remagen-Oberwinter: Forstbuch, 2003.

has been lost in the process of negotiating over the status and content of a strong legal document while the underlying problems kept growing. At the end, similar processes might take place in the field of victims' rights and that might cause serious frustrations on the side of, *inter alia*, victims' rights organisations. In the case of deforestation these frustrations were canalised into something good, namely the initiative of NGOs to establish a private certification system for sustainable forest management. There is no guarantee, however, that something alike could happen or would be fruitful in the context of victims' rights. In retrospect, environmental NGOs would probably advice victims' rights organisations: "Don't do as we have done, do as we have learned." Try to keep an open mind for alternative solutions[69] and do not focus solely on the means of protection, while forgetting that the ends are more important.

[69] Note for instance the efforts of the International Bureau for Children's Rights in drafting guidelines on justice in matters involving child victims and witnesses – a joint effort of experts and (other) NGOs) –, resulting in the adoption by ECOSOC of the UN 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Res.2005/20. More recently, a joint project between lawyers, victim support groups, insurance companies and scholars on the negotiation of damages of injuries resulted in the adoption of guidelines. For more information, see http://www.uvt.nl/faculteiten/frw/onderzoek/schoordijk/cva/normering/.

4. Framework Conventions and Forms of Co-Regulation

4.1. Introduction

In Chapter 3 it was noted that in the context of the discussion on a Forest Convention, the possibility of a framework convention was tabled. It is surprising to us that in that context the proposal for a framework convention was not taken more seriously by States. It would have been clearly an attempt to find a way out for those who are in favour of a convention with strict rules and strong monitoring and enforcement mechanisms and those who favour more open-ended rules and flexible implementation and compliance systems.
In the present Chapter we will further discuss the instrument of a framework convention, starting from the assumption that it is possibly relevant in the field of the victims' rights protection as well. The instrument is linked here to the legislative technique of co-regulation, bringing together States and other "stakeholders" of the victims' rights project.

4.2. The Idea and Actual Use of Framework Conventions

The term "framework convention" refers to the objective of fixing norms defining an action program for States, without immediately creating subjective rights for individuals, and leaving States a wide margin of discretion concerning the necessary means to implement the convention, thereby enabling them to take particular circumstances into account.
This regulatory instrument has been used for example by the Council of Europe, when addressing the issue of the protection of national

minorities, leading to the Framework Convention for the Protection of National Minorities (FCNM).[70] The provisions in the FCNM are programme-type provisions, leaving the States concerned indeed a wide margin of discretion in the implementation of and compliance with the objectives. In the beginning, the FCNM has attracted more criticism than appraisal.[71] The main criticism focused, especially, on the programme-type character of the convention and its alleged feeble monitoring mechanism. Some thought that the fact that the convention was set up as a legally binding document was not of great importance, for instance, because of the weakness of the language used ("shall endeavour", "where appropriate", "as far as possible").[72] It has also been argued, however, that requirements such as "shall endeavour" and "as far as possible" are duties of conduct which require action on the part of the State: "They are expressed in imperative language which aim not at minima but, rather, are open-ended and maximum-oriented".[73]

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70 The Convention can be found at: http://conventions.coe.int/treaty/en/Treaties/Html/157.htm. When discussing the Convention, G. Pentassuglia also makes a comparison with international environmental law: "A general insight into the concept of 'framework convention' may be gained from international environmental law where the concept basically refers to a normative regime containing general principles and policy goals, whose concrete and precise modalities of realization need to be determined at a later stage, by further international agreements." G. Pentassuglia, 'Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities – with Special Reference to the Role of the Advisory Committee', *International Journal on Minority and Group Rights*, Vol. 6, 1999, p. 417-461, p. 418 and note 2).

71 Among others: G. Gilbert, 'Minority Rights under the Council of Europe', in: S. Wheatley & P. Cumper, (Eds.), *Minority Rights in the 'New' Europe*, Martinus Nijhoff Publishers, 1999, p. 63.

72 S. Troebst, The Council of Europe's Framework Convention for the Protection of National Minorities Revisited, Working Paper European Centre for Minority Issues, December 1998, p. 5-6, 8.

73 Address by John Packer at the Conference on the 5th Anniversary of the Framework Convention. For the Conference proceedings, see *Filling the Frame, Five Years of Monitoring the Framework Convention for the*

Another illustrative example of a framework convention is the World Health Organisation Framework Convention on Tobacco Control (FCTC).[74] Article 5(1) of the FCTC states that each State Party shall develop, implement, periodically update and review comprehensive multi-sectoral national tobacco control strategies, plans and programmes in accordance with the convention and the protocols to which it is a party. However, Article 5(2) declares, among other things, that each State Party shall "in accordance with its capabilities" adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other parties in developing policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke. And Article 5(6), for instance, determines, that the parties shall, "within means and resources at their disposal", cooperate to raise financial resources for effective implementation of the convention.

It can be added that within such open texture of framework conventions, one can also easily insert combinations of soft law and hard law elements. This is the case, for instance, within the framework of the ILO, where conventions are sometimes referring to the need to live up to codes of practice. These codes and standards are then seen as valuable tools for national authorities in deciding how to implement the provisions of the relevant ILO convention. Furthermore, according to the ILO, referring to standards of best practice or state of the art in for example technology gives a convention far greater flexibility in adapting the policy measures it requires from national authorities to future changing circumstances.

Protection of National Minorities, Council of Europe Publishing, 2004, p. 46.

74 Adopted by the 56th World Health Assembly on May 21, 2003. The full text of the convention is available at: http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf.

Non-binding codes and standards are usually easier to alter than the text of a convention itself. The ILO nowadays admits that, whereas traditionally codes of practice were meant to serve as model regulations for the implementation of policy at the national level, their use and function seem to be evolving.[75]

4.3. The Idea and Actual Use of the Technique of Co-Regulation

Similar trends in international lawmaking combining hard and soft law mechanisms can be found on the European level, in the Action plan "Simplifying and improving the regulatory environment".[76] In this document, the European Commission held a warm-hearted plea for "co-regulation" as a way to implement European laws, especially so-called directives.[77] In the Interinstitutional Agreement "Better

75 International Labour Conference 2003, 'Report VI, ILO standards-related activities in the area of occupational safety and health: An in-depth study for discussion with a view to the elaboration of a plan of action for such activities'.
See http://www.oit.org/public/english/standards/relm/ilc/ilc91/pdf/rep-vi.pdf.

76 COM(2002) 278 final.

77 A directive is a legislative act of the European Union, which requires Member States to achieve a particular result without dictating the means, which have to be used to achieve the result. It can be distinguished from regulations which are self-executing and do not require any implementing measures. Directives normally leave Member States some leeway as to the exact rules that need to be adopted. See Article 249 of the Treaty establishing the European Union. A consolidated version of the treaty can be found at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/ C_2002325EN. 003301.html. Apart from directives and regulations the European Union also knows so-called "framework decisions". With the entry into force of the Treaty of Amsterdam, these new instruments under Title VI of the EU Treaty (Police and judicial cooperation in criminal matters) have replaced joint action. Being more authoritative, they should serve to make action under the reorganised third pillar more effective. Framework decisions are used to approximate (align) the laws and regulations of the Member States. Proposals are made on the initiative of the Commission or a Member State and they have to be adopted unanimously. They are binding on the Member States as to the result to

Lawmaking",[78] drafted by the European Council, the European Commission and the European Parliament, co-regulation is being defined as: "(...) the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements" (point 22).

Co-regulation enables actors to ensure that the legal principles and policy objectives defined by the legislature can be achieved in the context of measures carried out by the concerned parties recognised within the field of regulation.

The Action plan provides a framework for the use of co-regulation:

- Co-regulation can be used on the basis of a legislative act.
- The co-regulation mechanism must be in the interest of the general public.
- The legislature establishes the essential aspects of the regulation.
- The legislature determines to what extent defining and implementing the measures can be left to the parties concerned.
- In cases where using the co-regulation mechanism has not produced the expected rules, the right is reserved to draft a new unilateral legislative proposal.
- The principle of transparency of legislation applies to the co-regulation mechanism. Sectoral agreements and modalities for implementation must be made public.

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be achieved but leave the choice of form and methods. Contrary to directives, framework decisions can get no direct effect in case the implementation period had expired. An example relevant in the context op the present article, is the framework decision of 15 March 2001 on the standing of victims in criminal proceedings.

78 European Parliament, Council, Commission, 'Interinstitutional Agreement on better law-making', *Official Journal of the European Union*, 2003, C 321/01.

- The parties concerned must be considered to be representative, organised and responsible.

One of the characteristic features of co-regulation is that it makes use of some core insights as to how to reach the highest attainable effectiveness of legislation. As Philip Eijlander has argued, it aims at combining the advantages of the predictability and binding nature of legislation on the one hand and the more flexible regulatory approach of negotiated public-private rulemaking on the other.[79]
Further to that, there are also developments that link the concept of a framework convention to the legislative technique of co-regulation. A consortium of academics united in the Internet Governance Project[80] launched interesting thoughts in this respect. In 2004 this group raised the idea of developing a framework convention for Internet governance. The participants in the Internet Governance Project claimed that the approach of a framework convention could help to reconcile conflicting (domestic) legal regimes, at spots where further agreements are needed to resolve fundamental differences, for instance on the relationship between protecting intellectual property and safeguarding freedom of expression. In addition it was argued that a framework convention could legitimise the role of civil society and private sector organisations in a way unprecedented. Because these organisations have been critical to the development and maintenance of the Internet, they should be allowed to play a role in the formal governance process.[81]

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79 Ph. Eijlander, 'Possibilities and constraints in the use of self-regulation and co-regulation in legislative policy: experiences in the Netherlands – lessons to be learned for the EU?', *Electronic Journal of Comparative Law* 2005/1, p. 6. Also see *White Paper on European Governance*, Work Area no. 2, Handling the Process of Producing and Implementing Community Rules, Group 2c, May 2001.

80 See http://www.internetgovernance.org/about.html.

81 See http://www.internetgovernance.org/pdf/igp-fc.pdf.

The thought to give private organisations a more significant role in the rulemaking process points towards a more responsive, communicative and discursive approach of lawmaking. In short, this approach boils down to a conscious choice for codifying general norms, fundamental principles and aspirational rules that require interpretation and elaboration by the "interpretive community". As Willem Witteveen has pointed out, communicative laws are not merely symbolic, they also aim to influence what people and organisations really do.[82] The "communicative legislator" chooses a less hierarchical and more interactive approach instead of opting for 'full control' in an instrumental way. Important ideas behind theories about communicative legislation are that, in some cases, consensus-building and including non-governmental actors in the rulemaking process will be more successful than a more traditional top down approach of lawmaking that is going to result in both compromise rules and reluctance in monitoring and enforcement efforts.

Translated into the concept of a framework convention and into co-regulation in the field of victims' rights, using a communicative approach would suggest that when opting for a less intrusive legal instrument, States would be more willing to accept the contents of the convention. Of course, more emphasis will than have to be put on reviewing the results of the implementation and compliance process to find out if the objectives of the convention are really being met in practice. But then again, in a communicative approach also the implementation and compliance process can be made more accessible for non-governmental actors, which might generate extra legitimacy and commitment. The lawmaking policy of the European Union suggests that this could be a fruitful way to move forward on

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82 W. Witteveen, 'Turning to communication in the study of legislation', in: N. Zeegers, W. Witteveen and B. van Klink (Eds.), *Social and Symbolic Effects of Legislation under the Rule of Law*, Lewinston/Queenston/ Lampeter: Edwin Mellen Press, 2005, p. 17-44.

governance issues that cannot do without support from civil society.[83]

[83] See the Communication by the European Commission, European Governance: Better Lawmaking, COM(2002)275 final and L.A.J. Senden, *Soft Law in European Community Law*, Oxford, Hart Publishing 2004.

5. Monitoring Implementation and Compliance

5.1. Introduction

Over the course of decades, the ways to improve implementation of and compliance with international law have evoked many heated debates and have led to extensive academic literature. Various implementation and compliance theories have been developed to analyse what factors potentially affect implementation and compliance.[84] In short, on a macro level, some theories contend that a State's implementation and compliance performance is linked to the extent that a State engages in international institutions that can create norms affecting State behaviour.[85] This is referred to as the *managerial approach*, which relies on a problem-solving approach instead of a coercive one.[86] Others adhere to the so-called *realistic approach*, claiming that the extent to which a State complies with international norms depends on factors such as a State's political,

84 For an overview of various theories, see P.M. Haas, 'Why Comply, or Some Hypotheses in Search of an Analyst', in: E. Brown Weiss, *International Compliance with Nonbinding Accords*, Studies in Transnational Legal Policy, No. 29, American Society of International Law, 1997, p. 21-49. Note his remark on p. 22 where he rightly notes that implementation is first of all a matter of State choice. See also V. Collingwood, 'Conditionality in International Politics: Exploring the Relationship between Law and Power', unpublished paper presented to a colloquium of the Center for Transboundary Legal Development, Tilburg University, 9 June 2004, for an analysis of different theories. The paper is on file with the authors of this article.

85 See A. Chayes & A. Chayes, *The New Sovereignty: Compliance with International Regulatory Arrangements*, Cambridge, Harvard University Press, 1995, p. 88-134. See also R. Keohane, 'International Relations and International Law: Two Optics', *Harvard International Law Journal*, Vol. 38, No. 2, 1997, p. 487-502, p. 490. For an overview of different theories, also see S.R. Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?', N*ew York University Journal of International Law and Politics,* Vol. 32, No. 3, 2000, p. 591-698, p. 647ff.

86 Chayes & Chayes, *op. cit.*, p. 3.

economic, and military power.[87] Again other theorists add another component and question whether "(…) a state's propensity to comply depends upon *the messenger* – individual or institution – that is asking them to comply".[88]

It would go beyond the scope of this paper to fully discuss the monitoring of States' implementation of and compliance with international law at large. It would demonstrate that the international legal arena consists of a huge variety of such mechanisms, with different characteristics, depending on the specific working domain (peace and security, international economic law, etc), while it also would become obvious that there are many ways of looking at these mechanisms. Considering that the monitoring mechanism in the proposed Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power resembles to a large extent international human rights treaties, our discussion of the monitoring of implementation and compliance focuses upon this field.[89] In addition, it will be discussed what lessons can be drawn from the monitoring procedure attached to one of the framework conventions presented in this paper: the Framework Convention for the Protection of National Minorities, primarily because of the assessed effectiveness of the monitoring mechanism.

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87 In Ratner, *op. cit.*, p. 648.

88 Ratner, *op. cit.*, p. 658. Some have named the messenger "norm entrepreneurs", *i.e.*, agents actively promoting the norms. See A. Wiener & G. Schwellnus, 'Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights', Constitutionalism Web-Papers, *CONWEB*, No. 2/2004, available at <http://les.1.man.ac.uk./conweb> .

89 The discussion whether victims' rights belong to the realm of human rights falls outside the scope of this article. Some authors have listed criteria that can be used to measure whether a certain right belongs to the family of human rights. See B. Ramcharan, 'The Concept of Human Rights in Contemporary International Law', *Canadian Human Rights Yearbook* 267, 1983, p. 280 and Philip Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control', *American Journal of International Law*, 78, 607, 1984, p. 614-615.

5.2. Learning from Human Rights Monitoring Procedures

Having a look at the UN conventions in the field of human rights, the overall picture is that each convention has a committee of independent experts, tasked with the competence to see whether or not States are living up to their human rights obligations. An important part of the work of these committees consists of fact-finding, *i.e.*, trying to get all relevant information on a State's implementation and compliance behaviour. The three core monitoring instruments available to the committees are periodic reports, States complaints and individual complaints. Hereafter, a few remarks are made on the reporting and individual complaint procedures, from the perspective of their possible relevance for the victims' rights field and in terms of lessons to be learned or mistakes not to be repeated.

All UN human rights conventions oblige States Parties to submit periodical reports regarding their own implementation of and compliance with treaty provisions. Most treaty-based independent expert committees, such as the Human Rights Committee (HRC), have adopted detailed reporting guidelines with instruction to the reporting by States.[90] The HRC has furthermore adopted a General Comment on reporting obligations of States Parties, which states that the practices of non-reporting States may be reviewed by the Committee as well, thereby filling a gap which was left by the original rule-maker.[91] Many States have fallen far behind with regard to their regularly compulsory reports, while the follow-up to the findings of

[90] For a thorough overview of the reporting procedure under the International Covenant on Civil and Political Rights, see I. Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights, Practice and Procedures of the Human Rights Committee*, Antwerpen/ Groningen/Oxford: Intersentia/Hart, 1999.

[91] General Comment No. 30, 'Reporting Obligations of States parties under article 40 of the Covenant', 18/09/2002, para. 4 (b).

the committees often leaves a great deal to be desired, both in terms of content and in terms of their control.[92]

As to individual complaints it has been decided by the HRC in its "case-law" that there is no objection to a group of individuals, who claim to be similarly affected, to submit a communication.[93] In relation to that, it is also relevant to mention the collective complaints procedure, in 1995 attached to the European Social Charter.[94] Article 1 of the relevant Protocol sets forth that "other international non-governmental organizations [than the traditional employers' organizations or trade unions] which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee" may lodge complaints pertaining to observance of the Charter. This can be seen as an *actio popularis* and goes further than and is to be seen as different from the right to submit individual claims collectively.

Turning back to the UN HRC, it can be observed that the 'views' of the committee following upon the discussion of the complaints do lead to an obligation for the State Party "to adopt appropriate measures to give legal effect to the views of the Committee".[95] The

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92 Willem van Genugten, Kees Homan, Nico Schrijver and Paul de Waart, *The United Nations of the Future, Globalization with a Human Face*, Amsterdam: KIT-Publishers, 2006, p. 49. See also UN Doc. A/RES/60/1, 24 October 2005, para. 125 where it is stated that "we [the UN Member States] resolve to improve the effectiveness of the human rights treaty bodies, including through more timely reporting, improved and streamlined reporting procedures and technical assistance to States to enhance their reporting capacities and further enhance the implementation of their recommendations".

93 See the 'view' of the HRC in the case *Chief Ominayak and the Lubicon Lake Band v. Canada*, No. 167/1984, para. 32.

94 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No.: 158.

95 *Peter Bradshaw v. Barbados*, No. 489/1992, CCPR/C/31/D/489/1992, para. 5.3, quoted in A.H.E. Morawa, 'The Jurisprudence of the United Nations Human Rights Committee and the Other Treaty Monitoring Bodies', *EYMI*, Vol. 1, 2001/2, p. 462-485, p. 463.

HRC has furthermore decided that it may fix a sum for compensation, even though the first Optional Protocol to the ICCPR, establishing the individual complaint procedure, does not provide for this. The implementation of the Committee's views is entrusted to a Special Rapporteur whose task it is to meet with State representatives and ensure follow-up.[96] All in all, one can appreciate the fact that the States Parties' compliance with the rules "is increasingly being watched from 'above' by the organisation, and from 'below' by individuals".[97]

In addition to the treaty-based procedures, several international organisations and bodies also use approaches and monitoring methods that can be characterised by their non-judicial nature.[98] The former UN Commission on Human Rights has established an elaborate system of country or thematic special procedures, addressing various human rights issues. These special procedures, so far continued by the newly established Human Rights Council,

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96 The special rapporteur highlighted in 2002 that only 30% of the recommendations had been implemented. Members of the Committee have emphasised the need for a mechanism to monitor the follow-up, in H. McGlue, 'The Jurisprudence of the UN Human Rights Committee and Other Treaty Monitoring Bodies', *EYMI*, Vol. 2, 2002/3, p. 507-535, p. 508, note 7.

97 N.M. Blokker & S. Muller, Towards More Effective Supervision by International Organizations, Essays in Honour of Henry, G. Schermers, Leiden: Martinus Nijhoff Publishers, 1994, p. 289.

98 The distinction between political and legal mechanisms can be applied either to the composition of the body or to the procedures used. A body is political if composed of representatives of States who are subject to the instructions of their governments. This does not mean that a body composed of independent experts is always a legal body; this is only the case when it uses legal procedures. See A. Eide, 'Future Protection of Economic and Social Rights in Europe', in A. Bloed, L. Leicht, M. Nowak, & A. Rosas (Eds.), *Monitoring Human Rights in Europe, Comparing International Procedures and Mechanisms*, The International Helsinki Federation for Human Rights and Martinus Nijhoff Publishers, 1993, p. 198.

usually involve a Special Rapporteur.[99] During one of the meetings on a possible draft convention on victims' rights, the establishment of a Special Rapporteur on victims' rights was also suggested. It was seen as instrumental in making progress as to the future adoption of such a convention.[100] The Rapporteur is then not so much seen as an 'enforcement agent' but more as a 'diplomat' who has a mission to promote the benefits of a new legislative instrument.

Once it is clear that a State violates its treaty obligations, different methods are available to the supervisory committees. Apart from overall 'enforcement techniques' like discussions with governments, the friendly settlement of disputes through good offices, mediation and conciliation, one can think of the 'mobilisation of shame', *i.e.*, putting the names of States on lists and in reports – for instance the overall annual reports of the General Assembly of the United Nations – upon and within which they would rather not like to occur. In the eyes of many human rights monitoring bodies, however, a cooperative approach is often more appropriate than trying to force an unwilling State to change its behaviour, while the attitude towards the underlying rules and principles that have been neglected stays the same. Thinking along these lines, several international human rights treaty bodies have tried to expand their working methods in order to better review the implementation and compliance behaviour of States. For instance, some of these bodies conduct country visits, which enhances the ability to determine whether countries adhere to international norms and, furthermore, enables the supervisory bodies to enter into a dialogue with the government and other parties involved. With regard to several

[99] For an overview of the present 'special procedures' of the Human Rights Council, see http://www.ohchr.org/english/bodies/chr/special/index.htm.

[100] For more information, see http://www.tilburguniversity.nl/intervict/UN declaration/.

mechanisms, the authority to conduct such visits was not incorporated in the original mandates. It has been able to develop in practice because States Parties did not object to it.[101]

One of the major advantages of the present human rights mechanisms is being flexible in that they can develop new approaches when deemed necessary. Indeed, such supervision "respects the autonomy of the Parties and takes into consideration their wishes and interests. (...) In addition, the deciding body can offer new, attractive alternatives, possibly in fields not directly connected with the matter at issue. It can break fresh ground, taking account of the overall picture and considering all aspects of the problem."[102] The human rights bodies most of the time use non-confrontational tools to induce governments to implement and comply with certain standards. Key characteristics embraced by these mechanisms include constructive dialogue, advice and persuasiveness. These are aspects that relate closely to the so-called communicative approach in lawmaking that we discussed in section 4.3 of this paper. Instead of opting for 'command and control', these monitoring mechanisms are aiming at convincing States Parties. One of the benefits of this approach is that it focuses upon internalisation of rules and values, which might have a long lasting effect on compliance behaviour.

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[101] For examples in the field of minority rights, see R.M.Letschert, *The Impact of Minority Rights Mechanisms*, The Hague/Cambridge: Asser Press/Cambridge University Press, 2005. In this study it was furthermore concluded that the reflection of certain conditions in the mandates of international monitoring mechanisms will affect the mechanisms' ability to *a priori* be able to influence implementation on the domestic level. These conditions are as follows: a flexible mandate, independency, the possibility to conduct country visits, the possibility to continue dialogue, the possibility to seek contacts with NGOs, the availability of proper follow-up procedures, the availability of enforcement measures or appropriate incentives, coordination, and cooperation modalities.

[102] T.M.R. Chowdhury, *Legal Framework of International Supervision*, Akademitryck, Sweden, 1986, p. 231.

Finally, it is relevant to note that under several human rights monitoring mechanisms, both quasi-judicial and non-judicial, the information needed to fulfil the tasks belonging to the review phase, is most of the time not only provided by the State or the individual submitting the complaint. Several international mechanisms allow NGOs to submit such information as well. Further to that, in various States NGOs also play an active role on the national level as the follow-up to the concluding observations of the supervisory committees.[103]

5.3. Learning from the Monitoring Procedure of the Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities (FCNM) contains open, programme-type norms that leave much discretion to the States Parties. The monitoring mechanism under the FCNM has an important role to play in that it must "evaluate the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework Convention (…)".[104] The monitoring mechanism consists of an independent expert committee (the "Advisory Committee"), which assists the decision-making Committee of Ministers of the Council of Europe.

While many commentators consider the Framework Convention as a step in the right direction towards an effective system of minority rights protection, they also criticised its accompanying monitoring mechanism. It has, for instance, been stated that "the Framework

[103] For more information, see I. Boerefijn, A van Gans, & R. Oostland, 'De Rol van Niet-Gouvernementele Organisaties in de Toezichtprocedures op Basis van VN-Mensenrechtenverdragen', in: C. Flinterman & W. van Genugten, *Niet-Statelijke Actoren en de Rechten van de Mens; Gevestigde Waarden, Nieuwe Wegen*, The Hague, Boom Juridische Uitgevers, 2003, p. 121-133.

[104] Article 26 FCNM.

Convention adopts the weakest form of international supervision of human rights commitments".[105] The wind, however, seems to be changing. Over the years, the FCNM has turned into an important reference document, not only in relations between the Advisory Committee and governments when discussing State reports, but also as a reference document for other international organisations. Since the Convention has not changed, it can easily be argued that the positive sounds are due to the work of the Advisory Committee. An active Committee was very much needed since the Convention notes in the Preamble that implementation shall take place primarily through national legislation and appropriate governmental policies. Considering the fact that the Convention contains mostly programme-type provisions, the Advisory Committee has put much time in interpreting the provisions and providing guidance to States on how to implement and comply with them.

The original mandate of the Advisory Committee only provides for reactions to State reports. However, an analysis of the development of the monitoring methods demonstrates that the Committee has been able to draft its own Rules of Procedure in a flexible manner. Monitoring methods that were not foreseen in the Convention's articles itself or in Res. (97)10 of the Council of Europe, formulating the Rules of Procedure for the Advisory Committee, could be established without opposition from the States Parties. To illustrate, the possibility of country visits was not addressed but when the first invitation of Finland was accepted, other countries followed and by now all States Parties – with the exception of Spain – have invited the Committee when their State report was being considered. During country visits, meetings are held with government representatives, NGOs and minority groups, without the need to ask a formal

[105] G. Gilbert, The Council of Europe and Minority Rights, *Human Rights Quarterly*, Vol. 18, No. 1, 1996, p. 188.

mandate from the Committee of Ministers in advance.[106] These meetings provide most of the information needed for drafting the Advisory Committee's opinions, which aim to cover all perspectives. When additional information is needed, the Committee has the possibility to send a questionnaire to the government, which the government needs to submit in addition to the already submitted State report.

The Committee of Ministers of the Council of Europe has also supported the follow-up activities by the Advisory Committee, by recommending governments to take into account the opinion on their State practice expressed by the Advisory Committee. The added value of the resolutions of the Committee of Ministers must not be sought in the content but in the political backing they provide. The Committee is considered to have the most powerful role within the organisation, which, because of its political nature, sometimes poses problems in relation with independent expert bodies. The joint monitoring of the FCNM by the Advisory Committee and the Committee of Ministers, however, appears to work relatively well.

Finally, it can be observed that the involvement of civil society in the activities of the monitoring mechanism has been unexpectedly high. Unexpectedly because, as mentioned before, the Framework Convention attracted great resistance in the beginning because of the vagueness of the provisions and the alleged weaknesses of the monitoring mechanism (also from NGOs working in the field). The latter might just have been the reason why NGOs felt that their input would be of utmost importance in order to give the Convention any practical effects. As a consequence, several NGOs started

[106] The CoM furthermore extended the Advisory Committee's mandate relating to meetings with NGOs during country visits in order to get information from 'other sources' for which originally a separate mandate had to be requested before each visit. Note that the Advisory Committee has also received authorisation to contact NGOs outside country visits.

promotional activities to inform their supporters of the importance of the FCNM. In addition, in many countries NGOs drafted shadow reports through which the monitoring mechanism got another perspective than the perspective put forward in State reports.[107]

[107] See Letschert, op.cit, chapter 4.

6. A Preliminary Assessment of the Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power

6.1. Introduction

Following Garkawe's call for a convention, the World Society of Victimology and the International Victimology Institute of Tilburg University, INTERVICT, convened an informal meeting with experts from different regions to discuss the need and contents of a draft convention. The meeting took place in December 2005, at Tilburg University, and led to the "Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power". Following that meeting, in August 2006, the draft has been discussed at the 12th International Symposium on Victimology organised by the World Society of Victimology in Orlando, USA, leading to some revisions.[108] Since then, discussions started with the international community of States (more on that in the subsection on co-regulation; see below).

The draft Convention as it is now consists of 25 articles related to such diverse issues as the "commitment to reduce victimization", "access to justice and fair treatment", "protection of victims, witnesses and experts", and "restitution including reparation", while it also establishes a monitoring procedure and a supervisory committee (called: "Committee on Justice and Support for Victims of Crime and Abuse of Power").

In this Chapter the draft will be discussed from the perspective of this paper, *i.e.* on three levels: 1) the character of the standards; 2) the notions of a framework convention and co-regulation; and 3) the way the monitoring of the implementation and compliance of the

[108] The first draft, including these revisions, can be found at http://www.tilburguniversity.nl/intervict/undeclaration/convention.pdf.

draft Convention is foreseen. In the final Chapter (7), we will come back to some of the general notions on international lawmaking, presented in this paper.

6.2. Legal Character of the Standards

In Chapter 3, it was stated that the old dichotomy between (hard) treaty law on the one hand and soft law instruments on the other hand is no longer a fruitful way of looking at legal instruments. We referred to Dinah Shelton's typology of international legal instruments, addressing both their form and content, leading to four labels: law; commitment; hortatory; and freedom of action. In the same context we mentioned Boyle's observation that treaty law can be rather soft, in several ways. Following that, we discussed Abbott and Snidal's model, describing the status of international regulatory documents in terms of Obligation (O) + Precision (P) + Delegation (D), while we added that according to other authors (Keohane, Moravcsik and Slaughter), each of the three dimensions is a matter of degree and gradation.

Assessing the draft Convention in terms of "law, commitment, hortatory, freedom of action" (Shelton) and "Obligation, Precision and Delegation" (Abbott and Snidal), while having in mind the nuances and additional views tabled by the other authors, reveals a somewhat shattered picture. To begin with: some articles in the draft apparently show a high level of legal Obligation ("law", in Shelton's words) and (required) Commitment by States Parties and are formulated very detailed and Precise, while other articles are 'only' calling upon States to change their behaviour (hortatory) and/or are formulated rather vague.

Examples of the first category can be found in the Articles 5 and 7 about access to justice and fair treatment and the right to be informed. Just think of Article 5(2)(a): "Giving the victim a fair

hearing within a reasonable time in the determination of their entitlement to a remedy for the injury, loss or damage suffered by them as a result of their victimization without prejudice to the accused", and in the same Article and section, under (c): "Allowing victims to present their views and concerns themselves or through legal or other representatives without prejudice to the discretion of the court, tribunal or other appropriate authority, and in consonance with the relevant domestic criminal justice system", or Article 7(3): "States Parties shall take the necessary measures to ensure that the victim is notified, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released."

As far as the second category is concerned, other articles immediately catch the eye, like Article 3(4) that reads: "States Parties shall ensure that all officials and other persons dealing with victims treat them with courtesy, compassion, cultural sensitivity, and respect for their rights and dignity", or Article 11(4), which states: "The establishment, strengthening and expansion of national, regional or local funds for compensation to victims should be encouraged. States Parties may consider providing funds through general revenue, special taxes, fines, private contributions, and other sources."

Referring to Abbott and Snidal's criterion of Delegation, the draft Convention is again far from uniform. On the one hand, part III of the draft (on "Implementation, Monitoring and Cooperation") rests heavily on the willingness of States Parties to "take appropriate measures": "States Parties shall take appropriate measures to: (….) (b) establish and enhance such institutions and mechanisms as may be necessary for the achievement of the objectives of this Convention; (c) ensure the establishment and/or enhancement of appropriate procedures, which are victim-friendly and which must be adhered to" (Article 12(1)). Especially Article 13 turns out to be quite

disappointing because it confirms that States Parties themselves are responsible for taking appropriate measures to monitor the efficiency and effectiveness of policies and measures designed for the implementation of the convention. They should also ensure that various agencies, organs or bodies dealing with victims submit periodical reports. For these provisions to be effective, a lot of self-criticism will be indispensable. Further to that, not so much self-criticism but rather good faith is vital for the implementation of and compliance with Article 13(3), which demands from parties to the convention to make the principles and provisions of the convention widely known, by appropriate and active means. A wide margin of discretion is left in the course of the implementation of and compliance with these articles.

On the other hand, Article 14 of the draft Convention does ask for the establishment of a Committee on Justice and Support of Victims of Crime, Abuse of Power to examine the progress made by States Parties in achieving the realisation of the obligations undertaken in the convention. The draft Convention reveals that this committee will not just have to rely on the information provided by States Parties. It may, for instance, also invite the United Nations Office on Drugs and Crime, the UN Specialised Agencies and other competent bodies to provide expert advice on matters of implementation. If this provision would make it to the final text of the convention, it would at least show some willingness to delegate powers to an independent authority.

Having said all this, one criterion is left: Shelton's "freedom of action". However, we found no articles I the draft Convention that can be linked to that label.

All in all the draft Convention offers a mixed picture: some articles are directly aiming for 'hard' obligations, other articles have an open character, more or less asking instead of ordering States to adopt new policies and practices. In Chapter 3 we also cited Hartmut

Hillgenberg, who listed a number of reasons why States might be against hard obligations ("law" in Shelton's scheme, obligations with a big "O" in Abbott and Snidal's terminology). Such a reason might be that States feel the necessity to stimulate a policy development that is still in progress or that the creation of a preliminary, flexible regime may possibly provide for a development in stages. Reading the draft Convention this way, one can say that the drafters have had an open eye for the need not to talk in terms of hard obligations only but to address the manifold issues in terms of tailor-made standards, allowing States a serious margin of discretion. Whether States will be of the opinion that the right issues are addressed in the right legal form remains to be seen.

Finally as to the legal character of the standards: in Chapter 3 we also discussed Shelton's division of soft law in "primary soft law" and "secondary soft law". In relation to the issue of victims' rights protection, the first label would not be very relevant for the draft Convention, but would rather fit the 1985 Declaration, as well as, for instance, resolutions adopted by the UN Commission on Crime Prevention and Criminal Justice applying (parts of) the Declaration. The notion of secondary soft law, however, would fit the work of the future Committee on Justice and Support of Victims of Crime, Abuse of Power, and/or a possible UN Special Rapporteur on victim's rights. In both cases, we will again have to wait and see what kind of supervisory mechanism(s) – if any – the UN will come up with.

6.3. Framework Convention and Co-regulation

In Chapter 3, we referred to Hartmut Hillgenberg and Sol Picciotto, stating, in sum, that focussing upon flexible legal instruments, including soft law standards instead of treaty law, creates better possibilities to include non-state actors in the process of negotiated rulemaking. In Chapter 4 we elaborated upon one such flexible

instrument, *i.e.* framework conventions, in combination with the technique of co-regulation. The latter brings non-state actors into the legislation process, while it also leads to a focus upon the creation of measures to be carried out by the concerned parties recognised within the field of regulation. The latter refers to a more responsive, communicative and discursive approach of lawmaking. Translated into the concept of a framework convention, using such an approach suggests that when opting for a less intrusive legal instrument, States will probably be more willing to accept the content of the convention. Both elements – framework convention and co-regulation – are not necessarily linked, but linking them might create interesting insights.

Looking at the draft convention through the eyes of a framework convention, one will immediately observe that it already contains many characteristics belonging to that type of lawmaking. It includes differentiated types of rules and obligations, addressing in a strict sense some of the topics that are not really controversial anymore (in the previous section presented as standards with a high level of Obligation or "Law"). At the same time, programme-types provisions have been drafted on other issues where there is no consensus yet. An example, also to be found in the previous section, relates to the issue of compensation. Not only can such a programmatic rule gradually gain strength during the implementation process, it will also allow for a differentiation between States Parties' responsibilities on such a topic, while nevertheless the frame is clear. And even as to the compensation issue, it would be good to keep in mind that framework conventions often arise out of a compromise between some States claiming that hard law is the only proper and lasting approach to be able to tackle a worldwide existing problem effectively and other States that do not want to loose control over the situation in their own country or think they are unable to live up to the

expectations by the other parties due to, for instance, budgetary problems or lack of knowledge and manpower.

As to the notion of co-regulation, it can be observed that this seems to fully fit the needs and capacities of the victims' rights field. All advantages and characteristics of co-regulation elaborated upon in Chapter 4 – coming together in the notion that involving civil society organisations in the rulemaking process will be more successful than a more traditional top down approach of lawmaking that is going to result in both compromise rules and reluctance in monitoring and enforcement efforts – are extremely relevant for the victims' rights field. Further to that, experiences with co-regulation in the European Union show that – given its starting point, reflected in the word "co" – the legislator can provide from the very beginning on better safeguards as to transparency of the implementation process, the ability to turn the clock back whenever the objectives of the convention are seriously frustrated, and the assurance that NGOs are involved in compliance monitoring.

As to the way the present draft is prepared, one can observe that many of the foregoing insights are already practised, although the terms framework convention and co-regulation have not been used. After the initial preparations, discussed in the introduction to this chapter, the World Society of Victimology started to gather support for the idea of a convention at the level of States. In April 2006, it attended the Fifteenth Session of the UN Commission on Crime Prevention and Criminal Justice and addressed the Commission with several recommendations. One of them reads: "Member States may wish to invite an expert group to consider the desirability and feasibility of (…) the elaboration of a UN convention on the rights of victims".[109] The Commission indeed allowed an intergovernmental

[109] For more information and references, see http://www.tilburguniversity.nl/intervict/undeclaration/

expert meeting to take place in November 2006, which aimed (a) to design an information gathering instrument on standards and norms related primarily to victim issues and (b) to study ways and means to promote their use and application? The report of the intergovernmental expert group meeting has been submitted to the Commission on Crime Prevention and Criminal Justice at its Sixteenth Session in April 2007. During this session most of the attention of the States was focussed on a new questionnaire as an information-gathering instrument on victims' rights. Representatives of the World Society of Victimology continued their discussions with national governments on working towards a future convention on victims' rights.[110] As such, the process so far seems to be a good example of co-regulation. However, it is too early to make decisive remarks on the interplay between NGOs and States. It looks promising, but the real outcome can only be scrutinized afterwards.

6.4. Monitoring Implementation and Compliance

In Chapter 5 we discussed the issue of implementation and compliance, focusing upon lessons to be learned from victims' rights related fields (human rights and protection of national minorities). One of the lessons learned from the human rights field would be that a strong supervisory committee of independent experts is needed, that in daily practice creates or is given the space to strengthen its supervisory procedures. Further to that, we mentioned the advantages of collective complaints procedures, next to allowing every individual the right to complain about his or her specific case, while we also underlined the importance of non-judicial procedures,

[110] For documents relating to the sixteenth session, see http://www.unodc.org/unodc/en/crime_cicp_commission_session_16.html.

meaning that a convention could be important in terms of compliance and enforcement but that alternative monitoring procedures should not be forgotten as well.

The existence of a strong supervisory committee of independent experts is closely related to conventions with clear standards that can be applied with a legal mindset. Apart form that, we discussed in Chapter 5 a specific example of a framework convention (the Council of Europe Framework Convention for the Protection of National Minorities) with its open, programme-type norms that leave much discretion to the States Parties, and which includes a supervisory mechanism of a mixed charter: an Advisory Committee composed of independent experts as well as a decision-making role for a political body (*in casu*, the Committee of Ministers of the Council of Europe). One of the lessons learned, is that over the years due to the work of the Advisory Committee the Framework Convention has become an important reference document. An active Committee was needed to make the States Parties live up to their core obligations, *i.e.* effectuate the standards of the Convention through national legislation and appropriate governmental policies, while the Committee also gave authoritative interpretations of many of the programme-type provisions of the Convention. Here again, the Committee created space for itself, by simply doing its work carefully, and was backed by the Committee of Ministers, despite original hesitation. It was observed that the joint monitoring of the Convention appears to work relatively well. In addition, it was observed that in the very beginning the NGO world was not satisfied by the vagueness of the provisions and the alleged weaknesses of the monitoring system, but later on it started seeing this as a good reason to contribute to safeguarding of compliance as much as one could.

These are all lessons that can be taken on board, when constructing the supervisory mechanism for the draft UN victims' rights

convention. In the draft it is proposed to establish a Committee on Justice and Support of Victims of Crime, Abuse of Power. Its composition and mandate include the following elements:

- The Committee shall consist of (ten) experts of high moral standing and recognized competence in the field covered by this Convention and shall serve in their personal capacity (Article 14, (1)(a)).
- The Committee shall establish its own rules of procedure (Article 14, (1)(g)).
- States Parties undertake to submit to the Committee reports on the measures they have adopted which give effect to the rights recognized in the Convention on the progress made on the enjoyment of those rights (Article 15 (1)); they do so within two years of the entry into force of the Convention for the State Party concerned, and thereafter every five years (Article 15 (1)(a) resp. (b)).
- Reports made under the present Article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned (Article 15 (2)).
- The Committee may request from States Parties further information relevant to the implementation of the Convention (Article 15 (4)).
- States Parties shall make their reports widely available to the public in their own countries (Article 15 (6)).
- The Committee is entitled to make on-site visits to assess progress made in the implementation of the Convention (Article 15 (7)).

Further to that it is suggested that the Committee, in order to foster the effective implementation of the Convention and to encourage international co-operation in the victims' right field,

- Will closely cooperate with, *inter alia*, the United Nations Office on Drugs and Crime, and the UN specialized agencies and other UN organs as to the implementation of such provisions as fall within the scope of their mandate (Article 16 (1)(a)).
- Shall develop a regular dialogue and discuss possible areas of cooperation with all relevant actors, including national human rights institutions, governments, relevant United Nations bodies, specialized agencies and programmes, in particular with the United Nations Office on Drugs and Crime, the Counter-Terrorism Committee of the Security Council and the Office of the United Nations High Commissioner for Human Rights (Article 16 (1)(b)).
- Shall transmit, as it may consider appropriate, to the United Nations Office for Drugs and Crime, specialized agencies and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications (Article 16 (1)(c).

All in all, the composition and mandate of the Committee are strongly modelled after the standard approach as applied in UN human rights conventions. However, as we have seen in Chapter 5 of this paper, international organisations and supervisory bodies in the field of human rights as well as minority rights have developed different ways to better monitor the implementation of and compliance with international norms. Based on our previous analysis, we would propose to take some other issues into consideration, when discussing more detailed arrangements as to the monitoring of the (possible) future victims' rights convention.

- Preliminary: What kind of monitoring mechanism should be installed, in order to optimally influence the implementation and compliance performance by States in the field of victims' rights? What would be the best way to enhance the commitment of States to implement and comply with the full range and huge variety of victims' rights, from the right to respect for the dignity of victims, the right to receive proper information, to the more financially oriented rights, like getting compensation for damages and such things as receiving a priority status when it comes to housing? Would one type of supervisory procedure be sufficient, or would it be better to think in terms of mixed procedures, varying from (quasi-) judicial decision-making on concrete complaints to an advisory and dialogue approach for other issues?
- Whatever choices will be made, as with all international norms and instruments, one cannot simply trust that State Parties will automatically act in accordance to them. Therefore, there should always be a supervisory body, composed of independent experts, which can use a set of serious monitoring methods (such as the right to ask States to periodically report upon their practices in the victims' rights fields and the possibility to conduct on site visits if circumstances so require, both foreseen in the draft Convention). But having such an independent supervisory body does not automatically mean that its work should have the character of international independent (quasi-)legal decision-making, as is the case with for instance the UN Committee on Human Rights. Depending on the character of the convention to be adopted, the mandate of the committee could vary from giving 'views'/judgements, or of 'assisting' a political decision-making body in forming its opinions on the State behaviour in the field of victim's rights. As to the latter, we again refer to the positive experiences with the double-sided monitoring mechanism of the

Council of Europe Framework Convention for the Protection of National Minorities.

- Victims, or groups of victims, should be given the right to address the committee of independent experts, both in the form of providing information – by submitting shadow reports or attending hearings – and by complaining on violations of their rights. Both elements are not included in the draft. The first element is most probably left aside because the Committee is allowed to establish its own rules of procedure, which might include the wish to make use of the knowledge available in the NGO world. The second issue might have been skipped so far because of the fact that a complaint procedure would be a bridge too far, amongst other things because of the open character of some of the provisions in the draft convention. Nevertheless, to our mind at a later stage such complaint procedures should be taken into consideration. That could relate to an individual complaint procedure, working with admissibility criteria as incorporated in the main UN human rights conventions (and further elaborated upon by the relevant supervisory committees). It could also be decided that only specific hard elements in the convention (the ones referred to as obligations with a big "O"), could be open to such individual complaints. In addition, the right to complain could also be given to groups of victims, collectively submitting their claims, or even to NGOs acting within the format of an *actio popularis* (as is the case with the Protocol on collective complaints, in 1995 added to the European Social Charter). Especially in a situation of gross violations of rights, with their nasty long term and devastating effects upon human beings, such extra supervisory procedures would be indicated to our mind.
- Apart from the follow-up procedures foreseen in the draft convention (making reports available to the public, and entitlement of the Committee to make on-site visits to assess

progress made in the implementation of and compliance with the Convention), there should be a set of other follow-up methods, making clear that a State which is in one way or another confronted with a negative opinion by the committee cannot (easily) escape its responsibilities. One could especially think of appointing a special Committee rapporteur for the follow-up, but also of offering good offices, mediation and conciliation.

- Finally: the draft Convention rightly aims at cooperation between the Committee and other actors in the victims' rights field. This includes intergovernmental as well as non-governmental actors. As to the latter, however, it would be important to our mind to transcend the level of cooperation, and make national as well as international NGOs full co-owners/stakeholders of the victims' rights convention project as well. They might be able to create contra-forces in front of indifferent or unwilling States that cannot easily be neglected, and are extremely important for the real follow-up in the long run.

7. Final Observations and Overall Conclusions

We started this paper with some interesting observations by Sam Garkawe about the need for a victims' rights convention. At first sight, most of his remarks are very appealing. After all, who could be against a stronger legal protection of victims' rights? At the same time, Garkawe's observations seem to presuppose that a convention is necessarily going to lead to a better protection of victims' rights.

Garkawe himself refers to the European Union Framework Decision on the Standing of Victims in Criminal Proceedings to show that most principles in the UN Declaration are apparently not so obscure, vague or uncertain that transforming them into a hard law document is impossible. Garkawe is certainly right in this respect as far as the implementation on paper is concerned ('the law in the books'). He does not mention, however, that not a single European country followed up on the Framework Decision by introducing a comprehensive legislative project. Where national 'victim charters' were in place, they had all been established before 2001. Not a single Code of Criminal Procedure was amended in a systematic way with an eye to implement the Framework Decisions' requirements.[111] So the effects of legally binding instruments should not be over-estimated.

Reports by the European Commission have also revealed that the practical follow-up of the Framework Decision ('the law in action') has been disappointing. Even the most basic rights and obligations, like informing victims about the release of offenders, have not been fully transposed into domestic law in most countries. Moreover, there is still very little knowledge about the practical benefits the

[111] See M.S. Groenhuijsen & S. Reynaers, 'Het Europees Kaderbesluit inzake de status van het slachtoffer in de strafprocedure: implementatieperikelen en interpretatievragen', *Panopticon. Tijdschrift voor strafrecht, criminologie en forensisch welzijnswerk*, 2006.3, p. 12-33.

Framework Decision has brought for victims, because there has not been an independent, comprehensive, and methodologically sound empirical study about the effects of this codification. All in all, considering the long list of deficiencies, there is little evidence that the European Framework Decision has had a far greater impact on the lives of victims than the UN Declaration.

The latter instrument, adopted in 1985, has been taken by us as a starting point, in order to see where the global protection of victims' rights brought us about twenty years later. One of our conclusions reads that only minor parts of the Declaration have reached the status of international customary law, while it was also observed, among other things, that the Declaration did lead to the development of innovative implementation and compliance monitoring procedures.

We then discussed the question what can be learned from today's academic discussions on characterising international legal standards and from recent debates on lawmaking in the international legal field? As to the first topic, we have seen that more and more legal scholars challenge the traditional division between hard and soft law. Abbott and Snidal, for instance, argue that it is more fruitful to study conventions in terms of Obligation, Precision and Delegation of powers. Together with others they also state that conventions can contain hard and soft law elements simultaneously. Sometimes the rules are strict, while the compliance and dispute resolution mechanisms are weak. But the reverse exists as well: some conventions rely heavily on symbolic norms and principles, whereas the implementation process is used to upgrade the rules, for instance, through recommendations of monitoring and review committees. It can be added here that in the past rulemaking and compliance-monitoring mechanisms have often appeared to function as communicating vessels, also in a negative sense: the moment the aspiration in the text of a convention went upward, the commitment

to build-in strong enforcement and compliance mechanisms immediately seemed to go down.

In relation to entering the route of a possible victims' rights convention, we discussed some major risks: a convention might be adopted and signed by many States – for political or moral reasons, taking the opportunity to 'dress their windows' for external spectators – but might successively not be ratified by a sufficiently large number of States. Further to that, the possible advantages and possibilities of further developing the legal use and utility of the 1985 Declaration might be underestimated and 'given away' too early for the sake of a convention. Attempts to codify particular rights or duties, with possibly a 'little extra on top', might scare-off some States Parties, strengthen the opposition against a convention, and endanger results reached so far.

It might be good to add here that some theorists have gone even further and have claimed that conventions are less and less adequate to meet the needs of an increasingly interdependent and changing world, which is marked by the globalisation of problems in various areas. Hans-Peter Neuhold for instance believes that conventions often fail to meet four essential requirements for an effective legal regime: Speed (a quick response to new challenges), clarity and uniformity (the price for the adoption of a treaty is often deliberate ambiguity in the text), universality of participation (global problems can only be tackled through global participation) and flexibility and adaptability (revision of a treaty is often a difficult and lengthy road to travel).[112] His 'warnings' are not translated by us in the advice to refrain from a victims' rights convention per se, but are in many ways reflected in our paper.

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[112] H.P. Neuhold, 'The Inadequacy of Law-Making by International Treaties: "Soft Law" as an Alternative?', in: Rüdiger Wolfrum and Volker Röben (Eds.), *Developments of International Law in Treaty Making*, Berlin/Heidelberg/New York: Springer, 2005, p. 40.

Trying to learn from experiences in other policy areas, we discussed the attempts to realise a convention to combat deforestation. We found that the process of negotiations to legalise forest management has left many policy actors, particularly NGOs, extremely frustrated. The battle over the pros and cons of a Forest Convention has further shown that a lot of time and energy could get lost in the process of negotiating over the status and content of a legal document while the underlying problems keep growing. Transferring these experiences to the victims' rights context, similar risks would be imaginable: at the end lengthy negotiations might cause disappointment on the side of both victims' rights organisations and States that are willing to take the lead in improving the position of victims. At the same time, the fight against deforestation has also demonstrated how potentially strong NGOs and other non-State actors can be if they agree to work together.

Analysing all this, we have taken up the challenge to find middle ground between the ambitions behind the quest for a convention and the benefits and shortcomings of the present Declaration. Given the complexity and variety of the rights to be covered, the diversity of opinions of States on the desirability of hard standards, the need to have an open eye for the "significance of national and regional particularities and various historical, cultural and religious backgrounds"[113] of the negotiating parties, the need to work towards cooperation between States and NGOs ("co-regulation"), we presented the concept of a framework convention as a possible solution. Such a convention tries to combine the benefits of legal bindingness with the flexibility and 'stepping-stone-character' of successful soft law documents. We have seen that the instrument is used, in, amongst others, the field of international environmental law and the field of

[113] World Conference on Human Rights, UN Doc A/CONF.157/23, 12 July 1993 (see section 3.3.2. of this paper).

minority protection. In the present paper, we discussed especially the example of the Framework Convention for the Protection of National Minorities of the Council of Europe. In the beginning this convention has met a lot of criticism, amongst other things, because of its many programme-type provisions and its weak supervisory mechanism. Recently, however, the opinions about the Convention appear to be positively changing. The Advisory Committee has been able to draft flexible rules of procedure and establish monitoring methods that were not foreseen in the convention. The fact that independent experts have been able to introduce a system of on site visits, without having a formal mandate, and even arrange for hearings with different kinds of stakeholders, including NGOs, is nowadays considered to be a major improvement in the protection of minority rights.

Using the model of a framework convention in the field of victims' rights would open up the possibility of differentiating between various types of rules and obligations: strict rules on topics that are no longer controversial, programme-type provisions on other issues, such as in the field of financial compensation for injustice done to victims. The programmatic rules can gradually gain strength during the implementation process, while this system also allows differentiating between States Parties, within the limits of a desirable margin of discretion. It can be added, that a convention with programme-type provisions does not necessarily have to be considered as a sign of weakness. The strength of these kinds of agreements has to be judged according to the conditions that are being set in the convention for the implementation and the way compliance is going to be monitored.

Finally, this 'mixed picture' could also be reflected in the supervisory procedure to be established for the victims' rights convention. Here a framework convention approach might open up new opportunities as well. The supervisory committee's mandate should not necessarily

have the character of international independent (quasi-)legal decision-making. The mechanism can also be situated halfway (quasi-)legal decision-making and preparedness to enter dialogues with unwilling States or States in a backlash position. In the latter case, the Committee's task would basically relate to advising – not meaning 'advising only', but rather something like preparing draft-decisions which are taken over by the political supervisory bodies, unless otherwise indicated – political decision-making bodies as to the level of implementation and compliance by the States Parties to the convention. As of now, it might be the best way to make progress, also in relation to the many States that so far are not very much willing or able to live to the 1985 Declaration.

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2 New developments in policies and services for victims in Europe: An introduction to Council of Europe Recommendation (2006)8

Dame Helen Reeves

1. Abstract

In June 2006, The Council of Europe, the international body which comprises forty-seven of the fifty one states in the continent of Europe, adopted a new Recommendation on Assistance to Crime Victims, "Recommendation (2006)8". The new instrument provides the most comprehensive set of provisions so far included in any international protocol, covering all aspects of victim services, within and beyond the criminal justice process, compensation, from the offender and from the state and other rights for victims including privacy and protection. This paper is presented by Dame Helen Reeves (UK) who chaired the international Group of Specialists responsible for drafting the Recommendation. It describes the main policy advances which have now been agreed by the Council of Europe and the challenge of implementation in the context of competing political priorities. The paper ends with a brief case study to illustrate how these issues have impacted on recent developments in the U.K.

2. New developments in policies and services for victims in Europe: An introduction to Council of Europe Recommendation (2006)8

The growing political importance of victims' issues throughout the final quarter of the 20th Century was a major achievement of the international victims' movement. During that period we witnessed the growth of the first dedicated victim services in many parts of the world, informed by an increasing body of knowledge from academic research and underpinned in many countries by new legislation. The first international standards for the treatment of victims were developed in the mid-1980s. The United Nations "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" was published at the end of 1985 after lengthy negotiation. During the same period, the Council of Europe (C of E.) was engaged in the development of three detailed policy documents: the "European Convention on the Compensation of Victims of Violent Crime" which was opened for ratification in 1983, the "Recommendation on the position of the victim in the framework of criminal law and procedure", published in 1985, and the "Recommendation on assistance to victims and the prevention of victimisation" adopted in 1987. The innovative new policies were based on the experience of both practitioners and academics and, in their turn, these protocols provided the necessary stimulus for extensive further development.

For those who are not familiar with the European institutions, it is important to distinguish between the two main bodies. The C. of E. is open for membership to all European countries and currently has 47 member states (45 in 2006) out of the total 51 countries in Europe. By drawing upon good practice amongst its members, it is able to issue recommendations which set out the standards to which all countries should aspire. Where appropriate, it can also publish

conventions, aimed at international cooperation, which states are invited to ratify. All member states have ratified the European Convention on Human Rights, regarded as the most important achievement of the C. of E. By contrast, the European Union (E.U.) comprises 27 countries (25 in 2006) who are bound together by a series of Treaties. The E.U. can pass laws and adopt rules which are binding on its members. New states must apply for membership and are assessed as to their ability to comply with current rules and regulations before they can be accepted.

In 2001, the Criminological Scientific Council of the C. of E. decided to review their policies for victims, which had not been revised since they were originally adopted more than fifteen years before. Recent work on victim related issues had focused on international problems such as cross-border crimes including terrorism and trafficking and specialised areas including domestic violence and the abuse of children. The three, more comprehensive, policy documents for all victims of crime had remained unchanged since the 1980s. The intervening years had seen remarkable developments in both policy and practice in many countries so that considerably more knowledge was now available from both research and practical experience. Several member states had introduced new legislation, particularly regarding financial compensation and those states which were also members of the E.U. had, since March 2001, been legally bound by a "Framework Decision on the standing of victims in criminal proceedings" requiring new standards of practice to protect the interests of victims. In 2002 I was asked to carry out a review of the current situation and to advise the committee as to whether or not the 1987 Recommendations on assistance to victims and crime prevention were still relevant.

My report, "The relevance today of Recommendation No. R (87) 21 on assistance to victims and prevention of victimisation" was published by the C. of E. in January 2003. I concluded that considerably more detailed and comprehensive measures were now needed in the light of new information which had become available and the developments which had already taken place. It was no longer sufficient to call simply for services to be provided; the recommendation should now specify the range of services needed, the way in which they are organised and managed and the standards to which they should comply. Additional provisions, not recognised in 1987, should now be included, for example, the need for victims to be protected in the community as well as in the courts and the importance of victims rights being recognised by other social agencies, such as those dealing with health, housing and education. Academic research had also progressed considerably in recent years so that research only on the extent of victimisation was no longer sufficient. More detailed work was already underway in some countries on the variety of needs of different groups of crime victims and the effectiveness of services in meeting those needs. This work should now be extended so that comparisons could be made and knowledge acquired to inform better practice. In view of the extensive developments which had taken place in the fields of both victimisation and crime prevention, I also recommended that these two important issues should now be separated and that each would merit its own, detailed recommendation.

3. The Group of Specialists on Assistance to Victims 2005-6

Fortunately, my proposal for a new set of victim policies was accepted and in January 2005, a "Group of Specialists" was convened which I was honoured to be invited to chair. In accordance with the agreed practice of the C. of E., members of the group were appointed from different countries and different regions of Europe. Observers, all of whom were welcome to contribute fully to the discussions but not to vote, were invited from other relevant committees of the C. of E and other international institutions. The seven full members included a judge from France, a prosecutor from Russia, a professor of police studies from Portugal, a mediation specialist from Austria, a lawyer and researcher from Sweden, a representative from the ministry of justice in Hungary and myself, a victim service provider. To enhance still further this wide range of knowledge and skills, we were supported by two expert consultants: Professor Marc Groenhuijsen from INTERVICT in The Netherlands and Dr Michael Kilchling from the Max Planck Institute in Germany. Our observers, who contributed significantly to our discussions, included two representatives of the C. of E. Committee for Human Rights, from Turkey and the U.K. and representatives from the Committee of Experts on Terrorism who came from Sweden and Spain. We were also assisted by representatives from the International Criminal Court, the United Nations High Commission for Human Rights and the United Nations Office on Drugs and Crime as well as by an excellent secretariat. It is particularly significant that this remarkably diverse and highly qualified group of experts was able to achieve unanimous conclusions on a very wide range of recommendations.

3.1. Victims of terrorism

The first task required by our terms of reference was to consider the service needs of victims of terrorism. Advice had been requested the Committee of Experts on Terrorism (CODEXTER) who were due to produce their own report within a few months. It quickly became clear to us that this was an extremely difficult way to proceed. If left to our own devices, we would have worked extensively on the needs of victims in general before determining, in the light of our wider recommendations, what, if any, special provisions may be needed by any specific group of victims.

Michael Kilchling and his colleague, Hans-Joerg Albrecht were commissioned to provide us with a study of " Victims of Terrorism – Policies and Legislation in Europe, an overview of services for victims of terrorism", which served as the basis for our considerations. The study demonstrated a wide variation in policies and provisions amongst European states. Some had compensation schemes for victims of terrorism only, others provided the same compensation to victims of terrorism and other crimes and some had no provisions at all. We concluded after lengthy discussion that, in general, the needs of victims of terrorism were essentially the same as those of other victims of crime and that they should benefit from all the recommendations we would make when our final report had been concluded. In addition, some special provision, such as a memorial, may be needed by communities which have been affected by a major incident, but this would be equally true whether or not the crime had been motivated by terrorism. Similarly, we recognised that specialised centres offering support and information could be particularly relevant following any crime resulting in multiple victimisation.

3.2. Establishment of fundamental principles

We now returned to the primary purpose of the group: to produce an updated set of recommendations for the assistance of all victims of crime, taking into account the research, legislation and service development which had occurred since 1987. It had been agreed that our report could be more detailed than is usual for this type of document and that examples of good practice should be identified in order to provide practical guidance to member states in developing their own legislation and practice.

We considered it to be essential to agree the fundamental principles which should underpin all provisions for victims of crime and upon which our recommendations would be based. These are set out in section 2 of the final Recommendation and are referred to throughout the document. They are elaborated in more detail in the Explanatory Memorandum which was adopted to accompany the main text.

1. Human Rights

The first, and perhaps the most important principle we established, is the recognition that victims rights are based upon the human rights which should be accorded to all citizens. This is an important issue in Europe where, as previously stated, all states in membership of the C. of E. have accepted a commitment to comply with the European Convention on Human Rights. All citizens have access to the European Court of Human Rights if they believe their rights have been infringed by a public authority. In most E.U. states, these rights have also been incorporated into national legislation. The rights specifically referred to here include the right to security, dignity, private and family life although the right to access to justice is also relevant. Although the term “rights” has been used in many other

international conventions, no legal basis had previously been established.

2. Non-discrimination

At first sight, the non-discrimination clause (recommendation 2.2) will appear to be very familiar and uncontroversial. It is, thankfully, now standard practice to require that no public provision should be withheld or prioritised on the basis of the personal characteristics of the recipient. Turning to the Explanatory Memorandum (sections 49-53), however, it is clear that we intended this principle, which usually refers to issues such as race, sex, religion, disability, and sexuality, to be applied more comprehensively. We were aware of many countries who limit their provisions to victims of politically sensitive offences, such as organised crime or domestic violence. We concluded that assistance should not be prioritised on the basis of the type of crime but rather on the needs of the individual victim. This does not mean that services should be the same for all victims. We recognised there are victims whose particular vulnerability makes it necessary for services to be tailored to their individual needs (Recommendation 3.4). and that additional, specialist provisions should be provided "when specific characteristics or circumstances of the victims require". For example, children, people with learning disabilities or physical disabilities affecting communication may need particular support during police interviews or while giving evidence. Victims who have been exposed to crimes such as domestic violence, sexual assault or organised crime may need additional protection in the community. Foreign nationals (Recommendation 3.5) may need assistance in a language they can understand. Further examples of victims who may be considered to be vulnerable are provided in the Explanatory Memorandum (Para. 59).

We had also identified another form of discrimination which occurs in many countries. This is the exclusion from services of victims who

have a previous criminal record or those who are not considered by the authorities to be as deserving as others. The concept of the "innocent victim" has become very familiar in political statements and in media reports but its significance has rarely been challenged, until now. Here (Explanatory Memorandum 52-53), it is accepted that while the behaviour of a victim before, during or after a specific criminal event can be taken into account in determining the level of state financial compensation for that crime, it should not constitute grounds for refusing other services. Victims with a prior, unrelated criminal record, on the other hand, should not be excluded from any of the provisions of the Recommendation, including the award of state compensation. It is interesting that this highly controversial proposal was endorsed without comment by the Conference of Ministers of Justice when it is clearly contrary to the practice in a number of member states, including the UK.

3. Victims' rights should be independent of the criminal justice process

The group was aware of the tendency for some, if not most, governments to regard their responsibilities to victims as an adjunct to the provision of criminal justice. At worst, victims have been recognised primarily as witnesses, with services designed purely to assist them in co-operating with investigations and in giving evidence. Ironically, this limited understanding of victims' needs has been one of the main obstacles standing in the way of achieving wider and more appropriate services. We concluded that it was now necessary to provide a new definition of the relationship between the victim and the state.

The preamble to the Recommendation asserts "that it is as much the responsibility of the state to ensure that victims are assisted as it is to deal with the offender". This principle is later elaborated to confirm that "the granting of these services and measures should not

depend on the identification, arrest, prosecution or conviction of the perpetrator of the criminal act". The Explanatory Memorandum leaves no room for doubt:

38. The committee expressed its firm conviction that assistance to victims should be understood, developed and promoted for its own sake.

39. In particular, assistance provided to victims needs to be conceived, organised and provided independently from the overall interests of the criminal justice system. Even when the interests and the position of the victim are taken into consideration as part of the criminal justice procedure, the overall aim of assistance policies to victims should have the interests of victims as their primary focus".

If any further confirmation were needed, it is to be found in Recommendation 5.3. which encourages the setting up of specialised centres for victims of crimes such as sexual or domestic violence where, according to the Explanatory Memorandum (82) "they should be able to obtain support and information whether or not they decide to report the crime to the authorities". As independent victim services are also required elsewhere in the document to respect the confidentiality of the people they support, there is no suggestion that crimes coming to light in this way must be notified to the police. Services are, however, expected to provide information to assist victims if they do eventually choose to report. This potentially controversial recommendation was also adopted without amendment, an important indication that victims' interests are now beginning to be recognised in their own right.

4. A holistic approach to victim services

Having established that the responsibilities of governments should extend beyond the requirements of criminal justice, it now became necessary to define the various areas of social policy to which our recommendations should apply. We know, for example, that it makes little sense to concentrate services for victims within the criminal justice process if their physical and psychological health needs have not first been met. Providing expenses to get to court is important, but not as important as ensuring that victims are able to replace essential property which has been stolen or funds needed for the maintenance of their families. Similarly, there is little point in arranging protection for victims giving evidence in court if they are equally fearful about their safety from the offender in the community. We had sufficient experience amongst members of the group to know that the effects of crime can and do extend to all aspects of personal and family life. If asked to prioritise the problems they have faced following a crime, most victims will refer to the emotional distress experienced by themselves or members of their family, financial problems caused, for example, by theft or loss of time from work as well as the need for general emotional support in coping with the consequences of an unexpected and unwanted experience. These problems will occur whether or not an offender has been detected. Services designed to meet these needs would include personal support to help victims understand both their own reactions and those of other family members, practical help with home security, the replacement or repair of stolen or damaged items and the need for a victim-aware health service capable of providing appropriate support and treatment.

To take account of these issues, recommendation 3.1states that governments “should identify and support measures to alleviate the

negative effects of crime and to undertake that victims are assisted in all aspects of their rehabilitation, in the community, at home and in the workplace". There are, accordingly, and unlike any earlier international instrument, extensive provisions relating to all public social agencies who are likely to come into contact with victims in the aftermath of crime. These include all services dealing with health, education, housing, employment and social security, all of whom should be encouraged to have in place special measures for the protection and support of victims. Most particularly, relevant staff should be trained (recommendation 12.5) to a level which is appropriate to their contact with victims. People who become victims outside their own country are not forgotten; there is a call for staff in embassies and consulates to be ready to give appropriate information and assistance whenever needed.

4.1. Training for personnel in contact with victims

As with other sections of the Recommendation, we decided that it was important to provide some detail about the issues that need to be covered in the training of all personnel dealing with victims. These include staff in the social service agencies already referred to, members of the criminal justice agencies and those in the emergency services who attend the scene of a major incident. We felt strongly that all those coming into contact with victims when they are at their most vulnerable should have a good understanding of the way in which a crime can affect attitudes and behaviour. Victims may express uncharacteristic anger or vengeance or describe feelings of guilt, all of which could lead to inappropriate responses from police and helpers if they are not properly understood. Similarly, it is vital to avoid the danger of causing secondary victimisation, defined here (Recommendation 1.3) as "victimisation which occurs, not as a direct result of the criminal act but through the response of institutions

and individuals to the victim". Staff should understand which words and actions may be unhelpful or even damaging to victims and how to guard against causing unintentional harm. Finally, all personnel should have a good knowledge of the other services which are available in the local area, including specialist services for those who need them and the ways in which victims can obtain further help.
Of course, professional personnel are only a minority of the people a victim will come into contact with in the aftermath of crime. The reaction of friends, family, neighbours and work colleagues are equally, or even more important to the process of recovery. There is a particular danger of "victim blaming" as those close to the injured person struggle to come to terms with their own distress, fear, or anger. It is all too easy to ask, for example, why the victim had put themselves in such a vulnerable position or why they did not do more to protect themselves. We therefore recommended (Recommendation 16) that states should take steps to raise public awareness of the needs of victims and encourage understanding of the effects of crime with the joint aims of preventing secondary victimisation and promoting rehabilitation in the community.

4.2. Dedicated Victim Support Services

All earlier international protocols, including the E.U. Framework Decision, have referred to the importance of non-governmental organisations (NGOs) who provide services specifically designed for the purpose of supporting victims. While it is generally recognised that the agencies of the state cannot provide every service that is needed by victims of crime, it has also been acknowledged that the support of the state, financially and otherwise, is essential if these services are to operate at their optimum efficiency. In repeating these recommendations, we decided to draw particular attention to the importance of the national "generalist" victim NGOs which provide

services for all victims of crime. These organisations, 21 of which are already operating in Europe and affiliated to The European Forum for Victim Services, have proved to be important in developing standards of service and in co-ordinating access to other provisions in the community. Brienen and Hoegen, in their study published in 2000, had noted that countries in which such services were operating were more likely to have advanced the development of services and policies in general. We therefore stressed that, as well as ensuring that all victims have access to support, national victim services are easily "accessible to governments for consultation on proposed policies and legislation" (Recommendation 5.6). Recognising that services may be structured differently in the various member states, our recommendation (Recommendation 5) proposes that all services for victims should be fully co-ordinated, "by a single national organisation or by some other means".

The services to be provided we summarised as "emotional, social and material support, before, during and after the investigation and legal proceedings" (Recommendation 5.2). These should be confidential, free of charge and be delivered by people who are trained and "fully competent to deal with the problems faced by the victims they serve". For those victims who, for whatever reason, have not felt able to report their crime to the police, we recommended that free national help-lines should be provided as well as specialised centres for sensitive crimes such as sexual or domestic violence.

5. New provisions for criminal justice

The original remit of the group was to concentrate on "assistance" to victims but we soon realised that it would be difficult to produce a comprehensive set of recommendations which did not include the role of the criminal justice agencies. Good treatment in the community could be undermined by a bad experience in court and vice versa. In any case, we concluded, the police are in every sense a social agency, providing information and protection in the community. Their role is not limited to the detection and prosecution of offenders. It was therefore agreed that we should extend our discussions to every aspect of the victim's experience.

Countries within the European Union were already bound by the provisions of the E.U. Framework Decision and we recognised that much best practice relating to criminal proceedings had already been included in this. The Framework Decision requires that information should be provided to victims at all key stages of the case, including information about the release of offender where a victim may be in danger. Victims should be treated with respect and recognition and specific arrangements should be made for those who are particularly vulnerable. Further provisions are included regarding protection, compensation from the offender, penal mediation and the involvement of victim support services before, during and after the trial. We decided therefore to base our own recommendations on the provisions of the Framework Decision in the hope that other countries in the wider European community would be encouraged to follow this example. We did, however, identify several ways in which we thought the document could be improved.

The issue of police referrals to non governmental victim services had been fraught with difficulties for many years. While all E.U. countries

have adopted the same rules relating to data protection, these were being interpreted differently from state to state. In the majority of countries, the police consider it to be unlawful to pass the names and addresses of victims to NGO support agencies, in stead suggesting that the victims should make contact themselves to request a service. In other countries, notably France, the UK and The Netherlands, the means had been identified, either through legislation or by judicial ruling, for victims' contact details to be passed to approved victim support organisations unless the victim specifically requested otherwise. This practice had become known as the provision of "negative consent". Practitioners have learned from experience that victims find it difficult to ask for help while most find it reassuring to be contacted with an offer of support. In recognition of this, Recommendation 4.3 calls upon states "to facilitate the referral of victims by the police to assistance services so that the appropriate service can be offered". To avoid any doubt as to the practice being recommended, the Explanatory Memorandum (63) refers to the problems surrounding data protection and provides examples of countries which have dealt with this issue successfully.

One, seemingly small but vitally important, addition which is included in the Recommendation is that, in addition to simply being given information about key decisions, victims "should be provided with explanations of decisions made with regard to their case" (recommendation 4.4). All too often, people with little knowledge of the law or criminal procedures receive formally worded letters or brief telephone calls giving vital news about an issue of great emotional significance. Victims can be left feeling, at best, confused or, at worst, misunderstanding the decision or the reason why it was made. Steps need to be taken to ensure that victims not only receive the information but also that they understand it. The training of criminal justice personnel has already been referred to and it is clearly relevant here.

Both documents call upon member states to ensure that financial compensation from the offender can be awarded to the victim in the process of criminal proceedings. The Framework Decision also requires that "appropriate measures" should be taken "to encourage the offender to provide adequate compensation". Experience has demonstrated that awards from the offender are far more likely to be successful when the state takes steps to enforce the payment or to assist the victim in doing so (Explanatory Memorandum 102). Recommendation 7.2 therefore goes further by proposing that: "Advice and support should also be provided to victims in making these claims and in enforcing any payments awarded". States are encouraged to consider what steps are needed to ensure that the order of compensation becomes a practical reality.

Finally, given that the Framework Decision is binding on all member states in the EU, it is perhaps not surprising that members took steps to negotiate limitations to various provisions they would have difficulty in implementing. For example, the common law systems which operate in Ireland and the UK do not provide for victims to become "parties" to criminal proceedings. A clause was therefore agreed that there would be no obligation to "ensure that victims will be treated in a manner equivalent to that of a party to proceedings". An unfortunate consequence of this, whether it was foreseen or not, is that victims in Ireland and the UK who wish to attend the court hearing but who are not acting as witnesses cannot benefit from the provisions relating to translation services in court, legal aid or the reimbursement of expenses, all of which must be made available to victims who "have the status of parties or witnesses". No such qualification has been included in the Council of Europe Recommendation. All provisions here are intended to be available to all victims on the basis of their needs.

6. New provisions based on practical experience

The preamble to the Council of Europe Recommendation (2006)8 refers to the extensive developments in research, services and legislation which have taken place since the earlier Recommendation in 1987. The group of specialists convened to draft the new Recommendation was designed to reflect the range of experience and expertise that is now available. As previously described, it included prominent practitioners, academics and government officials from all parts of Europe and we were able to draw upon both the literature and the organisational experience which had been accumulated over the past twenty years.

Particular reference is made in the preamble to the work of the European Forum for Victim Services (now renamed Victim Support Europe) and the policy statements published by that body were drawn upon extensively during the drafting of the Recommendation. These include the "Statement of Victims' Rights in the Process of Criminal Justice" 1996, "The Social Rights of Victims of Crime" 1998, the "Statement of Victims Rights to Standards of Service" 1998 and the "Statement on the Position of the Victim Within the Process of Mediation" 2005. As a result of the extensive knowledge and experience available to us, we were able to deal with various issues which had not been included in previous international agreements.

Protection in the community: While most countries already have extensive provisions for the protection of witnesses in cases of organised crime or terrorism, few extend such protection to victims, for example, of stalking, hate crimes or domestic violence, who are often at equal, or even greater, risk. We identified an urgent need for particularly vulnerable victims to be protected in their own communities and in some cases to be assisted with relocation.

Recommendation 10.2 calls for "specific protection measures --- for victims at risk of intimidation, reprisals or repeat victimisation". The Explanatory Memorandum (125) confirms that protection should extend well beyond the criminal justice process and could "include practical measures, such as alarm systems, closed circuit TV, video cameras and involving neighbours, the community etc.".

Household insurance in high-crime areas: We also recognised the difficulties faced by many people in obtaining household insurance. Residents in high crime areas are likely to be amongst the poorest members of the community whereas the cost of insurance is likely to be comparatively high, as a result of the increased risk. The net result is that the families most vulnerable to household crime are frequently unable to obtain insurance that would enable them to replace stolen property or to repair damaged homes. It was difficult to identify a specific recommendation, as all states rely on the private commercial sector for the provision of home insurance. We considered various possibilities, such as group insurance cover to be arranged by social landlords for all their tenants or encouraging insurance consortia to make special provision in return for a statutory requirement for householders to insure. We were finally forced to conclude that all states should at least be aware of the extent of the problem in their own countries and "should encourage the principle that insurance be made available to as many people as possible".

Access to civil remedies: Professionals who work with victims are aware that there are many problems which need to be dealt with in the aftermath of crime which can not be solved either by criminal justice, or by personal support in the community. For example, families afflicted by domestic violence, including murder within the family, may be faced with a series of difficult legal problems. When a

father has murdered his wife, who should have the care of the children? The father, usually in prison, is now the only legal parent but should it be his family, or the relatives of his wife who should be entrusted with the upbringing of the bereaved children and who should have the right to decide? Where a wife or unmarried partner has been abused, but the offender is the legal owner of the home, who should have possession of the property, particularly when children are also involved? In cases where the injured party is permitted to remain in the home, whether or not children are involved, the question arises as to how the offender can be prevented from continuing to have access.

In all cases of violence and in the more serious cases of property crime, compensation awards from the criminal courts will rarely provide adequate recompense for the losses which have been incurred. Many victims would do better to state their case in a civil action for damages.

In all of these examples, the victim, or a bereaved family, needs to have access to civil remedies but may not have the necessary knowledge of the remedies available or the financial resources to pursue their claim. In recognition of this problem, recommendation 7.1 proposes that victims should have access to civil, as well as to criminal justice to protect their rights and the provision of free legal aid in appropriate cases.

Repeat victimisation: When the first Council of Europe Recommendation was published in 1987, "prevention of victimisation" was included in the terms of reference. For the new Recommendation, it had been agreed (Explanatory Memorandum 34-35) that as "crime reduction is considered to be an issue that affects the whole community, not just those people who have become the victims of crime", and in view of the extensive volume of work which

has been carried out on this subject, this should be the subject of a separate document. However, one important aspect of crime reduction had not been recognised at the time of the first Recommendation. The concept of "repeat victimisation" was not identified until the mid 1990s. It was then discovered from academic research that, once a crime has occurred, the same victim, or the same property, is significantly more likely to be victimised again. It follows that any service designed to support the victims of crime should incorporate provisions to help victims to avoid further victimisation. There would be little point in restoring confidence, repairing damage and replacing stolen property if the same event is likely to recur in the foreseeable future.

Recommendations 10.5-10.7 take account of this new knowledge. States are encouraged "to develop policies to identify and to combat repeat victimisation. The prevention of repeat victimisation should be an essential element in all strategies for victim assistance and crime prevention". All personnel dealing with victims should be aware of the risks and the means of reducing the probability of further crimes. They should also advise victims and assist them in implementing any measures to protect themselves from repeat victimisation. The recommendations are elaborated in the Explanatory Memorandum (127-130). Examples of good practice are provided for identifying the possibility of repeated burglaries, harassment and hate crime as well as the provision of special facilities to enable victims to report their victimisation, without increasing their vulnerability.

Mediation between the victim and the offender: The practice of mediation in criminal cases has also developed significantly since the previous Recommendation. Most of the international protocols have focussed on the benefits that can be achieved from this process. However, the policy document published by The European Forum for

Victim Services has identified, in addition to the potential benefits, the possible risks of secondary victimisation if the interests of the victim are not properly taken into account. The committee considered all of the relevant documents and we aimed to present a balanced recommendation, taking into account the respective interests of justice, the offender and the victim.

We concluded (Recommendations 13.1-13.3) that statutory agencies should, where appropriate and available, consider the possibilities offered by mediation between the victim and the offender. The interests of victims should be "fully and carefully considered" throughout the process and "Due consideration should be given not only to the potential benefits but also to the potential risks for the victim". Clear standards should always be adopted to protect the interests of victims and they should have access to independent advice and the ability to withdraw from the process at any stage. Steps should also be taken to ensure that victims are able to give their consent freely, without any possibility of coercion.

The Explanatory Memorandum (144-148) draws attention to the need for special care in cases of intimate relationships, such as domestic violence, where a victim may not be "in a position to express free consent". Cases which are not considered to be suitable for mediation "as a diversion from the criminal justice system may still benefit from mediation at any stage following the sentence". We stressed once again that it is essential that mediators are properly trained to take account of the interests of all parties and that they should be fully aware of the dangers of causing secondary victimisation.

7. The Adoption of the Recommendations

The recommendations of the Group of Specialists was presented initially to the committee comprising senior government officials from all member states of the C. of E. Some small, but important changes were made at this stage. For example, our proposals regarding the provision of state compensation to victims of violent crime (not previously included in this paper) were amended to conform more closely with the E.U. Council Directive on compensation (2004). The changes, which were not unexpected, related to the level and range of damages to be compensated. The important principle, that compensation should be based on "social solidarity", was confirmed. In view of the political importance of terrorism at this time, following the recent atrocities in New York, Madrid and London, further references to victims of terrorism were added to the text although the substance of the paper remained unchanged. Overall, our proposals were warmly welcomed. Recommendation (2006)8 was then placed before the Committee of Ministers on 14th June 2006 at a meeting of Ministers' Deputies where it was formally adopted.

It was then agreed that the text of the Recommendation would be presented as a basis for the discussions of the annual Conference of European Ministers of Justice which would be held in Yerevan, Armenia in October 2006. Although the conference took place after the WSV Symposium, it can now be reported that the Conference welcomed the Recommendation and "the extensive and effective" measures it provides for all victims of crime. The ministers decided:

"to promote measures at a national and international level to improve assistance to victims and their protection from repeat and secondary victimisation as well as to ensure, as far as possible, their psychological and physical rehabilitation as well as adequate compensation for damage suffered".

The European Committee on Crime Problems was entrusted with the responsibility to promote the Recommendation and to report back to ministers on the progress of implementation.

7.1. The problems of implementation

The adoption of such a wide-ranging set of provisions for victims of crime in Europe is a major landmark in the continuing campaign to secure the rights and services to which all victims should be entitled. Those of us who were involved in drafting the document were impressed by the enthusiasm with which our Ministers of Justice received our work and the commitment they made to promoting the implementation of the new measures. We were also aware, however, that previous international agreements had still not been fully implemented many years after their adoption. Even in the most advanced countries, we continue to struggle for victims' issues to be given a higher status and for the appropriate resources to be made available. Even the obligatory provisions of the E.U. Framework Decision have not yet been fully implemented. Political priorities rarely accord with the hierarchy of victims' needs as perceived by victims themselves or by those of us who work in the field. In addition to the continuing priority given to services associated with the criminal justice process, there have been many occasions when new developments have been determined more by the political sensitivity surrounding certain types of crime than by the needs of victims in general.

8. Crimes given political priority

Terrorism: One very important example of this has already been referred to. All governments are sensitive to the problem of terrorism which, by its very nature, causes alarm and anxiety throughout the population, even in countries which have not been directly affected in recent years. News of major atrocities spreads rapidly around the world, challenging our sense of security and impacting, not only on individuals and families, but also on trade, commerce and tourism. In addition to taking steps to prevent further tragedies, governments need to be seen to have responded effectively to the injury and distress which has already been caused. As a result, there is a tendency to put in place enhanced services and compensation programmes which are not available to victims of other violent crimes.

Substantial awards of compensation were available to families bereaved by the World Trade Centre tragedy in 2001and a special organisation was set up in Madrid to support those affected by the train bombings there in 2004. Following the London bombs in 2005, the government announced that victims would be compensated through the normal Criminal Injuries Compensation programme, which was a brave statement given the extent of media campaigning for more. However, the awards were fast tracked and victims also received significant additional payments from a voluntary charitable fund set up by the London Mayor. Clearly the victims and bereaved families deserved every penny, and more, but many families of other murder victims expressed their hurt and anger that their loss appeared to be regarded as less important.

While welcoming the attention which has been paid to the survivors of terrorism, victim service practitioners in many countries have

fought a long battle to secure equal rights and priority for victims of crime in general. It will be interesting to see if, having accepted the principle of services for all victims according to need, ministers will now ensure an equality of provision.

Major organised crime: Similar issues have arisen in the response to other major organised crimes such as drug trading and money laundering, which are rarely confined to a single country. Investigations usually involve the co-operation of several states, all of whom will benefit from a successful prosecution. Witnesses, who are often also victims, are particularly vulnerable to intimidation and reprisals. Without specially arranged protection, they are unlikely to be able to fulfil their essential task of providing evidence. As a result, most countries in Europe now have elaborate, and costly, witness protection schemes enabling potential witnesses to change their identities or to relocate their families, often to other countries. The absence or inadequacy of similar expenditure to protect victims of other crimes has already been referred to.

People trafficking: There has been a long-standing agreement in Europe that criminal justice in general is a matter of subsidiarity and that each country must be responsible for determining its own systems, while respecting the shared principles of the rule of law. The agreement takes account of the different legal procedures which have been developed historically in each state. There have, however, been extensive discussions of the increasingly important problem of people trafficking, which is by its nature a cross-border crime. International protocols have been developed, aimed at achieving a consistent response and inter-state co-operation. Bearing in mind that all victims involved in these crimes will be foreign nationals in the countries in which arrests and prosecutions occur, standards have been developed and agreed for their treatment. As a result,

there are many countries in Europe which have provisions for victims of trafficking who have no such protection for their own citizens who are affected by serious domestic crime. This is an example of prioritisation that has occurred, not only in recognition of need, but as a direct consequence of international policy.

Abuse of children: It is clearly a fundamental responsibility for governments to provide protection for minors who are abused or neglected by their parents or carers. There are therefore programmes in all European countries for the support and supervision of families in which children are considered to be at risk or for children to be removed where no other intervention is sufficient. In most countries, special measures have also been introduced to assist children in giving evidence to secure the conviction of an alleged abuser. The services provided are clearly essential but they may not extend much further than to those which are required to fulfil the statutory obligations of the state. Many children become victims of crime outside the family. It is less common to find services, other than those provided by dedicated, often poorly funded, NGOs for children who have been victims of abuse and other crimes in the community.

Sexual and violent crimes against women: Over the years, I have been privileged to be involved with development programmes and studies in many countries, including those of central and Eastern Europe. Even in countries where there is little or no provision for victims in general, there are almost always some services for women. These are usually provided by NGOs who specialise in supporting women who have been subjected to domestic or sexual violence. Services may include counselling, refuge accommodation, legal advice and support, delivered by both paid and voluntary staff. Although most of these services have been initiated by women's voluntary organisations, they are often supported by, usually

inadequate, funding from central or local government departments. Their motives of the authorities may well be altruistic but it should also be recognised that women constitute 50% of the electorate in all democratic societies. The increasing demand for the protection of women can no longer be ignored.

The danger inherent in responding to each of these political priorities is that they can tend to obscure the continuing neglect of victims of other crimes. Victims of individual crimes which occur in the community have, until recently, lacked a voice to demand justice. It is now the role of victims' organisations and academic victimologists to raise the profile of victims of crime in general, with the aim of ensuring recognition and equality of treatment for all.

9. Victims in the criminal justice process

There can be no doubt that the position of victims has achieved considerably more prominence in recent years, resulting in the development of new policies, procedures and dedicated services in many countries. However, priority still tends to be given to rights and services which also contribute to the achievement of criminal justice objectives including the improvement of conviction rates and increasing public confidence in the criminal justice system. As a result, there is continuing concern that victims and witnesses are being recognised less for their own needs than for the role they can play in the investigation of crime and the prosecution of offenders. A truly victim centred strategy, in the terms envisaged by Recommendation (2006)8, would give considerably more priority to the personal, practical and emotional needs of victims, in their homes and in the community, whether or not an offender has been identified. A short case study of recent developments in the U.K. will serve to illustrate this point.

9.1. A case study of the U.K.

The U.K. is generally regarded as being amongst the more advanced countries with regard to the provisions available for victims. State compensation for victims of violent crime has been available since 1964 and compensation from the offender can be both ordered and collected by the criminal courts. There is a well established Victim Support voluntary organisation which offers services to all victims throughout the country as well as a wide range of specialist NGOs providing additional assistance for example to children, victims of rape, hate crimes and domestic violence. In 1990, the U.K. was the first country to adopt a charter of victims rights, although these were not at that time enforceable. Over the past twenty years, extensive

new procedures have been introduced aimed at ensuring that victims will, if they wish, be kept informed of all developments in their case, including the arrest, charge, and prosecution of the alleged offender. Victims should also be informed, with an explanation if necessary, of any decision to reduce or to discontinue the charges against the defendant. In the case of sexual and other violent crimes resulting in a sentence of more than twelve months, victims must be informed of plans to release an offender and they are consulted about any continuing concerns they may have in this regard.

The Domestic Violence Crime and Victims Act (2004), introduced an important Code of Practice providing victims for the first time with statutory rights. The Code, which took more than a year to negotiate, drew together and extended the duties of the various criminal justice agencies to provide victims with information about their case and their rights. There is a requirement for the police to maintain monthly contact with victims whose offenders have remained undetected to provide them with information about the progress of investigations, and finally to inform them when the case has been closed. Where a crime has resulted in death, the police must provide the family with a Family Liaison Officer to facilitate communication with the investigating team. The Code also requires that all victims of violent or personal property crimes, with the exception of car theft, must have their contact details referred to Victim Support within two working days of the crime being reported, unless the victim requests otherwise. The Code of Practice finally came into effect at the beginning of 2006.

There have also been considerable improvements in the support of witnesses, both victims and non-victims. Research has demonstrated that the non-attendance of witnesses is one of the main causes of

cases failing to proceed through the courts and this problem has now become a major driver of government policy. More is now known about the extent of witness intimidation, particularly in cases of sexual and other violent crime and the plight of vulnerable witnesses including children and people with learning difficulties has also achieved a higher profile. The Youth Justice and Criminal Evidence Act (1999) introduced a series of special measures designed to help all vulnerable or intimidated witnesses to give their evidence, often without having to enter the courtroom. The Crown Prosecution Service has acquired new responsibilities for keeping witnesses informed of the progress of prosecutions, applying for special measures and presenting Victim Personal Statements to the court, including any applications for compensation. Witness Care Units have recently been established by the Crown Prosecution Service in partnership with the police and Victim Support to provide an active and accessible contact point to keep all witnesses informed of the progress of their cases and to assess and to meet their needs.

In welcoming all of these considerable improvements in victim and witness care, it must always be remembered that almost all of the new provisions only become relevant after a suspect has been identified and charged and that only 6% of crimes recorded in the U.K. will ever reach the courts. Other victims, whose offenders are not detected, including many who feel unable to report serious crimes such as domestic, racist or sexual violence, must also have access to services and support. The demands on Victim Support and other NGOs in the community far outstrip the current resources available.

The first government strategy, “A New Deal for Victims and Witnesses” was published in 2003, setting out an ambitious agenda to provide both rights and services, not only in criminal justice but also in the community. It was acknowledged that victims needs go

well beyond the criminal case, extending, for example, to health, housing and social security provisions. As I have shown, there has been significant progress regarding those aspects of the strategy which relate to the criminal justice process. Unfortunately, but not surprisingly, most of the proposed improvements in the community have been much slower to materialise.

Recognising that there were still major gaps in provision for the majority of victims, in December 2005, the U.K. government published an important consultation document, "Rebuilding Lives". It is proposed that a new network of Victim Care Units will be established to mirror the work of Witness Care Units by establishing a single co-ordinating service through which the needs of all victims will be assessed and services provided, either directly or by referral to specialist agencies. Funds would be available to the new Units to commission and to pay for services such as counselling or for practical assistance with the prevention of repeat victimisation. If this ambitious new initiative is eventually realised, the U.K. would be able to meet fully the standards of dedicated victim services proposed by the Council of Europe Recommendation (2006). Sadly, the paper also contains a proposal that the additional funds needed for this work could be obtained by significant reductions in the compensation of victims of violent crime. This implies that the overall budget for victims is finite, so that any improvement in one aspect of provision must result in the removal of another. Naturally, there has been considerable opposition to the funding proposals and it is to be hoped that the government will find some other means of proceeding without losing sight of the important concept of enhanced, comprehensive and co-ordinated services.

Also, we are yet to see any significant progress in involving the other government departments identified in "A New Deal for Victims and Witnesses". The health service already provides medical care and

rehabilitation for violent injuries but, to the best of my knowledge, there has been no specific training of medical staff in the effects of crime or the dangers of secondary victimisation. One hospital in Cardiff has pioneered the introduction of a multi-agency programme for victim identification and assessment in its accident and emergency department but it is no coincidence that the doctor responsible for this initiative was also the national vice-chair of Victim Support. Local government housing departments have, for some years, co-operated with the police in programmes of relocation for witnesses in cases of serious, organised crime and drug trafficking but there is still inadequate provision for victims of hate crime or domestic violence. Most schools have developed systems to respond to bullying but I am not aware of any similar response to support students who have been victims of crimes unrelated to their education, such as assault or burglary. Social Services have a key role in the protection of children who are considered to be "at risk" and they have always been closely involved with all aspects of the care of young victims of physical and sexual abuse in the family. It has been far more difficult to secure an adequate response from Social Services to even the most serious crimes against children which occur outside the family. Similarly, most important initiatives to counter the abuse of old people or people with learning disabilities have been taken by NGOs, and there is still a great deal to be done to improve provisions in these areas.

Of course, all of the government departments concerned have their own priorities and it is generally considered that crime related problems are the responsibility of the department of justice. The inevitable consequence is that most advances in victim provision will continue to be those which can be delivered by the criminal justice agencies, for whom the Ministry of Justice is responsible.

10. Conclusion

The adoption of the 2006 " Recommendation on assistance to crime victims" by the member states of the C. of E. marks a significant advance in recognition of the rights to which all victims should be entitled. However, true progress will be assessed according to the extent to which the various provisions of the Recommendation are implemented in practice. Those of us who have been closely involved with developments in Europe are aware that even the policies agreed and adopted in the 1980s have not, to date, been fully realised. Priority continues to be given to aspects of victim care which also advance the interests of criminal justice or to those which contribute to the achievement of other political objectives. It is to be hoped that the C. of E. will monitor implementation of the new Recommendation and use any powers which are at their disposal to encourage full compliance. Whatever the outcome, Recommendation (2006)8, based on the knowledge and experience of experts from across the continent of Europe, has provided new standards upon which any future progress should be measured.

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3 Implementing Victims' Rights - A Case Study on the South Australia Police

Michael O'Connell[1]

1. Introduction

If you want something really important to be done, you must not merely satisfy the reason, you must move the heart also. Only then might all public officials be predisposed to honour victims' rights. (O'Connell 2006[2])

Si quiere que se realice algo muy importante es preciso no solo promoverlo con razones, sino a través de una presentación que toca a lo corazones. Solamente entonces podría lograr que todos los responsables tengan la disposición de respetar los derechos de las víctimas.

もしあなたは本当に重要なものがほしいなら

理屈を証明するだけでなく，心を動かさなければならない。

そうすれば，政治家や公務員は被害者の権利を積極的に尊敬できるかもしれない。

People interested in victimology and victim assistance, whether scientists or humanists, see criminal victimisation as too common an experience for too many people. Consequently, they seek, amongst other things, to reduce that victimisation. They are often roused to action because of the harm endured by others. Alas, some of those charged with helping victims deal with their experiences and the resultant harm do so ambivalently. It is true, of course, that significant improvements have been made in many places. Victims of crime have internationally endorsed rights or principles governing their treatment in a criminal justice system, and in many places services for victims have evolved, even matured, to be among the mainstays in that system.

Arguably, what dictates how well a victim of crime is treated is not the advent of declarations on victims' rights, although these are undeniably important, but the ways those rights are respected and given effect by those who serve victims, especially the police. It is incumbent on these people to put aside their preconceptions about

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2 As spoken by this author when paraphrasing M. Gandhi at the International Symposium on Victimology in Orlando, USA, 2006.

what is good for victims and their individual priorities in the interests of justice for victims. Across all nations, however, history is replete with examples of where the interests of the police, for instance, have overshadowed victims' interests. Even worse, sometimes their acts can be counterproductive and cause a second injury. On the other hand, in many instances the police have taken steps to improve practical outcomes for victims.

Humans, asserted Foucalt, are knowing, knowable and self-knowing. Accordingly, police officers 'working personalities' and their views on victims are a result of their particular way of looking at the world in which they work. Police officers draw on their beliefs to divide victims into deserving and undeserving. As well, labelling a person a victim helps neutralise any threat that person might be to police power and affords some officers opportunities to pursue their priorities, which include catching offenders rather than helping those distressed by offenders' crimes.

Victims' rights are intended to counteract this power imbalance and to encourage officers to treat victims compassionately and constructively. Yet to take Foucalt's point of view one step further, the fundamental shift from crime fighter to service provider requires, amongst other things, a self-imposed commitment to the 'new way' of doing the business of policing. Given the ambit of police discretion, therefore, victims' rights are most likely to be realised when victim-oriented principles and practices have been inculcated in the discourses and procedures normalised in everyday policing. To achieve this, an inoculation is inadequate; indeed, it is absurd to anyone who knows the police to contemplate a vaccination-style approach to changing attitudes and modifying behaviours. Police in general do not alter their ways in response to once-off shots of victimology. If the goal is to heighten police consciousness of the

impact of crime on people, of the needs that victims have as well as their rights then a more sustained effort is required. So how does one bring about the transition that is needed to ensure victims' rights are more than aspirations? To answer this question, this paper tells the story of the South Australia Police, victims' rights and victim assistance.

The main purpose of this chapter is to explain the essential ingredients that make victims' rights more than pledges on paper. These ingredients are: a declaration or charter on victims' rights to serve as a framework for change; several champions who by strong leadership advance victims' rights as mandatory guidelines for action rather than pious platitudes; training and education that emphasizes being victim-oriented for victims' sake and promotes victims' rights and victim assistance; and compliance-monitoring processes so that responses to victims do not fall short of actually addressing victims' needs.

2. Background to South Australia's Criminal Justice System

South Australia, like most former British colonies, has a common law legal system. It was established as a convict-free utopia, which would not require a police force. South Australia, however, was the first Australian colony to have a centralised police force founded on Sir Robert Peel's principles of civil policing.

Before Peel convinced the British Parliament to setup the Metropolitan Police in England, there was no such thing as a centralised, government-controlled police force in that country or its colonies. Instead, crime victims did their own investigation, or paid someone (for example, the Bow Street Runners) to do it for them, and hired their own lawyer to lay charges and to prosecute the defendant. Unlike today, victims made key decisions in the criminal justice process and restitution was the prime punishment.

This so-called golden era in victims' rights was not necessarily just for all crime victims. Rather, for most victims justice was beyond their reach. The investigation and prosecution were time consuming and expensive. Legal expertise was required to navigate the complexities of the legal process. By the mid 19th century the State had largely replaced the former victim driven system with a centralised police force and public prosecutors. Arguably, disenfranchised victims, such as the poor, benefited from the shift to a criminal justice system intended to serve the public interest.

Unfortunately, all victims lost fundamental rights. They no longer had a say on what charges should be laid; they no longer had legal representation in courts; and the emphasis on restitution was replaced by deterrence, denunciation and reformation. For serious

crimes, prison became the main form of punishment, which is of little tangible benefit for victims. Victims seeking compensation for the harm done were forced, if they had the means, to instigate private law suits in civil courts. These tragedies, says Waller (2007, p86), "are exacerbated by a law-and-order industry that is obsessed with human rights and sanctions for suspects and offenders without recognising the human rights of, or harm done to, victims." Yet, gradually since the 1950s, in-roads have been made to remedy this situation.

3. Victims' rights as a framework for change in the South Australia Police

During the 1950s, Margery Fry, a British magistrate, fuelled debate on victims' right to compensation. She argued that compensation should be a legitimate punishment. Moreover, if the convicted defendant could not pay compensation then the State should have an obligation to do so. By the 1960s her advocacy had fostered the modern era of state-funded victim compensation schemes. In 1969, South Australia became the third Australian State to introduce such a scheme. This proved to be politically popular but did not satisfy victims' desire for law reform, systemic changes and other assistance.

Also during the late 1960s in South Australia, the feminist movement began to raise concerns about women as crime victims. By the 1970s they had encouraged changes in the treatment of female victims of domestic violence and sexual assault victims. The first shelter in South Australia for women escaping violence in their homes opened in 1974 and within a couple of years a specialist sexual-assault service was set up in a public hospital. By the mid 1970s the State Government had appointed a senior judge to examine criminal proceedings and, among other outcomes, to recommend changes to sex offence laws. Also by then the South Australia Police had adapted its procedures for dealing with family violence so that, amongst other steps that might be taken, police would call on the expertise of Crisis Care workers. When requested by the police, these workers often attended violent households to help victims. Unfortunately, the Police had also been reluctant to accept some of the criticism directed at them, especially by elements within the women's movement. Their opposition reflected in part

their innate conservatism and a view that police are not social workers.

Violent crime had been increasing in South Australia since the end of World War II. Two series of killings in the late 1970s led to the victims' families coming together to share their pain and agony and to vent their frustration, even anger, over their treatment in the criminal justice system. While there were differences between these victims and the feminists, they had common criticisms of the criminal justice system. They convinced Ray Whitrod, a former South Australian police officer who had recently resigned as Commissioner of Police in Queensland (another Australian State), to head the Victims of Crime Service in South Australia, which was the first general victim support service in Australia. This former officer won favour with local politicians and both major political parties committed to holding an inquiry into crime victims and criminal justice. An inquiry was commissioned by the Honourable Trevor Griffin as Attorney-General and reported in 1981 – which was another first in Australia. Not surprisingly, the inquiry recommended that victims be provided with greater consideration during the criminal justice process. The South Australia Police actively participated in the inquiry and staff later presented papers at the first national symposium on victimology that same year. The Police also agreed to distribute information on the Victims of Crime Service at crime scenes, which no other police force in Australia did at that time. A lesson on victims' needs and victim assistance, which was largely promotion for the Victims of Crime Service, was introduced for police recruits

South Australia continued to be at the forefront in the development of victim-oriented reform when in 1985 the Honourable Chris Sumner, then the Attorney-General, read the first declaration on

victims' rights in the Parliament and declared that all government departments would be instructed to comply. Despite its significance, this declaration was a set of administrative directions or guidelines rather than actual rights. Notwithstanding this, the declaration underpinned other reforms; particularly the controversial right for victims to make impact statements. The 1981 inquiry had recommended that sentencing courts should pay more attention to the effects of crime. For this purpose, some victim advocates had proposed victim impact statements. The declaration though gave only symbolic attention to victims' right to participate in sentencing offenders. The necessary legislation was not enacted until 1988 and not proclaimed until 1989.

At the same time as this legislation was being debated, a survey of victims was being conducted. Victims' replies validate many of the rights particularised in the declaration (see Figure 1). Many victims, for instance, wanted to be kept informed on the progress of the investigation and prosecution and court outcomes. They sometimes wanted to present their safety concerns at bail hearings. Some victims also wanted to be consulted before key decisions were made and some wanted to be actively involved in making those decisions.

Figure 1 – Victims' desire for involvement by various stages in the criminal justice system as a percentage of the sample

	No Involvement	Informed	Consulted	Actively Involved
Interview Suspects	36.6	45.8	4.7	12.9
Deciding on Charges	21.7	50.5	23.5	4.3
Modification of Charges	27.4	38.3	30	4.3
Attend Preliminary Hearing	42	24.6	0.2	33.2
Bail Decisions	41.3	34.8	17.6	6.2
Attend Court - Not as Witness	38.5	21.8	0.6	39.1
Deciding on Sentence	22.2	48.6	21.5	7.7
Release from Custody	54.7	34.7	7.8	2.8

(Source: Gardner 1990)

It was also evident from other survey results that about 85 percent of victim-respondents felt they were treated satisfactorily at the time they reported offences but victim satisfaction declined markedly thereafter. Several remedies were introduced (as outlined below) but their success was challenged when the results of the evaluation of victim impact statements were released in 1994. Over three quarters of the respondents stated that the criminal justice system failed to give enough attention and help to victims (Erez et al 1994, p54). Many respondents stated that more information should be provided on the way the system works and victims' rights; the criminal justice process should be faster, more efficient and less intimidating. Yet, again, most victims were satisfied with the police. Over 80 percent of respondents were satisfied or very satisfied with the police investigator and 72 percent were satisfied or very satisfied with the

police prosecutor (Erez et al 1994, p55). Victims appeared to become increasingly indifferent about their treatment as their cases progressed through the criminal justice system.

As the 1990s ended another victim survey was conducted. Whereas the samples for the earlier surveys included victims of property offences and victims of violent offences, this third survey included only victims of violent offences (JSU 2000). Victims were not asked to rate their satisfaction. Instead, they were asked if the felt they had received the assistance, service, support and/or counselling they expected at various stages in the criminal justice system. On average at each stage, about 57 percent of victims said they received the help they expected. When asked what types of things they wanted, respondents included more information about: preventing victimisation, victim support, victims' legal rights / legal position, progress of investigation & prosecution, and ways to obtain compensation. Victims desired a combination of state-funded victim-support and victim-compensation.

The results of these surveys are not directly comparable. The first survey was face-to-face interviews; the second was a mail-out survey; and the third was a telephone survey. The results suggest, however, that the introduction of victims' rights and complementary changes in procedures and practices have had some positive impact on victims' feelings about the criminal justice system. The results also imply that satisfaction with the police has declined. A few years after the declaration on victims' rights was promulgated close to nine in ten victim-respondents were initially satisfied or very satisfied with the police. Almost a decade after the introduction of the declaration about eight in ten victim-respondents was satisfied with the police. Then not quite one and a half decades after the declaration was introduced only six in ten victim-respondents said they received the

assistance, support and so on that they felt they needed from the police. Notably, victim satisfaction appears to have been higher when the Commissioner of Police and other leaders were actively championing victims' rights (see below).

The Hon. Trevor Griffin as Attorney-General ordered a Review on Victims of Crime in 1999. Almost a year later, the reviewers (JSU 1999) concluded that:

- The Declaration had led to positive reform across the criminal justice sector.
- The bulk of staff from all facets of the traditional criminal justice sector appeared aware of the Declaration.
- All criminal justice agencies had policies consistent with the Declaration. However, it appeared that the implementation of these policies places too much onus on victims to pursue their rights.
- These policies (in the main) are predicated on an assumption that victims are aware of their rights. There was reason to believe that this assumption is problematic.
- Despite attempts to exercise their rights, some victims were still denied their rights. This was blamed to some extent on the attitude of some people, including police officers, within the criminal justice sector.
- The limited knowledge of the Declaration among staff in agencies and organisations beyond the criminal justice sector was also a concern as it is contrary to the intent of successive governments.

The reviewers made sixty-five recommendations in their first report. Many of these were underpinned by the reviewers' contention that a managerial approach to further advance victims' rights and enhance victim assistance would be better than an enforcement approach

based, for instance, on disciplinary actions and sanctions for breaches of victims' rights. The reviewers, for example, recommended that:

- Recommendation 2 -- Consistent with the government's public sector reform, performance standards for Executive Officers in the Justice and Human Services portfolios should, where appropriate, confer an obligation to honour the government's commitment to victims' rights and victims' services.
- Recommendation 19 -- Police should continue to receive compulsory initial and ongoing training and education on victimology including how to respond to victims empathically and constructively, and in a culturally sensitive manner.
- Recommendation 20 -- Compliance with victims' rights and policies and procedures pertaining to those rights should be included as a standard in police performance appraisals.
- Recommendation 44 -- All agencies that have contact with victims (no matter whether that agency provides exclusively service for victims) should ensure their staff is adequately trained on victim issues.

The then South Australian Police Commissioner, Mal Hyde, was quick to endorse the bulk of the recommendations. He gave an undertaking to keep victimological education as a core subject in the promotional scheme. He also accepted the Attorney-General's invitation to have a representative on a Ministerial Victims of Crime Advisory Committee. Despite the enthusiasm of the Commissioner and other chief executives to embrace the recommendations, several of the recommendations central to the managerial approach have never been acted on. Chief executives' employment contracts, for example, still do not incorporate performance standards pertaining to victims' rights. Almost ten years after the review, however, most

chief executives (including the Commissioner of Police) have endorsed an Administrative Agreement (see attached) committing them to work together to facilitate compliance with the current declaration that governs the treatment of victims of crime.

The reviewers did not necessarily recommend that victims' rights should be enshrined in law but did recommend specifically that the Government should reiterate its commitment to victims and their rights. The Government replied by asking the Governor to appoint a Victims of Crime Co-ordinator to help advance victims' rights, especially their rights to services and information. The Government also introduced into Parliament the *Victims of Crime Act* that enshrined a revised declaration, only this time it was a declaration of principles governing treatment of victims in the criminal justice system, not a declaration on victims' rights. Despite the change in language, the Chief Executive of the Victim Support Service told journalists that these steps were the most significant advances in victims' rights for over a decade. Whether victims' rights legislation is "empty" or not for victims however, rests on the actual implementation of any declaration. South Australia's recent history has proven that champions can help give effect to victims' rights. That history has also shown that doing justice for victims requires more than the work of a few dedicated people.

4. The South Australia Police champion victims' rights

Until the 1970s the Police had no definitive policies and procedures regarding the treatment of victims. Initially, inroads to change focused on sexual assault and domestic violence. Victim assistance in policing was confined primarily to immediate intervention in crisis situations. After the promulgation of the first Declaration in 1985, the South Australian Police Commissioner, David Hunt, tasked those officers reviewing police responses to domestic violence and child abuse to explore the implications for the Police. Two years later, he committed the Police to providing a consistent approach to addressing the needs of victims of crime; whilst at the same time developing policies and strategies to reduce actual victimisation and the risks of victimisation. He also acknowledged that the police had to consider the process of victimisation as a basis for developing crime prevention strategies. The Commissioner issued an instruction that the police should honour victims' rights. He stipulated that police officers should always comply with 6 rights, including treating all crime victims with respect and dignity and keeping victims who ask informed about the progress of investigations. He also required that sessions on victims' rights and victim assistance be integrated into the recruit training course. To drive the force's victim reorientation, he established the Victims of Crime Branch. A year later, the Commissioner added that whenever a victim reports an offence they should be given a booklet listing victims' rights and outlining the criminal justice process. This policy remedied the problem that there was no requirement in the declaration on victims' rights to tell victims their rights.

Victims' views on the booklet have been elicited through three surveys. First, a telephone survey of 200 burglary victims showed

that about 82 percent of respondents recalled the police giving them the booklet and of these just under 70 percent read it (Pfau 1989). Second, a postal survey of 427 victims of various violent and/or property offences showed that 52 percent of respondents recalled the police giving them the booklet and of these about 73 percent found it useful (Erez et al 1994). Third, a telephone survey of 222 victims of violent offences showed that almost 56 percent of victims recalled the police giving them the booklet and about 44 percent of these found it useful (JSU 2000). At first glance, these survey results suggest that shortly after the introduction of the policy to give the booklet to victims, more victims could recall being given the booklet than those who responded to later surveys. Also over time victims apparently have found the booklet less useful. Respondents to the third survey were asked what other information they felt they needed at the time they reported offences. Their answers included: more information about counselling and victim support; more information about the criminal justice process; information about compensation; and, information about preventing further offences (JSU 2000, p13). These suggestions were addressed in the next edition of the booklet (see www.voc.sa.gov.au). A draft of the revised booklet was presented to victims who were clients of victim support services. The feedback on all sections of the booklet was overwhelmingly positive.

Returning to the 1980s, Commissioner Hunt also assigned a Special Projects Team to write papers to promote among his peers in other States and Territories and at the Australian Police Ministers' Council the virtues of police being victim oriented. He presented two papers to the Conference of Commissioners of Police of Australasia and the Southwest Pacific Region (Item 12 & Item 26, 1987; see also Item 33, 1989). He stimulated interest as other Commissioners rediscovered crime victims. The Victorian Commissioner who helped the Victims of Crime Assistance League in his State, for instance, publicly criticised

his State Government for not embracing victim impact statements. He also joined Hunt in sponsoring a resolution expressing concern for the plight of victims of crime and formally registering an interest in furthering the interests of victims of crime in policing. They recognised the importance of victimology as a basis from crime prevention and law reform and sought ministerial support for the implementation of crime-prevention strategies to reduce victimisation. All Commissioners endorsed the resolution at their conference in 1989. Since then, victim issues have featured on the Police Commissioners' Conference agenda; and the theme was taken up by the Australasian Crime Conference in 1995 when senior police resolved to continue to enhance and develop victim strategies to, among other outcomes, encourage a co-operative approach within the criminal justice system (Resolution - Item 1, 1995).

Back in South Australia, Hunt had continued to reform the South Australia Police. He approved the appointment of a Police Victim Contact Officer. His initiative proved fruitful not only for victims but also for the police, because the Government provided additional funds to employ another five contact officers who were tasked with keeping victims informed and referring them to support services. Furthermore the Government, in return for the police accepting responsibility for preparing victim impact statements, funded a police sergeant as that State's and Australia's first Impact Statement Co-ordinator. The co-ordinator convinced the Commissioner and then the Attorney-General, to approve victims writing their own impact statements (South Australia Police 1990). He also played a key role in the development of a computer based Brief Enquiry And Management System (BEAMS) to give police officers ready access to information about the progress of criminal proceedings. The BEAMS allows police to search records on prosecution files using victims' particulars as opposed to traditional police systems which are geared

toward offender data. As a consequence, the South Australia Police were better able to meet victims' information needs. By the mid-1990s, South Australia Police were acclaimed as the most victim-oriented police service in Australia (Eijkman 1994). They were looked on as the best practice example in Australia. Some advocates, however, continued to accuse the Police of too often paying only 'lip service' to victims' rights.

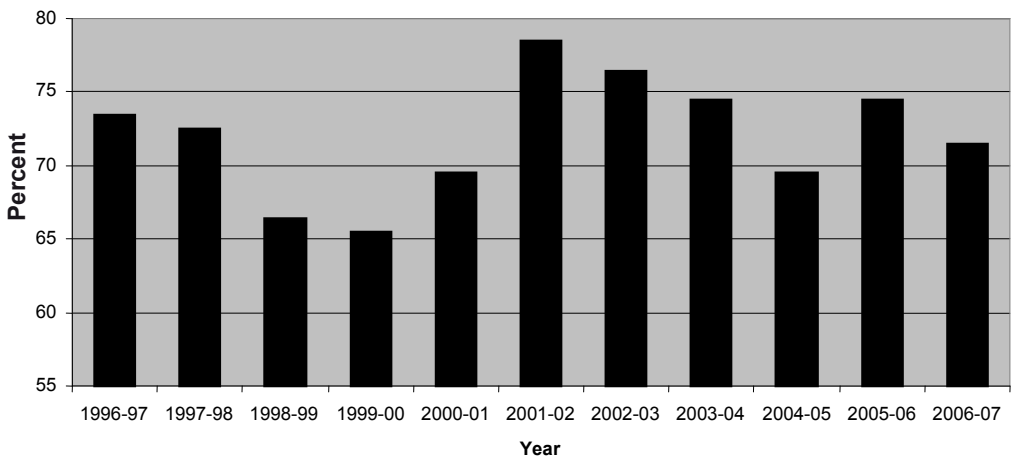
For most of his era as Commissioner, Hunt argued that there was a need to rethink past policing strategies. He asserted that the police are in a unique position to observe the trauma and suffering of victims of crime but also agreed that the police may have been serving the criminal justice system more than those suffering (Hunt 1987;1988). He emphasised the importance of preventing criminal victimisation and used this as a cornerstone to support community policing. The South Australian Police Review in 1994 reported some success in shifting the mindset of many police. It also reported that despite the corporate support for community policing, including the victim-oriented policies and procedures mentioned above, the 'rank and file' officers predominantly saw themselves as crime fighting, law enforcers. Consistent with this, some officers continued to feel that concentrating on post-offence responses to victimisation such as apprehending offenders was a better way to respond to victims. Clinging to the crime-fighter paradigm, Eijkman (1994) warned all Australian police services, however, risked locking victims into retributive justice that did not necessarily restore victims' personal freedom or autonomy. Five years on, during the Review on Victims of Crime in South Australia, it became evident that concern for victims' rights in the 1990s had waxed and waned in the criminal justice bureaucracies, including the police. The reviewers concluded that the existing declaration on victims' rights had fostered improvements in the treatment of victims but had not guaranteed that these were

always meaningful and appropriate for all victims. Both reviews confirm that changing culture is a difficult task. The later review (JSU 1999) also highlights the important role that champions can play in the implementation of victims' rights.

In the late 1990s, the South Australia Police conducted a comprehensive review resulting in a major structural reorganisation. There was a corporate shift towards a generalist approach to policing. Many once centralised responsibilities were devolved to local area commands. Satisfying victims' concerns, however, could not be divorced from the question of how limited resources should be directed or re-directed. Policing was becoming more business oriented. In the pursuit of efficiencies, tensions in the variety of services the South Australia Police offered 'consumers', including victims of crime, emerged. The Police embraced measures of police performance that incorporated a dual emphasis on crime-fighting and service delivery. The former aligns consistently with the image of the victim as central to crime control and a justification for conservative law and order policies; whereas the latter links supporting the victim into a broad caring philosophy that enhances an altruistic image of police and connects crime policy and social policy. Policing actually is conducive to both but organisational structures and priorities are important determinants of police officers' activities. As well, Police activities and conduct are important determinants of victims' satisfaction (Shapland 1983; Brandl & Horvath 1991; Chandek & Porter 1998). Thus, satisfying the expectations of victims of crime requires a balanced approach. Whether or not the South Australia Police struck that balance at this time is questionable. Data from the Productivity Commission's reports on policing in Australia shows that public satisfaction with the South Australia Police declined between 1997 and 2000 (see Figure 2) but increased markedly about 2001; and with the exception

of 2004-05 satisfaction has remained over 70 per cent since. The surveys also shows that for those people who initiated contact with the Police, the most common reasons were reporting a crime and getting assistance. With this in mind, the reasons given by these people who were dissatisfied with their most recent contact with the South Australia Police are particularly pertinent. Between 1996-97 and 1999-2000, about one third of respondents said the police 'took no action', about one third said the police were 'unfriendly / impolite' and about one fifth said they were "not kept informed'.

Figure 2 - People who were 'satisfied' or 'very satisfied' with South Australia Police



Note: Data are based on approximations drawn from the Australian Productivity Commission's Reports on Government Services (Steering Committee for the Review of Government Service Provision) 1999 to 2008. The graph is intended to illustrate the reported trend in satisfaction.

In the aftermath of the reorganisation, the Police disbanded the Victims of Crime Branch. The six metropolitan posted Victim Contact Officers who had been functionally responsible to the Victims of Crime Branch but daily reported to local regional managers were reassigned as local officers respectively in the six Local Service Areas in metropolitan Adelaide. Commanders for the 8 rural Local Service

Areas were encouraged to allocate Victim Contact Officers' duties to an officer in their areas but were not given additional staff for this purpose. Responsibility for training on victims' rights was largely centralised at the Police Academy. Some aspects of the restructuring that were seen to reduce timely support and service for victims of crime were openly criticised by victim-advocates (Paterson 2004; Victim Support Service 2004). A Parliamentary Committee heard that the Police were struggling to respond appropriately to some victims as they did not have adequate resources. The current Commissioner of Police, Mal Hyde, conceded some of the concerns and as a result, for example, he established a Victim Strategy Section but with less staff than the former branch. He reaffirmed his support for viable partnerships with victim service providers such as the Victim Support Service and the Rape and Sexual Assault Service. He also countered that the Police had established procedures and trained officers to comply with the incontrovertible victims' rights prescribed in the *Victims of Crime Act*. Others felt that more detailed and considered reforms as well as advances in training and education would be necessary to enhance victims' rights (Select Committee 2004) and achieve an optimal victim response.

5. Victimological education to improve justice for victims

Other significant advances for victims' rights during the 1980s and 1990s happened in education. At the first national symposium on victimology in South Australia in 1981 several papers encouraged training and education for police, lawyers and judges. Several proponents contended that many of the problems for victims in the criminal justice system stemmed from insensitivity fuelled by practitioners' ignorance. It was argued that it was absurd that the police were not educated on how to properly deal with the human suffering, which many officers faced daily. Thus, if they are to fulfil their obligations to victims resulting in a reduction in secondary victimisation, the police should be educated in the theories and practices of criminal victimology; in particular, victims' rights, the process of victimisation and the effects of crimes, as well as the availability of victim assistance. A similar view was expressed in the New South Wales Task Force on Services for Victims of Crime (1988). It recommended tertiary institutions should develop compulsory curricula on victims of crime for police officers and others who dealt with victims. In fact, many of the courses that have developed are often optional courses only and thus many students do not elect to study them (Garkawe 2003).

Victimological training in the Police initially focused on issues facing victims of domestic violence, sexual assault and child abuse. In the 1980s it was broadened to cover victims in general. Recruits began to learn about victims' rights, their needs and the effects of crime. Assessment during practical workshops covered recruits' victim-response skills and knowledge. In 1988 David Hunt joined Ray Whitrod, Chris Sumner and Harold Weir (who had been the central player in the professionalisation of the Victims of Crime Service) in

founding the Australasian Society of Victimology. The Society attained a grant that funded Whitrod and Weir to write Australia's first victimology course. Weir, although retired, lectured at the former Institute of Technology that hosted a Diploma of Business (Justice Administration) and a Graduate Diploma of Business. He convinced the Institute's hierarchy to approve victimology as an elective for both diplomas. The first students included David Hunt (Commissioner of Police), Gary Byron (Chief Executive of the Courts Department) and John Dawes (Chief Executive of Correctional Services). A revised course is currently taught as a core subject in the Advanced Diploma in Policing that is compulsory for all officers seeking promotion to sergeant and above (see Addendum A – Subject Outline). The South Australian Police remains the only police force in Australia to have incorporated victimology in its promotional framework. Police officers comments appear to support this policy. Results of exit surveys of victimology students (who were mostly police officers) in 2001, 2002, 2003, 2004 and 2006 show that the majority of respondents each year felt that the subject was worthwhile[3]. Some added positive comments, for example:

- "Very interesting, [I am] thinking differently to when I came in" (2001).
- "As a police officer, I got a lot of benefit from completing the subject" (2002).
- "Interesting and informative subject" (2002).
- "Victimology really highlighted to me the deficiencies in [the South Australia Police] handling and understanding of victims" (2006).

One police officer in all the surveys, however, criticised the policy but supported police being trained to help victims. That officer stated:

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[3] Response rates: 2001 - 16 of 25 students (semester 2); 2002 - 18 of 33 students (semester 1) and 11 of 16 students (semester 2); 2003 - 5 of 13 students (semester 1) and 5 of 11 students (semester 2); 2004 - 13 of 15 students (semester 2); 2006 - 13 of 14 students (semester 1)

- "Should be taken out of the diploma and Police personnel should have to attend the Victims of Crime course internally" (2002).

Currently, the Police have victim-oriented recruit and in-service training as well as the educationally-based Victimology. Although there are many training opportunities, there is no mandatory on-going victim-oriented training or education. An audit showed that there is a combination of broad-based victim-awareness and specialist courses. Some of the courses do not explore victims' rights; some of the courses are stand-alone rather than linked to an integrated victim-response.

At first glance, the South Australia Police has come a long way in recognizing the importance and significance of victims. Of course, the students' survey results do not necessarily indicate that police treat victims better, as shown by the results of victim surveys above. Real education is more than raising awareness and imparting knowledge. Real education should bring about changes in interpersonal behaviour such as listening respectfully to victims through to changes in procedures governing police activities. Real education is evident when these changes result in victims feeling that police dealt with them justly. The South Australian experience training and educating police officers shows that there are suggests that victimological education is both helpful and critical but it alone is not the panacea.

6. Strengthening victims' rights by improving compliance

Three decades of reform, changes in practices and procedures and advances in victim assistance should have improved the status of victims in the criminal justice system. Results of the aforementioned victim surveys, however, suggest mixed outcomes. For example, about 25 percent of victims were not satisfied with the information they received about support services (Gardner 1990). Just over 42 percent of victims would have liked more information about support services and other matters at the time they reported offences to the Police; and, about 25 percent of victims who asked for information about their cases did not receive it (JSU 2000). Furthermore, in 2000-01 an audit on the Information for Victims of Crime booklet suggested (as did earlier surveys) that the booklet was not being given to all victims when they reported offences, which police policy requires.

On advice from then Liberal Government, the Governor for South Australia appointed Michael O'Connell as the State's inaugural Victims of Crime Co-ordinator in 2001. The Co-ordinator was tasked to develop legislation to enshrine victims' rights in law and to advise the Attorney-General on how to effectively and efficiently utilise government resources to better help victims of crime. In 2002 the newly elected Labor Government committed itself to strengthening victims' rights. On advice from the Co-ordinator, several rights were amended; in particular, victims were given the right to make oral submissions to the Parole Board. The Attorney-General, the Honourable Michael Atkinson used his authority under the *Victims of Crime Act* (section 16 (2)) to require the Co-ordinator to inquire into victims' grievances about their treatment by the Police and other public officials. The Co-ordinator's role began to look more like an

ombudsman than an independent policy adviser. In its second term, the Labor Government recommended that the Governor dissolve the Victims of Crime Co-ordinator's position and instead appoint a Commissioner for Victims' Rights, which he did. As well as incorporating the former Co-ordinator's functions, the Commissioner was tasked to be a strong voice for victims in government.

Overtime the Co-ordinator, now Commissioner, Michael O'Connell, has worked with agencies such as the Police to develop compliance mechanisms in preference to harsher disciplinary regimes. This approach is consistent with the recommendations emanating from the Review on Victims of Crime (JSU 1999). The Commissioner of Police, Mal Hyde, has supported this approach. Now whenever a police officer records an offence on the Police Incident Management System (PIMS), he or she must also report whether or not a copy of the Information for Victims of Crime booklet was given to the victim. If the victim refused to take a copy that also must be recorded. The officer must as well record if he or she referred the victim to a support service and select what service from a list. The PIMS does not allow the officer to continue entering the offence report until those fields are completed. Each quarter, the Police give the Commissioner data by Local Service Area on the number of books handed out and the number of referrals made by operational police. Figure 3 illustrates the type of data now available on the distribution of the booklet and referrals made by the police.

Figure 3 - Number of Booklets Given & Referrals Made By Police in Each Local Service Area – Period 5

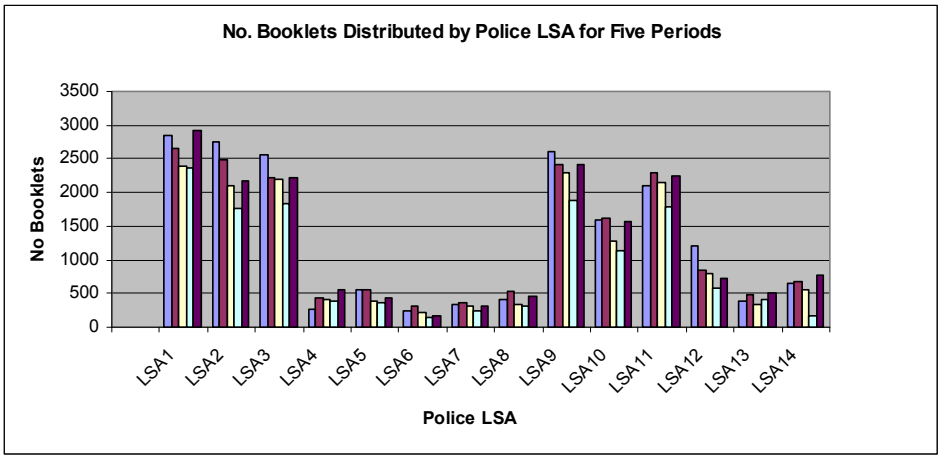
Police Local Service Area (i.e. District)	Period 5			
	Total Victims	*Books Distributed %*	*Victims Referred to Agency %*	*Victims Referred to VCO %*
LSA1	3904	74.95%	1.13%	3.25%
LSA2	3193	68.31%	1.13%	3.29%
LSA3	2914	76.56%	1.48%	6.01%
LSA4	798	68.92%	1.13%	1.38%
LSA5	1048	40.55%	2.67%	1.91%
LSA6	484	36.36%	3.31%	4.13%
LSA7	496	63.51%	1.61%	3.23%
LSA8	682	66.42%	2.93%	2.79%
LSA9	3190	75.74%	2.88%	8.62%
LSA10	2380	65.71%	1.97%	3.82%
LSA11	3875	57.88%	0.72%	3.64%
LSA12	1097	65.91%	3.28%	3.28%
LSA13	704	73.01%	1.99%	2.70%
LSA14	994	77.46%	1.91%	1.31%

The Police policy to give the booklet to victims has not changed since 1988 and the policy has remained a constant element of training and education for about two decades. Victim surveys have suggested since though that fewer and fewer victims remembered being given the booklet. Since this process has been in place, the data indicates that the Police give out about 5540 booklets per month. To ensure the integrity of the Police data, the Commissioner also accesses stock

records, which also suggests that the Police presently order about 5,500 - 6,000 copies of the booklet per month. The data by LSA also shows whether a victim refused a copy of the booklet. The intention was to clarify a reason that had often been given for not giving victims booklets. Several direct contacts with victims reported as refusing a booklet have shown that police officers sometimes record victims who are unable to accept the booklet (for example, due to being conveyed by ambulance from the crime scene) as refusing the booklet. Now that this problem is evident, Victim Contact Officers attempt to contact victims of violent crime within 48 hours and offer them a booklet.

Over time the data have been used to identify other issues pertaining to the distribution of the booklet that the Commissioner for Victims' Rights can address either with the Police Service Area Commander or the Commissioner of Police (see Figure 3). Occasionally at Performance Reviews run by the Police Executive, Police Local Service Area Commanders are confronted with the data for their area and asked to explain why variations in the distribution have occurred. Furthermore, the Commissioner for Victims' Rights works with Local Service Area Commanders to improve distribution of the booklet. As the graph (see Figure 4) shows, for example, LSA 5 has consistently low rates of distribution of the booklet. This area covers a major regional township frequented by Aboriginal people as well as a vast remote area occupied by Aboriginal people who do not necessarily speak or read English. Given the number of Indigenous victims, the Commissioner produced an Aboriginal English pamphlet that the Police can give instead of the booklet (see voc.sa.gov.au/Publications/Translations/Aboriginal/Aboriginal.asp). The Commissioner is also seeking an Aboriginal translator to record a modified declaration in an Aboriginal language on CD, which is an initiative recommended by several police in the remote area.

Figure 4 - Police Distribution of Information for Victims of Crime booklets for five periods



The data can be broken down further by each Local Service Area (see Figure 5), which produces information on police referrals to victim support services. Under South Australia's declaration victims should be told about health and welfare services to help them deal with the effects of offences. Encouraging police officers to comply with this victims' right is important. Two surveys showed that a considerable proportion of victims were not satisfied with the information they received from the Police about support services. Gardner (1990) reported that one quarter of victims were not satisfied and the reviewers for the Review on Victims of Crime reported that just over two-fifths of victims would have like more information at the time they reported the offence to the Police; as well just under half of victims indicated that the did not receive the type of assistance, service, support or counselling they expected when they reported the offence.

The Commissioner, who advises on use of government resources to help victims, draws on data as shown in Figure 5 to gain an

indication on police referrals. Patterns in this data suggest variations in demands for services across the State, which can be used to inform discussion on resources, for example. The data can in addition inform the development of other processes. Low rates of referrals in metropolitan Adelaide Local Service Areas, for instance, has resulted in Police Victim Contact Officers checking police offence reports each day and initiating contact with victims who might want information on victim assistance. Also several years ago the Police opened a call-centre to take reports of offences when police attendance was unnecessary. These victims are entitled to be told their rights and given information on what happens after they report offences.

Figure 5 - Police Referrals - LSA2 – Periods Four and Five

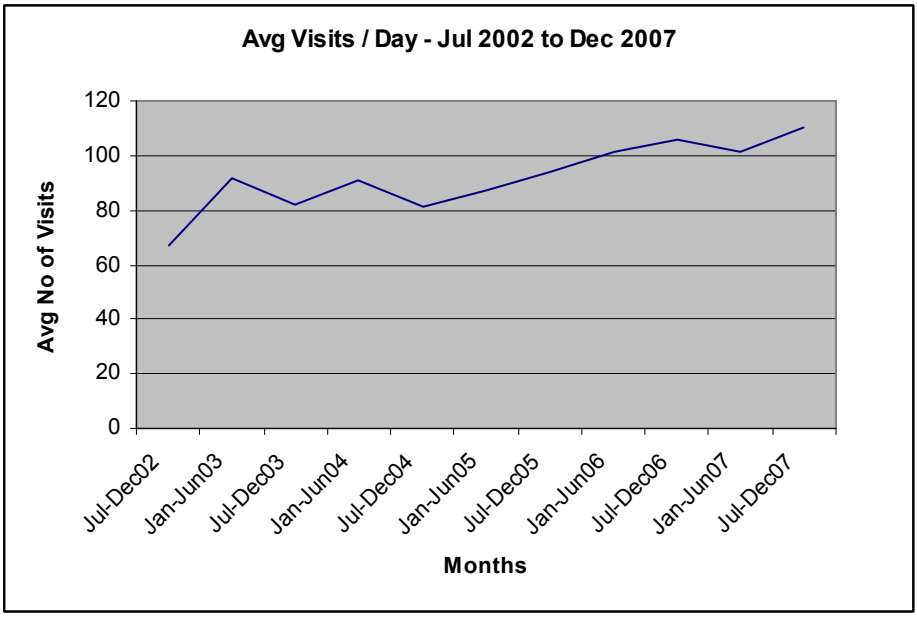
Police LSA2	Period 4	Period 5
Crisis Care	12	10
DV agencies	6	6
Yarrow Place	4	4
Victim Support Service	3	4
Other	13	12
No victims requiring VCO Contact	70	105
No of victims not requiring VCO contact	2402	3088

The call-centre staff, in consultation with the then Victims of Crime Co-ordinator, adopted a practice of sending victims a copy of the

Information for Victims of Crime booklet and crime prevention information by standard post or by email. Staff can access the website for the Commissioner for Victims' Rights that hosts a downloadable version of the booklet and forward either the link or a portable document format (PDF) booklet to victims. Although all police officers do not have Internet access, the Commissioner of Police approved access the Commissioner's website via the South Australian Police Intranet. Consequently, the Police can now print in-house or send via email copies of the booklet and copies of 15 non-English pamphlets on victims' rights and victim assistance. They can also download a Word version of the booklet that can be printed in different font sizes for the vision impaired, which is in addition to a Braille version and an audio version of the booklet.

Every month since July 2002 (that is about two months after the website was launched) usage statistics have been available for the website. Unfortunately, these statistics cannot be used to gauge the number of victims visiting the site but they do show that the average daily visits has risen from 67 in July-December 2002 to 110 in Jul-Dec 2007 and the average monthly hits has also increased over the same period (see Figure 6). Although there are many possible explanations for the increase, the rise since mid-2004 corresponds with the South Australia Police linking with the website.

Figure 6 - Commissioner for Victims' Rights website - voc.sa.gov.au -



Monitoring police compliance with the declaration governing treatment of victims is not the only way to improve outcomes for victims of crime. Empowering victims is also vital. The Commissioner for Victims' Rights and the South Australia Police have developed a letter-notification system to alert victims that their cases have progressed from investigation to prosecution. Each time a first court date is entered for a case recorded on the BEAMS, a letter is generated in the office for the Commissioner for Victims' Rights. The letter incorporates the Police Reference Number for the prosecution file, the defendant's name and the details for the first court hearing. It also tells victims that: they can attend the court hearing (which is a right) unless there is a specific reason to exclude them; a court companion service or a witness assistance service is available; and they could be entitled to make an impact statement. The letter evolved from concern that victims were not being told about the

progress of their cases and in response to data that showed that impact statements were presented in fewer than 5 per cent of sentencing hearings in the Magistrates Court (compared with about 80 per cent in the District and Supreme Courts) (O'Connell 2006). About 9,500 letters were sent 1 September 2007 – 30 June 2008, which generated about 3,500 followed up queries from victims in the Commissioner's office alone. Anecdote indicates that victims contacts with Police Victim Contact Officers have increased markedly; indeed, several officers complained that they were unable to respond in a timely way to all of the victims now contacting their office. An increase in the number of victims asking for information about their cases was anticipated. Past victim surveys showed that as many as 8 in 10 victims wanted this information. One survey (JSU 2000) also showed that at least a quarter of victims who wanted information said that they were not told, despite asking a public official. Yet again enhancing victims' rights has happened by using technology to improve compliance and as a consequence victims have been empowered.

As too many victims are not aware of their rights until it is to late and too many victims also continue claim not to have received their rights, it is necessary to have a grievance process. The South Australian declaration gives victims who ask the right to be told about the existing complaint mechanisms. The Government has decided to strengthen these mechanisms by giving the Commissioner for Victims' Rights the authority to consult with a public official (such as a police officer) or a representative for a public agency and, if in the Commissioner's opinion a victim's right has been breached by that official or an official of the respective agency, he or she can recommend that the official or representative make a written apology to the victim. This authority will be enshrined in the *Victims of Crime Act*. That Act will in addition require the Commissioner to publish an

annual report for the Parliament. He or she will as well be authorized to name in that report any official or agency that does not apologise to a victim. This approach to holding officials accountable is consistent with political convention. The *Victims of Crime Act* (including the declaration governing public officials' treatment of victims of crime) can be likened to a direction from the legislature to the executive. The Act will require the Commissioner to report to the legislature on whether the executive is complying or not.

The Parliament has also enacted an amendment to the *Correctional Services Act* that for the first time in the State's history makes the misuse of confidential information about a victim that is held on the Victim Register punishable by a fine of up to $10,000. Furthermore, the law that provides for the taking of forensic samples from victims (and volunteers) now compels the Police or other authorized person to tell the victim that he or she has a right to request to destruction of his or her DNA profile or other forensic material. Failure to do so make inadmissible any evidence gained from the future use of that profile or material. Thus, South Australia now has enforceable victims' right and its first mandatory victims' right. Almost a decade has passed since victims were surveyed, so whether or not more victims are satisfied is unknown. Indeed, there is a paucity of research on whether enforcement provisions truly strengthen victims' rights. One study from the United States actually suggests that victims are not necessarily more satisfied with their treatment in states with strong enforcement provisions (Office for Victims of Crime 1997).

7. Conclusion

South Australia has been at the forefront of victim-oriented reform in policy and law as well as in procedures and practices. For example, South Australia was the first Australian jurisdiction to conduct an inquiry into victims of crime; the first to convene a national symposium on victimology and victim assistance; the first to promulgate a declaration on victims' rights; and the first to introduce victim impact statements. Undoubtedly, progress has been made because both major political parties have agreed on much that is needed to do justice for victims.

Changes in law and reforms in procedures have been, and continue to be, made. However, the South Australian experience shows that changing the attitudes and behaviours of public officials towards crime victims cannot be achieved solely by the means of formal or legal reforms. The control of police officers treatment of victims in their daily activities can only improve if the law is complemented by sound leadership provided by champions; strong and durable policies, including training and education, directed at making officials more sensitive to victims and more cognizant of their needs. Furthermore, there must be processes to monitor and enhance compliance. The South Australian experience, as a case study, provides valuable lessons for other places seeking to strengthen victims' rights. It adds to the literature on implementation theory in victimology for which Groenhuijsen (1999, p109) said there is a dire need. Since the 1970s, for instance, the South Australia Police has embraced core elements of the four approaches to police-victim assistance that Muir (1986) identified. At first, the emphasis was on crisis intervention with a focus on victims of interpersonal and domestic violence, which was later augmented by policies and practices aimed at keeping victims informed and referring them to

victim assistance. These approaches were then combined as the Police endeavoured to provide a more comprehensive approach to all victims of crime. In the mid-1990s, the concept of generalist police officers lead to an emphasis on the role that all police staff can play to enhance responses to victims. This case study also favours the form and content of the draft convention on victims' rights that includes clauses on implementation and monitoring (InterVict 2008; see also Waller 2008).

Addendum A

ADMINISTRATIVE AGREEMENT

VICTIMS OF CRIME
BETWEEN:

ATTORNEY-GENERAL'S DEPARTMENT
-
SOUTH AUSTRALIA POLICE
-
DEPARTMENT FOR CORRECTIONAL SERVICES
-
DEPARTMENT OF HEALTH
-
DEPARTMENT OF EDUCATION & CHILDREN'S SERVICES
-
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
-
DEPARTMENT OF FURTHER EDUCATION, EMPLOYMENT. SCIENCE AND TECHNOLOGY
-
DEPARTMENT FOR FAMILIES AND COMMUNITIES
-
DEPARTMENT OF PREMIER AND CABINET
-
VICTIM SUPPORT SERVICE INC

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BACKGROUND

A. Much has been done in South Australia to improve the position of victims of crime in the criminal justice system and to provide an optimum level of support. Examples of these initiatives include:

- The employment of people in several government departments who are designated to work with or provide assistance to victims.
- The enactment of legislation to support victims of crime.
- The provision of funding to organisations that support the needs of victims of crime, such as the Victim Support Service Inc.
- The establishment of a Ministerial Advisory Committee on Victims of Crime to provide advice to the Attorney-General on issues pertaining to the rights and needs of victims of crime and services for victims of crime. The Committee also seeks to facilitate cooperation and better coordination between government agencies and non-government organisations providing services for victims of crime.

B. While much has been done, there are few formal agreements or protocols across agencies providing services and/or support to

victims. This Agreement is intended to be an important step towards advancing the interest of victims of crime through better coordination and cooperation among the parties.

THE PARTIES AGREE AS FOLLOWS:

1. INTERPRETATION

In this Agreement unless the context otherwise requires:

1.1 Words denoting the singular or plural include plural and singular respectively;

1.2 Words denoting any gender shall include all genders;

1.3 Headings are for convenience only and shall not affect interpretation.

2. DEFINITIONS

2.1 'parties' means the parties to this Agreement;

2.2 'The Principles' means the principles contained in the "*Declaration of Principles Governing Treatment of Victims in the Criminal Justice System".*

2.3 'victim' means a person who suffers injury, damage or loss as a result of the commission of a criminal offence (but does not include a person who was a party to the commission of the offence).

3. PURPOSE

This Agreement:

3.1 Provides the purpose and principles in support of which agencies within and outside the Justice Portfolio that are party to this Agreement will co-operate to ensure that services to victims of crime are better co-ordinated.

3.2 Brings together the parties to show a firm commitment to victims' rights and to respond to victims' needs. To meet this commitment the

parties agree to work together in the delivery of services to victims of crime.

3.3 Acknowledges the role of the Ministerial Advisory Committee on Victims of Crime to advise on practical initiatives that the Government might pursue to ensure that victims of crime are treated with proper consideration and respect; and to advance the interests of victims of crime.

3.4 Establishes agreed principles of operation and provides a framework for joint interagency activity.

4. AGREEMENT NOT LEGALLY BINDING

The agencies acknowledge and agree that this Agreement is an administrative arrangement between the parties and is not intended to create legal relations.

5. OBLIGATIONS

The parties to the Agreement will:

5.1 Develop partnerships and coordinated approaches to services for victims of crime to ensure services are timely and culturally appropriate.

5.2 ensure the effectiveness of the services is regularly evaluated.

5.3 Work in a spirit of respect that reflects the parties desire for and commitment to effective cooperation between government and community organisations.

5.4 Respond quickly to emerging issues as well as identified gaps in services including improving services for indigenous victims and groups with special needs as well as seeking opportunities for positive change.

5.5 Ensure those working in the area are responsive to victims needs and appropriate training programs are in place.

6. PRINCIPLES GOVERNING THE AGREEMENT

6.1 The Parties note that the *Declaration of Principles Governing Treatment of Victims in the Criminal Justice System* arises out of local, national and international concern about the position of victims of crime in the criminal justice system. These principles form part of this Agreement, and are contained in the Schedule to this Agreement. ("the Principles").

6.2 The Principles are not enforceable in criminal or civil proceedings; do not give rise to any right to damages for breach; and do not affect the conduct of criminal proceedings. However, public agencies and officials are authorised and required to have regard, and to give effect, to the Principles so far as it is practicable to do so having regard to the other obligations binding on them.

6.3 The Principles are intended to enhance the administration of criminal justice as well as bring about administrative, procedural and legal reform necessary to balance the interests and needs of victims of crime.

6.4 The Parties to this Agreement commit to the Principles and will seek to amend and enhance them as required to ensure that they reflect contemporary practices in the management of victims.

EXECUTED AS AN AGREEMENT BY THE PARTIES:

.....	.....
Chief Executive Attorney-General's Department	Commissioner of Police South Australia Police
.....	.....
Chief Executive Department for Correctional Services	Chief Executive Department for Families & Communities
.....	.....
Chief Executive Department of Health	Chief Executive Department of Education & Children's Services
.....	.....
Director of Public Prosecutions	Chief Executive Department of Further Education, Employment, Science and Technology
.....	.....
Chief Executive Department of Premier & Cabinet	Chief Executive Victim Support Service Inc

{Date}

SCHEDULE - THE PRINCIPLES

Declaration of Principles Governing Treatment of Victims of Crime

The Parliament for South Australia passed a declaration of principles to govern the way public agencies and officials deal with victims of crime. The principles are not enforceable in criminal or civil proceedings; and do not give rise to any right to damages for breach; and do not affect the conduct of criminal proceedings. Public agencies and officials, however, are authorised and required to have regard, and to give effect, to the principles so far as it is practicable to do so having regard to the other obligations binding on them.

1. A victim should be treated—
   (a) with courtesy, respect and sympathy; and
   (b) with due regard to any special need that arises—

(i) because of the victim's—

- age; or
- sex; or
- race or ethnicity; or
- cultural or linguistic background; or

(ii) for any other reason.

2. A victim should be informed about health and welfare services that may be available to alleviate the consequences of injury suffered as a result of the offence.

3. A victim should be informed, on request, about:
   (a) the progress of investigations into the offence;

(b) the charge laid and details of the place and date of proceedings on the charge;

(c) if a person has been charged with the offence—the name of the alleged offender[1];

4. A victim should be informed, on request, if an application for bail is made by the alleged offender—the outcome of the application.

If a police officer or a person representing the Crown in bail proceedings is made aware that the victim feels a need for protection from the alleged offender—

(a) the police officer or other person must ensure that the perceived need for protection is brought to the attention of the bail authority[2]; and

(b) reasonable efforts must be made to notify the victim of the outcome of the bail proceedings and, in particular, any condition imposed to protect the victim from the alleged offender (unless the victim indicates that he or she does not wish to be so informed).

5. A victim should be informed, on request, if the prosecutor decides not to proceed with the charge, to amend the charge, or to accept a plea to a lesser charge or agrees with the defendant to make or support a recommendation for leniency—the reasons for the prosecutor's decision;

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1 Section 64 of the *Young Offenders Act 1993* provides a mechanism for exercising this right in relation to a young offender.

2 Section 10(4) of the *Bail Act 1985* requires that where there is a victim of an offence, the bail authority must, in determining whether an applicant for bail should be released on bail, give primary consideration to the need that the victim may have, or perceive, for physical protection from the applicant.

A victim of a serious offence should be consulted before any decision is made—

(a) to charge the alleged offender with a particular offence; or

(b) to amend a charge; or

(c) to not proceed with a charge; or

(d) to apply under Part 8A of the *Criminal Law Consolidation Act 1935* for an investigation into the alleged offender's mental competence to commit an offence or mental fitness to stand trial.

6. A victim of an offence is entitled to be present in the courtroom during proceedings for the offence unless the court, in accordance with some other Act or law, orders otherwise[3].

7. A victim should only be asked to attend proceedings related to the offence if the victim's attendance is genuinely necessary.

8. A victim who is to be a witness for the prosecution at the trial of the offence should be informed by the prosecution about the trial process and the victim's rights and responsibilities as a witness for the prosecution.

The information should be given (if practicable) so as to allow the victim sufficient time to obtain independent advice, and arrange independent support, in relation to the exercise of those rights or the discharge of those responsibilities.

[3] See also section 29A of the *Evidence Act 1929* (which requires that, where a victim of an offence is a witness in the proceedings, the court can only order the victim to leave the courtroom until required to give evidence if the court 10 considers it appropriate to do so) and section 24 of the *Youth Court Act 1993* (which allows a victim and a person chosen by the victim to provide support for the victim to be present during Youth Court proceedings for the relevant offence).

9. A victim should be protected as far as practicable from unnecessary contact with the alleged offender and defence witnesses during the course of the trial and in proceedings under this Act[4].

10. There should be no unnecessary intrusion on a victim's privacy. In particular, a victim's residential address should not be disclosed unless it is material to the prosecution or defence.

11. If a victim's property is taken for investigation or for use as evidence, the property should, if practicable, be returned to the victim as soon as it appears that it is no longer required for the purposes for which it was taken.

12. A victim is entitled to have any injury, loss or damage suffered as a result of the offence considered by the sentencing court before it passes sentence[5].

13. A victim should have access to information about how to obtain compensation or restitution for harm suffered as a result of the offence.

If the prosecutor is empowered to make an application for restitution or compensation on behalf of a victim in criminal proceedings—

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4 Section 13 of the *Evidence Act 1929* contains special provisions for the protection of a person who is a "vulnerable witness" within the meaning of that section.

5 Section 7A of the *Criminal Law (Sentencing) Act 1988* provides a mechanism for exercising this right. Section 7 of that Act places an obligation on the prosecutor to present the court with details of injury, loss or damage resulting from the offence before sentencing.

(a) the prosecutor should bring that fact to the attention of the victim; and

(b) should, if asked to do so by the victim—

(i) make the application on the victim's behalf; and

(ii) bring to the attention of the court any relevant information provided by the victim in connection with the application.

14. A victim should be informed, on request, about:

(a) the outcome of the proceedings based on the charge and of any appeal from those proceedings;

(b) details of any sentence imposed on the offender for the offence.

15. A victim who is dissatisfied with a determination (for example the sentence) made in relation to the relevant criminal proceedings (being a determination against which the prosecution is entitled to appeal) may request the prosecution to consider an appeal against the determination. A victim must make this request within 10 days after the making of the determination. The prosecution must then give due consideration to that request.

16. A victim should be informed, on request

(a) if the release of the offender into the community is imminent—details of when the offender is to be released.

(b) if the offender was ordered to undertake community service — whether the offender completed the community service; and

*(c)*if the offender was subject to a bond—whether the conditions of the bond were complied with.

17. A victim of an offence is entitled to make written submissions to the Parole Board on questions affecting the parole of a person imprisoned for the offence[6].

18. A victim should be informed, on request:

(a) if the offender is sentenced to imprisonment and later makes an application for release on parole—the outcome of the proceedings and, in particular, any condition imposed to protect the victim from the offender.

(b) if the offender is subject to a supervision order under Part 8A of the *Criminal Law Consolidation Act 1935* (which applies to mentally incompetent offenders) and the offender, or any other person, later makes an application for variation or revocation of the 20 order or an application for review of the supervision order is made — the outcome of the proceedings and, in particular, if the offender is released on licence, any conditions imposed on the licence.

19. A victim should be informed, on request:

(a) if the alleged offender absconds before trial—the fact that he or she has absconded;

(b) if the offender escapes from custody—the fact that he or she has escaped;

(c) if the offender, having escaped from custody, is returned to custody—the fact that he or she has been returned to custody.

20. A victim should be informed, on request, about procedures that may be available to deal with a grievance the victim may have for non-recognition or inadequate recognition of the victim's rights under this Declaration.

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6 See section 77(2)(ba) of the Correctional Services Act 1982.

A victim is not entitled to information that might jeopardise the investigation of an offence.

Addendum B – Subject Outline

To provide the participant with a knowledge and comprehension of the scope, concepts, theories and practices of victimology with a particular emphasis on criminal victimisation, and the application of principles and practices of victimology in the justice sector.

1 - The nature and concerns of victimology

2 - Sources of victimological information and empirical data

3 - The theoretical basis for victimology

4 - The victimisation process

5 - The effects and consequences of victimisation

6 - Crime victims and the criminal justice system

7 - Criminal justice practitioners and crime victims

8 - Services for crime victims

9 - Compensation and restorative justice

10 - Victims with special needs.

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4 A Victims' Convention – The arguments in favour and in Analysis of the draft by the World Society of Victimology/Intervict

Sam Garkawe[1]

1. Introduction

When one reviews the position of victims in the latter half of the first decade of the 21st century, it can be seen that the victims 'movement' has been a reasonable effective lobby group in many jurisdictions, and has caused considerable change for the better in the treatment and support of victims (Garkawe 2008:54-56). This is not to suggest by any means that there is not still much work to do in many areas. Although we have seen extensive amendments to laws, policies and even Constitutions throughout numerous criminal justice systems as a result of the victims' movement, we do need to be careful in saying these necessarily mean that they are effective in changing the actual reality for crime victims. Laws and policies specifying that crime victims have rights to certain information, for example, do not necessarily mean they always receive this information. Controversial questions still arise as to whether particular changes actually benefit victims, such as whether therapeutic interventions might cause more harm than good. Despite these realities, it is the opinion of this writer that improved standards in favour of victims are, for the most part, beneficial for victims' interests and may well be a necessary

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prerequisite for their better treatment. While they do not necessarily guarantee better treatment, at worst they can constitute a significant rallying point for victim advocates; and at best can be seen as a start towards real improvements being implemented by those governments that are committed to their realization.

Similar considerations also apply at the international level. At this level, presently the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) (the 'UN Declaration') is the main document that sets out international standards in favour of victims, and as such is often referred to in the literature as the victims' '*magna carta'* (W. van Genugten, R. van Gestel, M Groenhuijsen & R Letschert, 2007:114; Separovic, 2000:277-282). It establishes obligations on states with respect to the categories of crime victims and victims of abuse of power, each category of victim defined in the instrument in articles 1 and 18 respectively. In the case of crime victims, the focus of this Chapter, these obligations include fair treatment and access to justice, the facilitation of restitution from the offender, and the provision of compensation, social and other forms of assistance. The victims' movement should be justifiably proud of this achievement, clearly the single most important set of standards in favour of crime victims that apply throughout the world. van Genugten *et al* (2007) describe it as a 'remarkable document' (116), 'strik[ing] the right balance between idealism and realism' (114) with 'its symbolic value being derived from its aspirational content' (114). But does this necessarily mean that it has had a sufficient impact on States throughout the world? One obvious test of this for an international lawyer is whether the articles contained within the UN Declaration have become customary international law as a result of there being both sufficient state practice coupled with *opinio juris* being present at the same time to satisfy the demands of international law making. In an exhaustive

analysis of the legal character of the UN Declaration, van Genugten et al (2007) conclude that while it generally meets the standards of *opinio juris*, it fails however to meet the international law standard of sufficient and consistent state practice for much of the UN Declaration to be declared customary international law.

The World Society of Victimology (WSV), a Non-Governmental Organization that is dedicated to helping and supporting all victims and ensuring that they are treated with respect, dignity and justice, recognized that further steps in the process of having support and justice for victims recognized internationally was needed. For many years it was involved in efforts to induce States to take more steps to implement the UN Declaration, such as assisting the UN Office of Drugs and Crime to draft and send out a questionnaire to member States in 1995 on how they were implementing the UN Declaration. However: "reactions were received from only 44 states, the lowest reply-rate in any UN survey on implementation in the field of victims' rights. These results were generally seen to be extremely disappointing and the data could not be considered as reliable" (van Genugten et al 2007:120). WSV experts also helped to draft *The Guide for Policy Makers* (1999) and the *Handbook on Justice for Victims* (1999); documents that were to be utilized by State authorities to help them implement the UN Declaration. While these efforts have met with considerable success, it is generally acknowledged that a lot more is needed to be done (van Genugten *et al*, 2007:122)). Consequently a number of people at the WSV (the writer included) felt that it was time to aim for a binding international Instrument[2] on support and justice for victims.

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2 Such a binding Instrument may be termed under international law a 'Treaty', 'Convention', 'Covenant' or 'Protocol' - each of these terms is believed to be of similar effect (except a 'Protocol' normally refers to an amendment or addition to an existing 'Treaty', 'Convention' or 'Covenant').

The main purpose of this Chapter is to make the argument that a binding international Instrument in favour of crime victims will be of considerable benefit to victims and their supporters and an improvement on the present UN Declaration. After presenting the arguments in favour of a binding instrument in Part II of the Chapter, I will then in Part III briefly describe the history of the drafting of such an instrument by the WSV and INTERVICT, and then mention the advocacy by victim advocates taken towards the adoption of such an instrument by the United Nations system. The second purpose of the Chapter, directly related to the arguments in favour of such an instrument, is to analyse and compare the content of the draft Convention agreed to by the WSV with the UN Declaration. This will be carried out in Part IV of the Chapter, where it will be shown that the draft Convention generally constitutes an enhanced elaboration, improvement and consolidation of crime victims' rights at the international level. The Chapter will conclude in Part V with a reiteration of the writer's view that a binding international instrument on support and justice for victims is a worthwhile endeavor for the victims' movement.

It is important to point out at this stage that the UN Declaration is not the only international instrument that benefits victims. Recent times have seen the advent of specific International Treaties covering certain crimes that now include binding standards for the treatment of the victims of those crimes. For example, see Article 25, of the UN

Another possibility is a 'Framework Convention'. This possibility for a victims' instrument is strongly and cogently advocated for by van Genugten *et al* (2007), who argue this allows for 'more open-ended rules and flexible implementation and compliance mechanisms' (at 131), and thus may be a better option tactically and in practice may deliver more for victims. A discussion of this possibility is beyond the scope of this Chapter, as is a detailed discussion of their analysis of the dangers of a Convention.

Convention against Transnational Organized Crime (2001) ('UNTOC') and Articles 6, 7 & 8, of the UNTOC's *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2001). Furthermore, there are many progressive victim-related provisions in modern international criminal courts that provide for victim protection, support, compensation, and in the case of the International Criminal Court, possible victim participation in proceedings (Garkawe 2001). Other significant standards are the *Guidelines for Child Victims and Witnesses* (2005) as well as the *Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005). The important point to note regarding all these later standards, however, is that they are very strongly based on the principles annunciated in the Declaration. In other words, the principles articulated in the Declaration are the main basis for much of the later international victim standards.

2. The key arguments in favour of a binding international instrument

The most basic question often asked when the issue of a possible victims' Convention is raised – why is one needed? What is wrong with retaining the existing international standards as found in the UN Declaration? Why not focus on their proper implementation before trying to obtain agreement on a further instrument by the UN system? In this section five key arguments in favour of a binding international instrument, such as a Convention, will be made. In Part IV below of the Chapter a very important sixth argument will also be made – that is a Convention, such as the draft WSV/INTERVICT Convention, can significantly improve and update the standards found in the UN Declaration.

The first argument is a technical international law one – there is a clear difference under international law between the two types of instruments. A Convention or other binding international instrument (termed 'hard law' within international legal circles) is formally binding on States, whereas a Declaration (termed 'soft law') is not binding under international law. Without venturing into the intricacies of international law it is well accepted that a binding instrument has more authority and status under international law, and this, in the writer's opinion, will increase the visibility of victims' issues at the international and national levels. The UN Declaration, no matter how widely supported it is, simply does not have the same standing under international law - States do not have to make any formal commitments to it (other than the 'yes' vote during its passage through the UN system). On the other hand, States must formally deposit an instrument of ratification or accession if they wish to be a State Party to a Convention, and once the Convention comes into

force, each State Party is then bound to uphold each of its terms under international law.

It is however conceded that there are many who would reject the significance of the above differences between 'hard law' instruments and 'soft law' instruments. It can be argued that in many states of the world (including Australia for example) a Convention is not really binding within the legal system of the state anyway; domestic law does not have to follow international law. Furthermore, the experience of many human rights advocates is that many States cynically ratify Conventions for symbolic reasons, but are not really serious about carrying out their terms. Due to the lack of effective enforcement in the international legal order many States know that little can be done even in the unlikely event that they are found to be in breach of an international commitment. On the other hand, sometimes 'soft law' instruments such as a Declaration can be so widely respected that they do form customary international law and have a very significant impact (the *Universal Declaration of Human Rights* (1948) being a good example). In other words, so the argument goes, the division of international instruments between 'hard law' and 'soft law' is not as great as many international lawyers make out. Therefore one can argue that there is no guarantee a Convention will improve the position of crime victims.

While the writer concedes that there is some truth in the above argument and the dichotomy between 'hard law' and 'soft law' is sometimes blurred, he would still argue that there is a significant difference between the two. A Convention is normally drafted in more precise, detailed and unequivocal language than a Declaration. If a State violated their obligations under, say, a victims' Convention (assuming one comes into force one day), then international law does allow for it to be possible for a State, where it can show damage done

to it, to take the violating State to an international forum such as the International Court of Justice in order to sue for damages for the violating States breach. While such a scenario is admittedly unlikely in practice and would probably be limited to a very high profile case of victimisation, the presence of a Convention does make it more of a possibility. Another way to perhaps look at the difference between a Convention and a Declaration is to think of the difference between legislation in the area of victims' rights verses administrative directions to Government Departments. Most people would agree that legislation is far superior – much more visible, taken far more seriously by bureaucrats and lawyers; and by judges in interpreting legislation or deciding upon common law principles. In Australia, for example, there is jurisprudence that suggests an Australian Court should take principles found in a Convention that Australia has ratified far more into account in, say, the interpretation of ambiguous legislation or in the development of the common law, than other international legal principles not formally accepted by Australia in the manner of a Convention.[3]

The second key argument in favour of a Convention as opposed to keeping the current UN Declaration is that the UN Declaration has no formal *monitoring mechanism*, and the presence of such a mechanism would be a considerable improvement. It is true that there have been some attempts to monitor implementation of the UN Declaration via, for example, a questionnaire sent to states by the UN, but this has proven to be insufficient (see Part III below) – the fact of the matter is that it is in no way binding upon states. On the other hand a Convention can have 3 types of monitoring mechanisms – the most basic one is to require State Parties to issue

[3] See for example the comments of Mason CJ and McHugh J in the High Court decision of *Dietrich v R* (1992) 177 CLR 292.

Reports to a body established by the Convention that sets out how the State is carrying out the terms of the Convention. There is also the possibility of allowing for individual complaints to this body, and finally, the possibility of providing for inter-state complaints. The WSV/INTERVICT draft Convention includes the establishment of a Committee in article (*the Committee on Justice and Support for Victims of Crime and Abuse of Power*) to examine Reports from state parties.[4] While in the writer's opinion this is not necessarily the best method of monitoring, he believes that it is still a very useful method. Although it is conceded that often State Reports are self-serving, revealing little except for (often exaggerated) claims of the State's compliance with the relevant Convention, it is still a useful exercise for a State to be forced to examine its laws and policies against the norms and standards found in the Convention. Furthermore, the experience of the international human rights legal system is that independent human rights organisations do have opportunities to contradict State Reports, sometimes even writing their own 'alternative' Report, and scrutiny bodies can seek out these alternative views in reviewing a States performance. In the field of victims, what this means is that national victim support agencies and groups would be able to comment on their State's Report, and possibly even draft their own contrary Report and submit this alternative to *the Committee on Justice and Support for Victims of Crime and Abuse of Power*. In this manner, victims and supporters would be in a better position to use the standards articulated in the Convention to hold their state to account for not meeting their promises, and thus a Convention can empower individual victims

[4] It is possible at a later stage for States to agree to an Optional Protocol to the Convention that allows for individuals who assert their rights under the Convention have not been adhered to by their State to complain to the *Committee on Justice and Support for Victims of Crime and Abuse of Power*.

and victims' groups much more than the Declaration. It is further submitted that the very existence of a body of experts such as the proposed *Committee on Justice and Support for Victims of Crime and Abuse of Power*, together with the considered written opinions they will bring to the job, will also be an advance for the victims' movement.

The third argument is that a Convention represents a more equitable approach to all crime victims than the present piecemeal approach. Without a general victims' Convention, some specific types of crime victims who now have the benefit of existing standards (such as victims of transnational crimes, victims of trafficking, and victims of international crimes the subject matter of the International Criminal Court) are privileged under international law as binding international standards do apply to them (see the last paragraph of the Introduction). The effect of a Convention such as the WSV/INTERVICT draft Convention is that it would make available agreed international standards to all types of crime victims, not just those who are the subject of a specific existing Convention. The existence of binding international standards for some victims also shows that international principles in favour of victims are not so vague or uncertain that States could not agree to precise wording in a possible future Convention.

The fourth argument is based upon human rights considerations. In the opinion of the writer the poor treatment and situation of victims following their victimization is a human rights issue and should be seen by the international community as such. It is well documented that many crime victims are treated poorly by the agencies and systems that are supposed to be there to provide justice for them; and often victims have few rights; and the rights that they do have they are often unable to access. In another Book Chapter written by

the writer the argument was made that victims' rights are human rights (Garkawe 2008: 57-64). Just like other human rights Conventions that seek to help marginalised people who suffer from violations of their rights, such as children, women, people who have been tortured, disabled people and those racially discriminated against, a victims' Convention should be seen in the same light. If this is correct, then it is a natural progression within the international human rights legal system that rights of particular groups are first found in a 'soft law' instrument, such as a Declaration, and later, often many years later, they become articulated in a 'hard law' instrument, such as Convention. Unless one can provide reasons why victims should be treated differently and be considered as 'second class' rights holders in the international human rights legal system, logic suggests that it is only a matter of time before the rights of victims should and will be found in a binding 'hard law' international instrument. This is the pattern for other human rights protections, such as the move from the *Declaration on the Rights of the Child* (1959) to the *Convention on the Rights of the Child* (1989) some 30 years later. The negative argument that there is 'Convention fatigue' within the UN system does not stand scrutiny. Yes, it is not easy to add more Instruments to the already existing numerous number of Conventions and other instruments, but the recent adoption by the UN General Assembly of the very significant *Convention on the Rights of Persons with Disabilities* (2006) belies the fact that new areas of human rights protection, such as a victims' Convention, cannot take its rightful place on the international standard setting agenda of the UN.

The fifth and final argument in this Part is perhaps the most problematic – that is that a Convention would be more likely to be implemented by States than the existing UN Declaration. Without actual implementation of the standards found in a Convention, it is

perhaps trite to point out that the whole exercise would be futile. In the speech by the writer at the 2005 UN Crime Congress in Bangkok he made the claim that: "Making the standards found in the Declaration more binding and visible would … considerably assist implementation of these standards." (Garkawe 2005:5) Such a claim required far more analysis and justification than the writer's short speech and follow up article allowed for, and this claim has quite rightly been subject to critical analysis by van Genugten *et al* (2007). One problem with the writer's assertion is that he does not explain exactly what is meant by 'implementation'. van Genugten *et al* (2007) refer to the critically important difference between the terms 'implementation' and 'compliance'. While they point out that often the two are used interchangeably (van Genugten *et al* 2007: 112), it is useful that they should be considered as separate requirements. 'Implementation' of international standards refers to the domestic legal system enacting legislation or instituting policies that conform to the standards articulated in the relevant instrument – the 'law in the books'. On the other hand, the concept of 'compliance' with international standards goes further – this means that individual victims are actually able to obtain the assistance, support and rights promised to them by the terms of the international instrument and by their subsequent 'implementation' by their domestic legal system – the 'law in action'. Viewed in this manner, one can see that 'implementation' by itself is not sufficient, there also has to be 'compliance'. It can also be argued that in a sense 'implementation' is a prerequisite to 'compliance' – without 'implementation' we cannot get to 'compliance'. It is widely acknowledged that the main problem with the UN Declaration and other standards and policies in the field of victims' rights is not so much at the implementation stage (although this can also be a problem, see below), but rather with compliance. This of course not a problem that is unique to victims' issues – it also pervades the whole international human rights legal

system laws in the books often do not match the reality on the ground for many marginalized people.

The writer agrees with van Genugten *et al* (2007) that the main goal of any international instrument should ultimately be 'compliance'. Let us look more deeply at the issue of compliance. Once a Convention or other form of binding international instrument has been agreed to by the UN system, three steps have to take place before it can be said to have been 'compliance'. . The first is that a sufficient number of States must agree to formally ratify or accede to its terms so that it enters into force.[5] This will depend upon the content of the instrument and the subsequent judgment by individual States that it is in their overall interests to ratify it. This will in turn depend upon whether the State can 'live with' its terms – would they need to change very much in order to ratify? How precise are the obligations on States as found in the terms of the instrument? Realistically also States would be very interested in the related issue of the cost to them of ratification, and that is why the experts from WSV/INTERVICT were very mindful of this issue in their deliberations on the draft Convention (see Part IV below). van Genugten *et al* (2007) rightly point out that a binding instrument that no States wish to ratify would be useless. Although there are examples of such Instruments[6], it is submitted it would be unlikely that this would be case for a victims' Convention. The fact is that the nature of such an instrument would mean for it to successfully be able to pass through the UN system its terms would already have been carefully subjected to review by States, and in all likelihood will often be 'watered down' to some extent as a result. The main

5 The draft Convention in article 20 (1) requires 20 ratifications before entering into force.

6 The best example is the *Arab Charter on Human Rights* (1994) agreed to by the Council of the League of Arab States.

objections of most States to the instrument would be likely to take place at the drafting stage. Furthermore, the very existence of an instrument open for ratification would produce pressure both internationally and nationally for States to ratify the instrument. States refusing to ratify would be asked why they were not interested in protecting, supporting and assisting 'their' victims? While it may take some time before enough States are willing to be bound by its terms, with the above considerations in mind it is submitted that obtaining sufficient ratifications of an existing binding victims' instrument should not be too much of a problem in the long run.

The second step required for compliance is that of 'implementation' in the sense suggested above - for an individual State that has decided to ratify or accede to the instrument to then enact legislation or implement internal policies that comply with the terms of the instrument. It is here that van Genugten *et al* (2007) are critical of the writer's claim that a Convention will assist in the implementation of victims' rights. They argue that, for example, following the passage of the 2001 legally binding *European Framework Decision on the Standing of Victims in Criminal Proceedings* (2001) "not a single European country has followed up the Framework Decision by introducing a comprehensive legislative project. … Not a single Code of Criminal Procedure was amended in a systematic way with an eye on implementing the Framework Decision's requirements" (van Genugten *et al*, 2007: 151). While this is clearly regrettable and a matter for concern, it is also a difficult to understand from a non-European perspective. The experience of the writer in terms of the impact of the UN Declaration on implementation on victims' rights in Australasia suggests that international standards can have an important impact in some parts of the world. For example, much of the legislation and policies we see today around Australasia that concern the position of crime victims in the criminal justice system

derive their inspiration from the relevant provisions of the UN Declaration. Around the time that the former South Australian Attorney-General Chris Sumner helped to guide the Declaration through the UN General Assembly in 1985 as a member of the WSV, he was responsible for the introduction of the first set of administrative directions to Government Departments in South Australia on the treatment and rights of crime victims during the criminal justice system. Clearly, the influence of the UN Declaration sparked this first step. Soon after, practically all Australian criminal jurisdictions in the 1980s and the early 1990s agreed to similar guidelines. New Zealand then became the first jurisdiction to enact a *legislative* direction in Australasia (the *Victims of Offences Act* 1987 (NZ)) to provide for similar guidelines that outline victims' rights during the criminal justice system (replaced later by the *Victims' Rights Act* 2002 (NZ)). The mid-1990s onwards then saw the enactment of legislation largely embodying these rights and principles throughout Australia. Examples are the *Victims of Crime Act* 1994 (WA), *Victims of Crime Act* 1994 (ACT), the *Criminal Offences Victims Act* 1995 (Qld), the *Victims Rights Act* 1996 (NSW), the *Victims of Crime Act* 2001 (SA) and the *Victims' Charter Act* 2006 (Vic). It is clear that the international norms articulated in the UN Declaration were the primary inspiration of these important crime victim developments in Australia. For example, if we look at the recent 2006 Victorian legislation, after providing for the objects of the legislation in section 4 (1), sub-section (2) then states that '*the objects referred to in sub-section (1) are based on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.' The only other aspect of these conclusions worth noting is that it is acknowledged that it did take many years between the existence of the UN Declaration and its implementation via the above legislation, but the important thing is that it did eventually happen. The common practice in Australia today is for the Federal government to enact the

necessary implementing legislation at the same time as its ratification of a Convention or a Treaty.

This then covers the issue of implementation – 'the law on the books' aspect. What then about the third aspect – the critical question of 'compliance' in the above sense: 'the law in action'? What guarantee is there that the enactment of the 'law on the books' will convert to victims actually receiving the support, assistance and rights they are entitled to? The main point here is that the difficulties here of the 'law in action' are actually no different whether there are international standards or not – whether the 'law on the books' is guided by standards, or whether a government decides to enact a victims' policy or laws without being directed by any international or regional standards. Research shows that there are a variety of reasons why victims may not be receiving what legislation and policy requires then to receive – lack of information, bureaucratic resistance to change, agencies not being provided with sufficient resources to make the changes necessary, and governments and/or agencies not really having the will or understanding of what is required to really make the cultural changes needed. This again is not just an issue unique to victims' issues. The presence of international standards as the 'guiding light' of the changes to laws or policies may have both positive and negative aspects in terms of the compliance question. On the positive side it can be argued that international standards provide an important framework for governments and those who work in the criminal justice system to be held more accountable to ensure that legislation and policies based on those standards actually achieves what is needed. Such standards and any mechanisms available internationally allows for victim advocates, groups of victims and individual victims to place pressure on governments and criminal justice officials as there are agreed international standards by which their actions can be judged. On the

negative side are governments who proudly assert that it has done what it can by implementing the international standards, and avoid or minimize criticism of the realities for victims. The writer firmly believes that the above positive arguments outweigh the negative arguments, and thus while it is conceded that compliance will always be difficult to achieve, on balance compliance has a better chance (albeit by not a large margin) of success where implementation is a result of international standards and where those standards are stronger, and that is why a binding international instrument as compared to the UN Declaration will be more likely to achieve compliance.

3. The history of the WSV'S draft Victims' Convention

The concept of a binding international instrument with respect to victims, such as a Convention, was first raised by the writer together with some other members of the WSV at the general meeting that accompanied the 1997 WSV International Symposium held in Amsterdam. There was general support for the concept at the meeting but little action was taken. The next step came during the first decade of the 21st century when the WSV decided to form a UN liaison Committee as it saw an increasing role for itself at various UN forums. In fact, the WSV had already obtained observer UN status in the 1980s as an officially recognized NGO through the UN Economic and Social Council. The formation of the UN liaison Committee was an important development - members of the WSV felt much more should and could be done on an international level through the UN and in particular, the UN Office for Drugs and Crime based in Vienna. Under the auspices of this Committee the writer travelled to Bangkok in April 2005 to participate on behalf of the WSV in the quadrennial UN Congress on Crime Prevention and Criminal Justice. During a workshop initiated by the WSV the writer made a speech where he called for the need for enhanced international standards for victims, and asserted that the manner for this to be best achieved was to move towards a binding international instrument, such as a UN Convention (Garkawe, 2005).

The international Victimology Institute based of Tilburg University, the Netherlands ('INTERVICT'), took up this call, and in December 2005 it brought together about 12 international victim experts from around the world, mostly members of the WSV (including the writer) to draft a Convention. While the starting point of this draft Convention was the terms of the UN Declaration, the experts from WSV took the opportunity to update, modify and hopefully

significantly improve many of the UN Declaration's provisions based upon what has been learned over the past twenty plus years in the area of victim support and justice (see the next Part of this Chapter). At the 2006 International Symposium of Victimology in Orlando, Florida, USA, much feedback of the first draft Convention was obtained at a number of workshops held on the issue, and further changes to the original draft were made as a result of this feedback.[7] Note also that the draft Convention has also been translated into a number of other languages, and further time was thus provided for victim support groups and individuals in the relevant States to make comments and offer suggestions for improvement. In February 2008 another key research victimological Institute based in Mito, Japan, TIVI, organized a symposium specifically on the draft Convention in order to further advance its adoption through the UN system. Since the drafting of the Convention in late 2005 many WSV/INTERVICT/TIVI members have attended the major meetings of the UN Crime Commission in order to lobby for better implementation of the UN Declaration, including the desirability of the adoption of the draft Convention at the next Congress on Crime Prevention and Criminal Justice to be held in 2010 in Brazil. While the April 2008 session of the UN Crime Commission saw some progress being made in support for and awareness of the draft Convention, having the draft Convention specifically referred to on the very important agenda of the 2010 Congress has not yet eventuated. As at the time of writing this Chapter efforts are continuing to have the draft Convention placed on that agenda by finding one or more States who are prepared to take the initiative and sponsor a formal resolution at the 2010 UN Crime Congress.

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7 See <http://www.tilburguniversity.nl/intervict/undeclaration/convention.pdf>

4. Comparing the two instruments – the WSV draft Convention as an improvement on the UN Declaration

While the UN Declaration was a great achievement, we must recognize it is now, as at the time of writing (January 2009) over 23 years old, and much has changed both in society generally and in the victims' movement specifically over the intervening years. We have learnt much on so many levels and in so many areas in supporting, protecting and helping victims. Just to name a few of these areas:

- the greater understanding of the psychology of criminal victimisation, including the types of mental health conditions that may occur or be exacerbated as a result of victimisation, such as post traumatic stress and depression
- the effect of criminal justice involvement (both positive and negative) on crime victims
- the phenomenon of repeat victimisation, and how we can use this information for more effective crime prevention
- problems in the implementation of victims' standards and rights
- the recognition of many new specific types of victims, such as victims of cyberstalking, human trafficking, terrorism etc.
- the benefits and possible pitfalls for victims of restorative justice mechanisms and other forms of alternative or indigenous justice systems

This Part of the Chapter will focus on another key argument, if not the most important argument, in favour of a binding international instrument for victims. This is that a new instrument can update, improve and better reflect the current state of knowledge and understanding we now have in relation to victims' issues. The main

purpose of this section is to illustrate this point by comparing the draft Convention, as agreed to by the WSV/INTERVICT, with the UN Declaration.

The first and most obvious point to make in comparing the two instruments is that the draft Convention is much more detailed and lengthier than the UN Declaration. This is probably due to a number of factors - the extra knowledge we have gained in the field of victimology reflected in the need for more detailed provisions, the inclusion of provisions for the establishment of a Committee to oversee implementation of the future Convention (*the Committee on Justice and Support for Victims of Crime and Abuse of Power*), and perhaps also because the draft Convention was largely the product of the work of experts from INTERVICT/WSV, unrestrained by the input of States. This very much relates to one of the difficult overall issues that was raised at the very start of the discussions at Tilberg in the drafting of the Convention. This was whether the experts should draft something that most victimologists would desire, or whether they should only draft an instrument that they thought might be acceptable to the vast majority of states. The question was not really definitively answered during the deliberations, although an inspection of the draft Convention indicates that while it very much reflected what victimologists wanted, the experts also exercised a degree of caution in the understanding that it needed to produce something that would not be immediately unacceptable to States. This is best illustrated by the provisions found in the draft Convention that would impact on the cost to States of accepting the instrument. It is quite natural that experts on victimology would want governments to invest a lot more resources into alleviating the plight of victims. However, they realized that expecting too much expenditure by governments was one sure way of losing support and assuring States would use any excuse to delay considering the draft

Convention. Thus article 2 (2) of the draft indicates that 'State Parties shall undertake to implement these provisions *to the maximum extent of their available resources* ..', and later refers to the '*progressive* realization of goals'. Later, article 5 (3) refers to states reimbursing 'victims and witnesses for their *reasonable* expenses' when needing to participate in criminal proceedings. Similarly, in referring to States being responsible for compensation to victims where they are unable to recover restitution from the offender or other sources, the language of article 11 is conservative, stressing the need to States to only *endeavor* to provide such compensation. To emphasize the fact that the financial burden need not just fall on governments, the draft Convention mentions that such compensation should be also funded by *private contributions* (article 11 (4)), and the private sector is also mentioned in article 12 (3) to help 'contribute to the resources required for implementation' of the draft Convention.

We shall now examine how the draft Convention specifically differs from the UN Declaration under a number of headings.

4.1. Matters mentioned in the draft Convention that were not mentioned in the UN Declaration

Perhaps the most obvious example is article 4 of the draft Convention that refers to the *prevention* of victimisation. The inclusion of this provision was not without some controversy and disagreement amongst WSV experts, with some arguing that such a provision really was conceptually different to the rest of the draft Convention as it had more to do with structural issues concerning society in general that have no place in an instrument that focused on victims. The majority however were in favour of the provision, perhaps on the basis that measures to prevent victimisation are relevant for, and do benefit victims, especially when one examines

article 4 (a) – the need for 'more effective detection, prosecution, sentencing and corrections of perpetrators …'. Some also asserted that crime prevention and victim assistance are inextricably linked, particularly via the concept of repeat victimisation (see also article 8 A (e) of the draft Convention), and thus such a provision will add to the legitimacy of the instrument. It will be interesting to see whether this provision will remain in the instrument once it is examined more closely by State representatives.

Another new area not included in the UN Declaration is specific mention in article 2 of the draft Convention of victims of terrorism. This is a good example of what was mentioned above – how new concerns of the global community (terrorism) can and should be incorporated in an updated instrument. By including victims of terrorism in article 2 (under 'scope') they are then clearly also included in the definition of a 'victim' (see article 1 (1)). One might assert, of course, that specific mention of victims of terrorism is unnecessary as victims of terrorism are already automatically crime victims. It was felt, however, that their plight would be strongly supported by practically all people and governments, and thus this might be a useful vehicle tactically to encourage support for the draft Convention. In fact, the experts at Tilburg did have a debate on whether to include victims of terrorism in the actual name of the draft Convention, and in fact the first draft was called the 'UN Convention on Justice and Support for Victims of Crime, Abuse of Power and Terrorism' (Waller 2008). In later versions of the draft Convention the word 'Terrorism was omitted from the name; instead it was decided to still emphasise their situation by retaining a specific mention of them under 'scope'. It was also felt that that it would be best not to ignite the issue of which victims to include in the draft Convention that had almost prevented agreement in 1985 during the passage of the UN Declaration through the UN system

(Lamborn 1987), and thus the two categories of victims found in the UN Declaration (victims of crime and victims of abuse of power) were retained.

A further area that was not included in the UN Declaration is specific recognition of other potential persons that might be vital for a criminal prosecution – namely, witnesses and experts. These are defined in article 1 (3) and (4) of the draft Convention, and their protection is specifically referred to in article 6, and the need to reimburse witnesses' reasonable expenses is also mentioned in article 5 (3).

4.2. Further elaboration of the rights of crime victims during the criminal justice system

The draft Convention in article 5 (2) (b) retains the basic principle found in the UN Declaration that States allow 'the views and concerns of victims to be presented and considered at appropriate stages of proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant domestic criminal justice system'. This important provision has been the subject of much comment and debate on what should be the appropriate rights of victims in relation to the rights of accused persons during significant stages of the criminal justice system, such as bail hearings, plea bargaining, sentencing and parole hearings. This provision quite rightly leaves it up to each domestic criminal justice system, through their legislation, court decisions, administrative guidelines to Government departments, and even Constitutional protections, as to how to implement the provision. The UN Declaration also provided some further elaboration on the treatment of victims during the criminal justice process in its article 6 – matters such as keeping victims informed, providing assistance,

minimizing inconvenience and delays, and protecting their privacy and safety. However, the draft Convention improves on the UN Declaration because it provides further elaboration on these provisions.

First, in article 5 (2) (c) the draft Convention provides that states should allow 'victims to present their views and concerns themselves or through legal or other representatives'. This right of victims to be legally represented is very significant and was not mentioned in the UN Declaration. While it is a right that is generally available in Continental European criminal justice systems (Joutson M, 19??), it is not available in common law systems and until recently has not been available under international criminal law. This right was one of the most significant innovations of the International Criminal Court ('ICC'); the ICC becoming the first international criminal court in history to provide victims with the potential[8] of a formal role in proceedings (Garkawe 2001 & 2003). This provision in the draft Convention mirrors the provision made for victims of the crimes under the jurisdiction of the ICC[9] to have a legal representative appointed (Rome Statute of the ICC, 2002: article 68 (3)).

Secondly, article 5 (2) (e) of the draft Convention stipulates that victims be provided: 'where appropriate, the right of appeal against decisions of the prosecutorial authority not to prosecute in cases where they were victimised'. This is a right that was not provided in the UN Declaration and many of the experts at Tilburg thought this

8 The ICC will only allow victims to be legally represented where a Chamber of the ICC is satisfied it is appropriate to do so – it is not an automatic right of victims.

9 These are presently genocide, crimes against humanity and war crimes. When a definition is agreed upon, the crime of aggression will also come under jurisdiction of the ICC. See article 5 of the Rome Statute of the ICC (2002)

to be an important right of victims, for if the prosecution authority refuses to prosecute victims are generally left with few satisfactory options. It is not clear to the writer what precisely is the scope of the right found in article 5 (2) (e). In many states with common law criminal justice systems there is generally a right of *internal* appeal within the prosecuting authority itself against its decision not to prosecute, but normally there is no right to appeal such a decision to an external person or body or court of law. For obvious reasons many victim advocates consider the internal right of appeal to be unsatisfactory. Governments in common law States are reluctant to grant an external right of appeal to crime victims due to a fear of frivolous claims, confidence that their professional and independent prosecution services will make the right decisions, and for financial reasons. It thus may well be that such States will place a reservation or interpretive declaration on their possible future ratification of any binding instrument that includes a provision such as article 5 (2) (e) of the draft Convention.

A third improvement of the draft Convention over the UN Declaration in the area of criminal justice rights is found in article 5 (2) (j) of the draft Convention – here it is made clear that States themselves should enforce any orders to grant an award to victims (such as a compensation order against the offender in favour of the victim). This is a welcome improvement because in many jurisdictions even where a victim obtains an award against the offender in a court or Tribunal they are left to their own expense and inconvenience to attempt to enforce that award; this constitutes a major disincentive for victims to pursue what rightfully should be theirs.

The fourth improvement has already been mentioned above – the clear direction to States in article 5 (3) that victims and witnesses

reasonable expenses 'incurred as a result of their legitimate participation in criminal proceedings' be reimbursed.

The final improvement of the draft Convention in the area of criminal justice rights is found in article 6 – a much more detailed provision on how victims might be better protected from retaliation or intimidation during or as a result of their participation in criminal justice proceedings. While the UN Declaration referred to the need to protect victims in a general sense, the draft Convention refers specifically and in detail to the methods by which this could be achieved. These measures include possible relocation of victims, non-disclosure or limiting disclosure of details concerning the victim, and utilising modern technology during the giving of evidence by victims to minimise their trauma.[10] Many of these methods have come to international attention recently by their utilisation in international criminal courts such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, and thus this represents yet another example of the draft Convention learning from recent improvements and knowledge of the rights of victims.

4.3. Improvements to the wording of two key provisions of the UN Declaration.

The UN Declaration stated in article 4: 'Victims should be treated with compassion and respect for their dignity.' This provision, although vague and probably almost unenforceable from a legal perspective, is considered to be vital by many people working in the field of victim assistance and support. Many such people regard the problems victims experience in their dealings with various

[10] These provisions also apply to witnesses and experts.

government officials and agencies to be as a result of insensitive treatment, resulting in the well-documented phenomena of 'secondary victimization'. Many would thus regard this provision as the most important in the entire UN Declaration. Article 3 (4) of the draft Convention is a considerable improvement on this provision, stating that: 'States Parties shall ensure that all officials and other persons dealing with victims treat them with courtesy, compassion, cultural sensitivity, and respect for their rights and dignity'. It is submitted that the addition of the words 'courtesy', 'cultural sensitivity' (reflecting modern trends in the treatment of people from different racial, cultural and religious backgrounds within multicultural societies) and 'rights' are significant improvements. Furthermore the explicit reference to 'all officials and other persons dealing with victims' makes it clear that these important principles apply to everyone victims come into contact with, including welfare agencies, doctors and other medical and mental health personnel, and even private businesses.

The other key provision that represents an improvement on the UN Declaration is article 3 (3) of the draft Convention, the 'non-discrimination' clause. In the period leading up to the adoption of the UN Declaration the main focus of feminism, civil rights and other related social movements was to entrench the principle of 'formal' equality – ensuring that all laws and policies did not directly discriminate against women and minorities. This was appropriate at the time as far too many laws and policies in many areas did discriminate on their face against women and minorities. Thus the UN Declaration reflected 'formal equality' in article 3 that stated: 'The provisions contained herein shall be applicable to all, without distinction of any kind…'. From the 1980s onwards the attention of many social movements changed to what is known as the principle of 'substantive' equality – the recognition that treating people who have

been historically disadvantaged equally (as 'formal' equality tends to do) would be likely to entrench political, social and economic disadvantage rather than remove it. This modern principle of 'substantive' equality reflects an acknowledgement that whereas legislation and policies in many jurisdictions now does provide for equal rights to all citizens, this has however not changed the reality for many women and minorities. In other words, formal equality by itself did not prove to be sufficient, it was realized that equality in outcomes needed to be the main aim. This realization is very much reflected in the second sentence of article 3 (3) – while the first sentence still reflects the principle of formal equality – 'the provisions contained herein shall be applicable to all, without distinction of any kind…' – the second sentence brings in modern notions of substantive equality: "This will be without prejudice to providing special justice and support best suited to victims who are particularly vulnerable because of age, gender, disability or other characteristics'.

4.4. More detailed wording in a number of important areas.

Another significant improvement on the UN Declaration is that in the draft Convention there are much more detailed provisions, based on more recent knowledge and understanding in the field of victims, in a number of key areas. The more detailed provisions in the field of victims' rights during the criminal justice system have already been mentioned above. Two other major areas are worthy of particular mention. The first is information rights of victims – it is perhaps trite to point out that without information, many victims will remain unaware of their rights and of the services available to them. Whereas the UN Declaration made reference to victims being 'informed of their rights in seeking redress ..' (article 5) and to the availability of 'relevant assistance' (article 15), as well as the need to

'[i]nform… victims of their role and the scope, timing and progress of … proceedings and of the disposal of their cases …' (article 6 (a)), the draft Convention is far more detailed. Article 7 of the draft Convention starts off in subsection 1 by stressing that victims' should 'have *an enforceable right* to information', and they must be informed of this from the moment of their first contact with a State agency. This is a significant improvement on the UN Declaration and perhaps is a reflection that in the past vague promises that victims are to be informed of certain matters has not been implemented sufficiently. The subsection then continues in the following manner:

State Parties shall ensure that victims receive general information in the most expeditious and efficient method appropriate to the culture such as through oral or written communication with concern for literacy and literary traditions. Specific information should be given person to person.

One can see clearly that the above is an obvious and significant improvement on the UN Declaration. Subsection one then proceeds to list in parts (a) to (j) ten specific types of information that shall be provided to victims as a minimum; again a clear improvement on the UN Declaration. Subsection 2 then refers to certain information rights for victims during the criminal justice system, such as outcome of proceedings and the sentence of the court, this time only where victims themselves request the information. Subsection 3 refers to the need to notify victims of the release of an offender, but only where there might be a danger to the victim; and the final subsection makes it clear that victims have the right *not to* receive the information referred to in subsections 2 and 3.

The other key area of significant improvement on the UN Declaration worthy of specific mention is that of assistance to victims as found in

article 8 of the draft Convention. Once again, this provision is based on more recent knowledge and understanding in the field of victims. Whereas the UN Declaration referred very generally to the need for victims to be informed and receive relevant assistance, article 8 of the draft Convention is once again far more detailed. In particular, the main provision in subsection 6 divides up the type of assistance victims should receive into three logical time frames – immediate assistance, medium term assistance and long term assistance. This was not done in the case of the UN Declaration as we now know that different forms of assistance are required, depending upon the time frame since the victimization. Many of these provisions are a result of more recent understanding by specialists in the fields of victim services and support, once again illustrating the advantages of the draft Convention over the UN Declaration.

Finally, it should also be pointed out that there are also some minor improvements from the UN Declaration in the draft Convention in regards to the provisions regarding restitution (including reparation) (article 10), compensation (article 11), and training of personnel working with victims (article 12(5)), who are to be asked to adopt 'an interdisciplinary and cooperative approach in aiding' victims (article 12 (2)).

4.5. Greater emphasis on restorative justice & informal methods of dispute resolution in the draft Convention

One final area worthy of special attention and of particular interest to many is the issue of restorative justice and other forms of alternative or indigenous justice systems. This is an area where experts in victimology, criminology, and others concerned with justice generally have far more knowledge and information at their disposal in recent years due to the institution and evaluation of

many more such justice programs. In particular we know a lot more about the benefits and possible pitfalls for victims of restorative and other alternative justice mechanisms. The UN Declaration did not mention the term 'restorative justice', and only made a brief mention of 'informal mechanisms of justice', such as in article 7: "Informal mechanisms for the resolution of disputes … should be utilized where appropriate to facilitate conciliation and redress for victims". On the other hand, while this provision is replicated in the draft Convention (article 5 (1) (b)), it improves on the UN Declaration as restorative justice has its own article that is worth repeating in full:

> **Article 9**
> (1) States Parties shall endeavor, where appropriate, to establish or enhance systems of restorative justice, that seek to represent victims' interests as a priority. States shall emphasize the need for acceptance by the offender of his or her responsibility for the offence and the acknowledgement of the adverse consequences of the offence for the victim.
> (2) States Parties shall ensure that victims shall have the opportunity to choose or to not choose restorative justice forums under domestic laws, and if they do decide to choose such forums, these mechanisms must accord with victims' dignity, compassion and similar rights and services to those described in this Convention.

The references to the need for restorative justice mechanisms to represent victims' interests as a priority, for offenders to accept their responsibility for the offence, for victims to be able to choose such mechanisms, and for the mechanisms to also comply with the various rights found in the provisions throughout the draft Convention, clearly shows this provision is a result of much recent understanding, research and one significant European instrument (Council of Europe, 1999) into the benefits and possible pitfalls for victims of restorative justice mechanisms. Note also that article 8 (6) B (e) of the draft Convention also stipulates that States provide: 'Information, support

and assistance concerning options for participation in alternative justice forums'. Clearly these provisions represent a large advance on the UN Declaration.

5. Conclusion

It is true that a binding international instrument on justice and support for victims, such as a Convention, will not necessarily ensure that there will be improvements in the treatment of victims. Action must take place at all levels of society, and the international level is just one of many. A binding instrument is not a panacea - it will be hard to get States to agree to its terms, and even if they do agree, it may not result in any changes at first instance. However, the arguments presented in Part II of this Chapter, together with the numerous examples of where the draft Convention by the WSV/INTERVICT is a significant improvement on the UN Declaration in Part IV, indicates that such an instrument has the potential to make a significant difference to the treatment of victims around the world. Perhaps the best overall argument against such an instrument is that obtaining sufficient agreement for it to be ratified by enough States will take a lot of energy from victim advocates and supporters around the world; and this energy that might be better spent elsewhere on the myriad of other issues concerning victims that clearly need attention. It is submitted however this represents short term and narrow thinking. The writer remains strongly of the belief that the time, effort and money on the quest for such an international Instrument will constitute a significant advance for the care, support and justice for victims around the world, and as such will be well worth it in the years to come.

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5 A Code of Conduct for Negotiating Personal Injury Claims: Structuring the Shadow of Tort Law

Corry van Zeeland, Peter Kamminga & Maurits Barendrecht[*]

1. Abstract

Victims of road traffic accidents often have great difficulty in obtaining damages recovery through the tort system. They spend time, incur costs, and experience uncertainty and stress. Victims regularly complain about treatment that is not consistent with procedural justice values such as respect, voice, and neutrality. Secondary victimization of some sort is likely to occur. The insurance companies that are their counterparts complain about high costs, uncertain outcomes, and unpleasant experiences in the claim-handling procedure because of its adversarial nature. From an economics perspective one may call these elements the transaction costs of the tort system.

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The aim of this study is twofold. In the first place it reports on a project carried out in the Netherlands which aim was developing procedural rules to improve the process of negotiation personal injury claims. It has resulted in the Dutch Code of Conduct for Handling Personal Injury Claims. The process of development has been an interactive one: key persons from the field, coming together in expert meetings and contributing in other ways, identified the problem areas the code would have to address, established the form of the code (mainly best practices), the options for best practices, the preferred best practices that are now to be found in the code, and the mechanisms to induce compliance. The Code of Conduct and its development are supported by key stakeholders: the Dutch Ministry of Justice, organizations representing victims, organizations of insurers, and most (though not all) organizations representing professionals working in the field of personal injury.

Second aim of this study is to evaluate how well the parties have done in this collaborative development process and its results. Several perspectives may be used to do so. In this study we choose the following perspectives: transaction costs; the needs of victims as derived from victimology research and procedural justice; negotiation theory; conflict resolution theory; and consensus building theory. The perspectives together give an indication what parties did well and where is room for possible improvements in similar applications of this unique and promising process.

2. Introduction

In the Netherlands, around 95% of all personal injury claims related to motor vehicle accidents is settled out of court. In most cases, settlement is reached within two years. However, in 20% of the cases victims report great difficulty in recovering damages through the tort system. They have to cope with the disruptive impact of the accident on their health and lives. In this straining period, they also have to deal with a claim- handling procedure that is complicated, confusing, challenging, and sometimes nasty. Secondary victimization of some sort is likely to occur. The insurance companies on the other hand complain about high costs, uncertain outcomes, and disagreeable experiences in the claim-handling procedure because of its adversarial nature. Both victims and insurers, and their organizations, have begun looking for methods of dealing with settlement procedures that are less taxing, time-consuming, and adversarial.

In this study, we report on a Dutch project whose mission was to develop a claim-handling procedure that focuses on the victim's needs, is cooperative in nature, and saves costs: the Dutch Code of Conduct for Handling Personal Injury Claims. This paper reports on the facts of the project and its results. It also takes a step back and reflects on the possible perspectives from which the process and the outcomes may be evaluated. These perspectives are the reduction of transaction costs, the needs of victims as derived from victimology research and procedural justice, negotiation theory, conflict resolution theory, and consensus building theory (Section IIIA to IIIE). We also discuss some of the cultural and institutional factors that are specific for the Dutch personal injury field. They may have to be taken into account if the project results were to be implemented in other legal fields of interests, or in other countries.

3. The Process of Development of the Code of Conduct

From the perspective of economics, the overall expenses for recovering damages are known as the transaction costs of the tort system. In an earlier comparative study,[1] we found that recovering damages through contractual liability and tort law, legal proceedings, or negotiations between the involved parties and insurers costs Dutch society approximately EUR 1 to 2 billion every year. For every Euro paid to a victim, we estimated that 50 Eurocents were spent on transaction costs.

In search of potentially less expensive instruments as alternatives for the Dutch procedures and mechanisms, we collected 12 foreign practices from European and US jurisdictions that may lead to cuts in transaction costs. We rated these practices on their theoretical potential to diminish the financial and emotional costs of tort recovery and asked experts to challenge this ranking. This procedure yielded four options as the most promising alternatives: the development of objective criteria (in particular for damages awards); strict liability; procedural standardization of the claim-handling process; and improved methods for negotiation and conflict resolution.

The project we report on in this study started in September 2003 with the potential cost reduction effect of the two last options in mind. Key organizations and persons from the personal injury field

[1] J.M. Barendrecht, C.M.C. van Zeeland, Y.P. Kamminga and I.N. Tzankova, *Schadeclaims, kan het goedkoper en minder belastend?* (Boom Juridische uitgevers, Den Haag 2004), available at: <http://www.uvt.nl/faculteiten/frw/onderzoek/schoordijk/cva/publicaties/rapporten/schadeclaims.pdf>. The study was commissioned and funded by the Research and Documentation Centre of the Dutch Ministry of Justice (WODC).

were invited to work with us on recommendations for improvement of the claim-handling procedure. A group of experts—initially around 40, but rising to around 200 towards the end of the project—joined the project in 12 expert meetings. Four subgroups dealt with specific issues, and other participants contributed in other ways in this very open structure, that welcomed any person who wanted to contribute to the project or wished to observe it.

In an interactive process, the group identified the problem areas the code would have to address, established the form of the code (mainly best practices), and provided a list of options for best practices. The preferred best practices are now laid down in the code. Negotiation theory and conflict resolution theory were taken as starting points for finding solutions to the main types of problems of the claim-handling process (see Section IIIC and D).

The project and the development of the Code of Conduct were supported by key stakeholders: the Dutch Ministry of Justice; the main Dutch consultative body in the field, the *Nationaal Platform Personenschade* (The National Platform Personal Damages); organizations representing victims; organizations of insurers; and most (though not all) organizations representing professionals working in the field of personal injury. They consistently provided manpower, ideas, comments and other support. Our role as researchers evolved from instigator of the project to facilitators of the (consensus building) process that gradually developed between victim support organizations, insurers, and other key organizations. We provided oversight and reported on drafts, choices, and results.

In July 2006, the project was concluded with the presentation of the code to victim support organizations and the personal injury field. Even though not everyone agrees on all aspects of the code, it is generally quite well received. The code was not the only deliverable. At the presentation, a Guide for Victims was introduced, which leads

victims through the claim-handling process, and refers to the code so that victims become empowered to understand the process.

There are a number of spin-offs. At this moment, an experiment is running with a web-based planning and claim-handling tool (Personal Injury Claim Express: 'PICE'), in which both parties can enter information and which enables the victim to follow the process in his particular case.[2] Moreover, a pilot with a so-called Dispute Resolution Center, which will refer parties to a suitable neutral dispute resolution professional in case of a conflict, is all but ready to go. And finally, a small Permanent Organization for the maintenance, evaluation, improvement and further development of the claim-handling process as envisaged by the code is about to be established by the *Nationaal Platform Personenschade* ((National Platform Personal Damages). A toolbox for organizing compliance to the principles formulated in the code has already been developed.

[2] See C.M.C. van Zeeland, R.E. Leenes, J. van Veenen & J. van der Linden, Handling Personal Injury Claims PICE, in Tom M. van Engers ed, *Legal Knowledge and Information Systems* (IOS Press, Amsterdam Berlin Oxford Tokyo Washington, DC 2006) 131-140.

4. Perspectives for Evaluating the Project Results and Process

4.1. Transaction Costs

Theoretical Framework: Reducing Transaction Costs

Our earlier study focused on the transaction costs of claim-handling. We defined transaction costs as "all costs of settling claims within the legal system".[3] This includes lawyer fees, expenses that insurers make for handling claims, and the costs of calling in experts. It also comprises costs of uncertainty, of time investment by injured parties, and of stress and other negative emotions, including secondary victimization. Six types of transaction costs that may arise during the claims handling process were distinguished.

1. Fees paid for courts and legal aid;
2. Other out of pocket expenses (medical and other expertise; witnesses fees);
3. The opportunity costs of time invested by the parties;
4. Costs of uncertainty;
5. Costs of stress and other negative emotions;
6. The expenditure for controlling the system.

Settling claims necessarily brings about transaction costs. However, not all costs are inevitable. For example, victimology research shows that victims of road accidents are negatively affected by lengthy and complicated settlement procedures. Speeding up and simplifying

[3] We used Calabresi's definition of tertiary transaction costs, which in tort law is the generally accepted one. See G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, New Haven, 1970).

proceedings can help to avoid harmful side effects. [4] Coordination problems[5], informational costs[6], barriers to conflict resolution,[7] and market failure[8] are other causes of high expenditures that can be worked at. The cost-raising effects of these problems can be diminished by choosing processes that are less costly.

For instance, procedural norms can structure the process of settlement of (personal injury) claims. They can help to achieve open and cooperative consultation between the parties and can create an environment for dispute resolution. An accessible dispute resolution system creates an exit option, and thus a more cooperative process that presumably is also more efficient. Transaction costs are likely to diminish. For instance, joint coordination of the process by the parties, instead of a clash of individual (and often adversarial) strategies, may speed up the procedure and may make the process more predictable and less time-consuming. Explicit best practices can be expected to improve learning. Reductions in legal aid costs, time investment, and uncertainty may be expected. Procedural rules

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4 See M. Haegi and B. Chaudhry, Impact of Road Death and Injury. Research into the principal causes of the decline in quality of life and living standard suffered by road crash victims and victim families. The study was undertaken by the European Federation of Road Traffic Victims in collaboration with the Commission of the European Union, February 1995; available at http://www.fevr.org/exec.html.

5 See W.C.T. Weterings, *Efficiëntere en effectievere afwikkeling van letselschadeclaims* (Boom Juridische uitgevers, Den Haag, 2004). Weterings conducted an extensive survey on negotiation theory. He identified 8 coordination problems, which are likely to cause decision costs and error costs.

6 See E.J.P. Mackaay *Economics of Information and Law* (Boston, Den Haag, Kluwer/Nijhoff, 1982) and J. Stiglitz, *Economics of the Public Sector* (3rd ed., 2000) 8-10, 83.

7 K.J. Arrow, R.H. Mnookin, L. Ross, A. Tversky and R. Wilson eds, *Barriers to Conflict Resolution* (W.W. Norton & Company, New York, 1995). Also R.J. Lewicki, B. Barry, D.M. Saunders and J.W. Minton, *Negotiation* (3rd ed., McGraw-Hill, Boston, 1999) 147 ff.

8 See P.K. Rao, *The Economics of Transaction Costs* (Palgrave, New York, 2003) 7.

of conduct may positively effect the interaction between victim and insurance company, and may lead to less stress and other negative emotions. Default rules, for example regarding the exchange of information or the procedure of calling in experts, can contribute to smooth proceedings, and to cuts in expenses.

These are all indications that procedural standardization has the potential to decrease transaction costs. However, there is some research that suggests that procedural norms for the out-of-court settlement phase lead to "front-loading of costs." If decision makers, such as courts, require to be more completely informed, this translates into higher transaction costs.[9] The key issue seems to be to collect only information that is really likely to influence the outcome in a substantial way. Information is expensive. Managing the trade-off between the costs of collecting additional information and the increased quality of the outcome (the avoidance of error costs) is a key issue. Moreover, the development, maintenance, and enforcement of procedural norms could cause a substantial extra expenditure.

The Code of Conduct as a Tool to Reduce Transaction Costs

The Code of Conduct outlines best practices of dealing with personal injury claims. The code contains 20 principles, with for each principle 5 to 15 concrete rules that reflect good practice. The preamble is laid down in the first principle that summarizes the core values of the claim-handling procedure:

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9 See Emerging Findings - an early evaluation of the Civil Justice Reforms (2001), Further Findings-A continuing evaluation of the Civil Justice Reforms (2002), available at <http://www.dca.gov.uk/civil/procrules_fin/consult.htm>; more recently: J. Peysner and M. Senevirathne, The Management of Civil Cases: The Courts and Post-Woolf Landscape (DCA Research Series 9/05, November 2005) 52-71, available at <http://www.dca.gov.uk/research/2005/9_2005.htm>.

Principle 1: These are the core values of the claim-handling procedure: the emphasis should be on the victim, interaction should always be respectful, clarity, creating and furthering trust, harmonious consultation, swiftness, resolving problems in concert, and mutual correction.

The code describes how claims can be handled as smoothly and quickly as possible. It addresses the primary parties (victims and insurers), their representatives, and other professionals that are involved in the claim-handling process, such as medical advisors and vocational experts. For instance, the code provides good practices that help to keep up the pace of the process, and to speed it up if necessary. Firstly, principle 5 urges parties to settle the case within two years, unless there is a good reason for extension. A timeframe for the entire process is given, as well as timetables for the various parts of the procedure.
Secondly, the code provides advisable response times for particular situations, such as first contact after reporting the injury, agreeing on how the claim will be handled, deciding on liability and paying an advance (see Principles 2, 4, 11, and 16). Another means to keep up the pace is effective communication. This is stimulated by three-way conversations, which involve the victim, his lawyer or other professional helper,[10] and the insurer, and by the use of rapid forms of communication (Principle 2), e.g. the digital dialogs through "PICE", the web-based plan of action (Principle 7). Generally, this plan of action supports mutual coordination of the claim-handling process. The PICE-application enables parties to organize early conflict management, prioritize the issues of the case, set dates for

[10] In the Netherlands, legal advice can be freely supplied by others than lawyers, so the victim may also be aided by non-lawyers specialized in claim-handling, or by legal expenses insurance companies.

the three-ways conversations, agree on timelines, exchange information, and negotiate through dialog boxes.

The code also promotes an early, open exchange of information that is limited to what is necessary for the decision making process (Principle 8), and helps to avoid lengthy discussion and deadlocks in negotiation (for example: concerning payments in advance, Principle 11; regarding the selection of a joint expert, Principle 12; joint scenarios to determine subjective situations, Principle 14; and the extrajudicial costs, Principle 18). Finally, the code recommends accessible timely dispute resolution in case consultation fails, and the parties are not able to resolve the dispute themselves (Principles 15-17).

Generally, the field seems to be convinced that the procedural norms put forward by the code will have a positive long-term effect on the transaction costs. An assessment of the possible effects in the next years will be able to show whether the procedural norms come up to the field's expectations. This evaluation may be carried out by the field itself. If the plan of action is to be implemented on a large scale, it can provide the field with valuable data on costs and terms. Also the Permanent Organization can contribute to the assessment by monitoring and evaluating the code's procedural norms. In the short run however, insurance companies and lawyers working for victims expect a rise in costs due to necessary changes in work methods (complying with timelines, more three-way conversations) and essential investments, such as staff education.

4.2 The Needs of Victims

Theoretical Framework: Victimology and Procedural Justice

Settling claims may be daily business for lawyers and claim adjusters; it is not for victims. For them, the settlement procedure can be a burdensome experience, with high transaction costs in

many forms. They have to spend time, incur costs, experience uncertainty and stress. The claim-handling procedure is often perceived as unpredictable and uncontrollable. Basic victims' needs, such as recognition, being heard, being in control, being informed, and the like, do not receive much attention in the existing settlement practice. Victimology research shows that victims in pending litigation cope more poorly with their situation than victims whose cases have been settled, or who did not claim at all.[11] Victims regularly complain about treatment that is not consistent with procedural justice values such as respect, voice, and neutrality.

There still appears to be a substantial gap between the needs and interests of victims as perceived by the professionals and the needs and interests, experienced by the victims themselves. Though many professionals have turned to consider other interests, there still is a tendency to see the claims handling process as "a matter of money and rules". This latter view puts the focus primarily on the legal and financial merits of the case, and on needs such as legal assistance and information, but not on the basic needs and emotional condition of the victim. Knowledge and competencies of professionals come from traditional legal sources and methods, such as law books, case law and the practice of distributive negotiations. Insights and skills from relevant other disciplines, such as victimology, procedural justice theory, communication theory, problem-solving negotiation methods, and conflict resolution theory are rarely found in the toolbox of professionals.[12] Furthermore, there may be a principal-

[11] See E.B. Blanchard, E.J. Hickling, A.E. Taylor, T.C. Buckley, W.R. Loos and J. Walsh, 'Effects of Litigation Settlements on Posttraumatic Stress Symptoms in Motor Vehicle Accident Victims' (1998) 11 *Journal of Traumatic Stress* 337-354.

[12] See for a client-centered approach: R.H. Mnookin, S.R. Peppet and A.S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (The Belknap of Harvard University Press, Cambridge, 2000), 178-223; also R. Fisher, 'A Code of Negotiation Practices for Lawyers' in

agent problem.[13] The victim's interest in a swift, smooth, and cheap procedure is not always aligned with the interest of his representative, especially when this agent charges an hourly fee.

Research on victimology and procedural justice theory[14] has shown that victims and litigants in general are more positive towards procedures in which they can participate. Process control, in the sense of being able to speak and being heard is found to be relevant. Whether victims actually want to take part in the decision making process is not yet clear, however. A victimology study on the involvement of crime victims in criminal procedures concludes that crime victims care more for information, consultation and consideration than for having an active role in the decision making

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Menkel-Meadow and M. Wheeler, *What's Fair: Ethics for Negotiators* (Jossey-Bass, San Francisco, 2004) 23-29, and P.R. Tremblay, ' "Pre-Negotiation" Counseling: An Alternative Model', Research Paper 88 (2006), available at <http//ssrn.com/abstract=882463>.

13 See L.E. Susskind and R.H. Mnookin, 'Major Themes and Prescriptive Implications', in R.H. Mnookin and L.E. Susskind eds., Negotiating on Behalf of Others: Advice to Lawyers, Business Executives, Sports Agents, Diplomats, Politicians, and Everybody Else (Sage Publications Inc, 1999) 275-282; also R.J. Gilson and R.H. Mnookin, 'Cooperation and Competition in Litigation: Can Lawyers Dampen Conflict?', supra note 7, at 184-211.

14 See J. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (John Wiley & Sons Hillsdale NJ 1975), E.A. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice* (Plenum, New York, 1988), T.R. Tyler, 'Citizens Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform' (1997) 45 *The American Journal of Comparative Law* 871-904, E.A. Lind, R.J. MacCoun, P.A. Ebener, W.L.F. Felstiner, D.R. Hensler, J. Resnik and T.R. Tyler, 'In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System' (1990) 24 *Law & Society Rev.* 953, E. Fattah, 'A critical assessment of two justice paradigmes: contrasting the restorative and retributive justice models', in E. Fattah and T. Peters eds., *Support for crime victims in a comparative perspective* (Leuven University Press, Leuven, 2004) 99-110, and J. Resnik, 'Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement' (2002) *Journal of Dispute Resolution* 155-169.

process.[15] This may have to do with the punishment component of criminal procedures, but the question whether this also goes for victims of accidents in procedures aimed at compensation is not yet answered. There are similarities in needs of crime victims and non-crime victims, but presumably also significant differences. A more active role in claim-handling procedures could empower victims, but could also increase the risk of re-victimization. Another question is whether informal, out-of-court dispute resolution procedures involving a mediator or other neutral third person, meet the procedural needs on the same level as trial-like procedures do.[16]

Still, fair procedures (procedural justice), being allowed to provide input (control, voice), being treated with respect and dignity by professionals and neutral persons (interpersonal justice), and being provided with good information (informational justice) do seem crucial for victims in out-of-court claim-handling procedures. An interesting topic for future research is why victims needs seem not to be met by the existing procedures. Why are preferences of victims at the demand side of the process not able to steer the process? And finally, what should a victims oriented claim-handling procedure ideally look like?

Victims' Needs in the Code

A settlement procedure that takes the needs of victims seriously probably contributes to prevention or, at least, to a reduction of secondary victimization. During the project, the participating victim

[15] See J. Wemmers and K. Cyr, 'Victims' Perspective on Restorative Justice: How much involvement are victims looking for?' (2004) 11 *International Review of Victimology* 1-16. It is not clear however, if these findings also apply to non-crime victims. See A. Pemberton, F.W. Winkel, M.S. Groenhuijsen, 'Taking Victims Seriously in Restorative Justice' (2006) working paper International Victimology Institute, Tilburg University 4-5.

[16] See T.R. Tyler, *supra* note 13, at 871, reporting a preference for mediation over litigation with settlement conferences being least preferred; more critical towards mediation, J. Resnik, *supra* note 13, at 168.

support organizations insisted on incorporating best practices in the code that put the emphasis on the needs of victims. In line with procedural justice theory and victimology research, and in accordance with the input of victim organizations, the code structures the claim-handling process in such a way that professional parties become aware of, and responsive to, the needs of victims. The code's core values and best practices stress that the focus should be on two goals. The main goal is to settle the claim constructively and swiftly. Secondly, the claims adjuster, the victim's representative, and other professionals involved in the case, should show consideration for the situation, the worries, the needs, and the desires of the victim during the whole process.

According to the principles and concrete good practices, professionals should communicate respectfully with the victim. They should listen to his story, and show recognition and understanding for his situation, emotions, and needs (Principles 1, 2 and 6; interpersonal justice). They should also make the process transparent for the victim, and provide objective information on both the procedure and the substance of the case (Principles 1, 2, and 5; information; transparency; predictability; and certainty). This allows the victim to understand what is going on, why actions are taken, how and when this will be done, and who is responsible for the results (Principles 5 and 7; informational justice).

Furthermore, the need for legal aid or other forms of assistance[17] is recognized in the code (Principle 6). In addition, the victim may become personally involved in the procedure through three-way conservations, unless he is unable or unwilling to (being heard, voice, control, the right of self-determination; Principle 2). This gives him an actual say in the draft of the plan of action (control; Principle 7). Moreover, when parties use the PICE-application, the victim is

[17] See note 10.

able to participate in the dialog (voice, control; Principle 7). When it comes to the substance of the case, the personal involvement of the victim is deemed essential when parties are looking for tailor-made solutions (Principle 4).[18] Procedural needs are also taken into account in the conflict resolution section of the code (accessible conflict resolution by a neutral person; Principles 15-17).

4.3. Negotiation Theory

Theoretical Framework: Supporting Integrative Negotiations

Distributive negotiation methods are still common practice in the legal environment. Although some individual professionals and organizations have been looking for more proactive and problem-solving approaches, until recently a more or less structured alternative to distributive bargaining was not available in Dutch legal practice. The majority of the professionals use competitive bargaining tactics because that is what they have been taught in practice and at law school. Others are convinced that it is the only way to good results.

However, the distributive negotiation method is likely to lead to increased costs, results that do not fit victims' needs, and to tensions during the process.[19] First, distributive negotiators often have a limited view of the amount of resources that are available for division. Because of this "fixed-pie" perception, parties only try to

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[18] The emphasis on fitting solutions, early intervention and rehabilitation could also save costs. See the report of the IUA/ABI Rehabilitation Working Party, *Psychology, Personal Injury and Rehabilitation* (International Underwriting Association of London, 2004) 59, available at www.abi.org.uk/Display/File/364/Psychology,_ Personal_Injury_and_Rehabilitation_July_2004.pdf.

[19] See R. Fisher, W. Ury and B. Patton, *Getting to Yes*: *Negotiating Agreement Without Giving In* (2nd ed., Penguin, New York, 1991) 3-14, see also R.J. Lewicki, B. Barry, D.M. Saunders and J.W. Minton, *supra* note 6, at 75, 113.

maximize the outcome for themselves at the expense of the other.[20] Because goals are believed to be opposite, no effort is made to achieve both parties' objectives at the same time. The "win-loose" frame of distributive negotiators means competitive, not cooperative bargaining.[21] A mutual exploration of the problem(s), the interests and possible solution(s) is not carried out, and an attempt to "create value" is not made.[22] Another disadvantage of distributive bargaining is that often a competitive interaction will come with it. Issues and disputes risk being personalized. Winning seems to become a goal in itself. Negotiators tend to interact strategically. They hold on to their positions, conceal their needs and concerns, keep information to themselves, and sometimes use "hard ball" tactics to achieve their goals.[23] This may lead to over-optimism and inaccurate power assessment, with decision costs and error costs as results. Another relevant aspect of negotiation, maintaining viable relationships for future interaction, is not valued highly. In complicated and extended negotiations, where parties have to deal with each other frequently or, as in the Dutch personal injury field, will probably meet again in other cases, the disadvantages of distributive bargaining can be substantial.

Improved negotiation methods[24] may alleviate these problems. In integrative bargaining, parties' goals are not perceived as necessarily

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20 See R.J. Lewicki, B. Barry, D.M. Saunders and J.W. Minton, *supra* note 6, at 153-154, also M.H. Bazerman and M.A. Neale, *Negotiating Rationally* (The Free Press, New York, 1992) 16-22.

21 Combining the "zero-sum mindset" and the "adversarial mindset". See R.H. Mnookin, S.R. Peppet and A.S. Tulumello, *supra* note 10, at 168.

22 See R.H. Mnookin, S.R. Peppet and A.S. Tulumello, *supra* note 10, at 11-43.

23 See R. Fisher, W. Ury and B. Patton, *supra* note 16, at 128-143, see also R.J. Lewicki, B. Barry, D.M. Saunders and J.W. Minton, *supra* note 6, at 103-112, and R.H. Mnookin, S.R. Peppet and A.S. Tulumello, *supra* note 10, at 22-25.

24 See R.J. Lewicki, B. Barry, D.M. Saunders and J.W. Minton, *supra* note 6, 113-146, for an overview of the literature on integrative negotiation.

conflicting. Differences in preferences create chances for parties to accomplish both objectives at the same time. This cannot be achieved, however, if parties stick to their initial positions. As in all negotiation processes, parties are interdependent. In order to obtain good results for both, they have to explore the opportunities for mutual gain. This requires reciprocity, openness, honesty and commitment to cooperate. Integrative negotiators try to accomplish this as follows. The focus is on interests. Parties convey their own concerns and needs, and are responsive to the needs of the other party. In open discussions, they work on joint problem definitions, share ideas and information, and generate possible options for win-win solutions. Distributive issues are resolved by the use of objective criteria.[25]

This problem-solving, cooperative approach to complex negotiation situations, as personal injury cases often are, may be preferable for several reasons. Irrational optimism may be neutralized by the open exchange of interests and information. Biased perceptions are less likely to occur. Lower error and decision costs can be expected. Difficult, competitive communications and deadlocks may be avoided when the parties share the responsibility for a respectful, safe and open negotiation environment. Negotiators are stimulated to care for long-term relationships, which may be profitable for both in the future. And, of course, there is the mutual gains argument. Both parties can win from cooperation, in particular if they can jointly search for the optimal way for the victim to reorganize his life, his employment, and his personal environment. This benefits the victim, as well as the insurer, because damages awards will generally be lower.

[25] See R. Fisher, W. Ury and B. Patton, *supra* note 16, at 84-98.

Recommended Method for Negotiation in the Code

Competitive negotiations are inevitable, according to some in the Dutch personal injury field. Those who support this view often compare the out-of-court settlement process with a "tournament", where the victim's representative and the claim adjuster "duel" for the outcome they perceive to be the correct one. This perspective on how to handle personal injury claims is still common among Dutch personal injury lawyers. Others working in the field believe that the tournament model may sometimes be difficult to avoid, in particular in the final negotiations about money issues, but that it is also a self-fulfilling prophecy. Looking for alternatives, they have come up with the "harmonious consultation model". This model is concretized in the code, where it is linked to the theoretical approach of integrative negotiations.

The code provides an integrative negotiation framework enabling parties to cooperate in the settlement of the claim. First, the code's core values encourage parties to create a positive atmosphere through respectful and open communications. Personal contact and honest behavior may help to build trust. Then, Principle 3 outlines the essence of the recommended approach. The main focus is on interests, not on positions. Sharing and understanding each other's interests may help parties to find win-win solutions (avoiding the "fixed-pie" perception). Interaction is to be friendly and with empathy (avoiding competitive interaction). Issues are to be discussed openly. Joint fact-finding and the exchange of open information are encouraged. When it comes to resolving issues, parties are stimulated to jointly look for objective criteria. Problems are to be dealt with proactively. When parties are not able to solve a dispute themselves, they are obliged to consult a neutral person who can intervene.

This integrative approach is incorporated in several other principles in the code. Through its communication structure, the plan of action

(Principle 7) stimulates interest-based dialog. A coordinated, open exchange of information may be able to prevent information asymmetry, over-optimism and inaccurate power assessment (Principle 8). Principle 13 enhances cooperation in establishing the damage awards by stressing the importance of the use of objective criteria for the determination of the amount of compensation. Principle 14 suggests a specific method that may help to avoid deadlocks in negotiation, when parties discuss the possible consequences of uncertain circumstances that cannot be determined objectively, such as the future career or health situation of the victim. First, they consult on the points of departure for calculating the damages, for example the expected career path. After they have drafted one or more possible scenarios, calculations of the amount of compensation for each scenario are made. If parties cannot agree on the point of departure, the calculations will be based on all scenarios. The code recommends to discuss the odds for each scenario, and to calculate the award on the basis of the relative weight each scenario should have, instead of pushing one scenario each, and haggling over the outcomes.

4.4. Conflict Resolution Theory

Theoretical Framework: Dispute Resolution System Design

In the extensive research literature on conflicts and their resolution, there is a developing field that is referred to as 'dispute resolution system design'.[26] These studies address two basic questions: what is

[26] W. L. Ury, J. M. Brett and S. B. Goldberg, Getting Disputes Resolved: Designing Systems to cut the Costs of Conflict (Jossey-Bass, San Fransisco, 1988), C. A. Costantino and C. S. Merchant, Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations, (Jossey-Bass, San Franscisco, 1996), K. A. Slaikeu and R. H. Hasson, Controlling the Costs of Conflict (Jossey-Bass, San Francisco, 1998). L. Bingham and T. Nabatich, 'Dispute System

an ideal conflict resolution system and how to implement it? For the purpose of this paper—tools for evaluation of the Code of Conduct—we limit ourselves to a short overview of the theory relevant for answering the first question. An effective resolution system is defined as one with minimal expenditure of time and other resources while honoring and respecting the integrity of rights of all parties.[27]
This literature, however, mainly discusses conflict resolution systems within organizations. The problem, of course, is that current conflict resolution systems between organizations are weak, and difficult to design and implement, because there is no "neutral change-agent". This problem also applies to relationships such as the insurer-victim relationship during claim-handling;[28] Nobody is responsible for the system. One or both parties often tend to deal with conflict either in an adversarial way ("fight") or by denying or avoiding conflicts ("flight"). Negotiations stall and threats to start litigation seem to be the only possible option to resolve an impasse. But this neutral intervention is a long way off, and courts feel not yet a general responsibility for the conflict resolution system in the shadow of their interventions. The general approach in this conflict resolution system

Design in Organizations', in W. Plamer and J. Killian (eds.) Handbook of Conflict Management (Marcel Dekker, New York, 2003). See also H. Gadlin, 'Bargaining in the shadow of management: integrated conflict management systems', in Plamer and Killian supra note 22 at 371-385; and D.B. Lipsky, R.L. Seeber, and R.D. Fincher, Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution professionals (Jossey-Bass, San Francisco 2003). See for 'ad hoc' process design by neutrals, e.g., R. Mnookin, 'Creating Value through Process Design', Journal of International Arbitration, 1/1994, 125-132.

27 Slaikeu and Hasson *supra* note 22 at 10.

28 See e.g. Costantino and Merchant *supra* note 22 at 7-18.

is still based on authority and legal rights.[29] ADR is still seen as an add-on. Litigation is the best-known way of resolving disputes.[30]

This lack of a dispute resolution system approach has its costs.[31] Denial of conflicts, the application of higher authority procedures as the only means to solve them, and the poor accessibility of those procedures, are likely to lead to delays and unproductive attempts to resolve conflict. Apart from that, there is the risk of additional disputes arising in the course of the claim-handling process, if conflicts are not resolved properly.[32] According to many studies, there is a lack of systematic encouragement of collaborative approaches of conflicts.[33] Parties often fail to reconcile interests. There are often no internal procedures that encourage early resolution, and adequate training is lacking.[34]

The aim of conflict resolution system designers, according to Ury, Brett and Goldberg, should be "to design a system that promotes the

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29 Ury, Brett and Goldberg use the distinction in power, rights and interest based methods of dispute resolution, see Ury, Brett and Goldberg *supra* note 22.

30 What complicates this is that parties have to choose together for an alternative way of dealing with disputes. Parties in conflict tend to disagree over which ADR process to use. If there is no mechanism for solving this procedural conflict of choosing a method parties most likely end up in litigation. Lawyers may fight over the question if an ADR procedures is suitable to solve the issue.

31 Other costs are, e.g., emotional damage, drained energy, low levels of satisfaction, damage to relationship, likelihood of conflict spreading and recurring, see Lewicki et al. *supra* note 6 at 493-497.

32 See for the evaluation of conflict resolution systems Costantino and Merchant *supra* note 22 at 10-11, 168-186.

33 See on this R. A. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, Cambridge, Mass., 2001), C. Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1996) 38 *Wm. & Mary L. Rev.* 5 (proposing a variety of methods for different types of disputes), Compare N. A. Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79 *Wash. U. L.Q.* 787 in the context of mediation.

34 See for more details on factors that have effects on the dispute systems that are used in a relationship, Ury, Brett and Goldberg *supra* note 22 at 21.

reconciling of interests but that also provides low-cost ways to determine rights or power for those disputes that cannot or should not be resolved by focusing on interests alone".[35] When starting the design process of a conflict resolution system, the first step is to diagnose the existing system. The second step is to draft a new system. After the new system is drafted, regular evaluation is also recommended. Basic criteria for evaluating conflict resolution systems referred to in literature are: transaction costs; parties' satisfaction with outcomes; effects on the relationship (it may strengthen or weaken it); recurrence of disputes (it is durable and prevents new disputes); and procedural justice.[36]

From the literature on conflict resolution system design the following principles can be derived that should be taken into account when designing a system:[37]

- *Focus on interests*. Facilitate interest-based negotiations. Conflict resolution based on interests provides more satisfying outcomes, more voice, more sense of control, and lower transaction costs compared to authority-based procedures such as litigation.[38] A system should also offer directions how to use collaborative options before moving up to a higher authority solution: negotiations and assisted processes such as mediation.

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35 See Ury, Brett and Goldberg supra note 22 at 18.

36 Ury, Brett, Goldberg *supra* note 22 at 11.

37 Principles set forth by Ury, Brett and Goldberg *supra* note 22, See also J. M. Brett, S.B. Goldberg and W.L. Ury, Designing systems for resolving disputes in organizations (1990), 45 *American Psychologist* 162-170, and referred to e.g. by Costantino and Merchant *supra* note 22. See also B.H. Sheppard, R. J. Lewicki and J.W. Minton, *Organizational Justice: The search for fairness in the workplace* (Lexington, New York, 1992).

38 Ury, Brett and Goldberg *supra* note 22 at 46.

- *Build in 'loopbacks'*. Encourage parties to loop back to negotiations instead of embarking upon a rights or power contest. Thus, information about rights and power can be used in negotiation.

- *Secure back up of interventions based on 'rights' and 'power'*. Interest-based negotiation is not the ultimate solution to all conflicts. Provide low-cost access to a resolution as a back up if negotiations fail. Rights and power may be necessary to bring a conflict partner to the negotiation table. Possible procedures are arbitration, med-arb and final offer arbitration.[39]

- *Consultation and feedback*. Parties should announce their intended action in advance. One step further is that they discuss the action with the other side before it takes place. Post-dispute analysis helps parties to learn and prevent future conflict. Establishing a forum for regular discussion may also be useful.

- *Arrange procedures in a low to high cost sequence*. A menu of procedures ranging from prevention (for example a notification and consultation forum), to interest-based procedures, loop-back procedures and low-cost back-up procedures. Phases in dealing with disputes start with negotiations by parties themselves. If that does not work, internal help may be called in, such as mechanisms to assist parties in reviewing and using available options. Then informal external help (ADR) and finally, formal external help (higher authority courts, governmental agencies).[40]

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39 Ury, Brett and Goldberg *supra* note 22 at 56-58.
40 Slaikeu and Hasson *supra* note 22 at 55-57.

- *Provide knowledge, skills and motivation.* Parties need to have the knowledge to use the system and be motivated to enter it and choose low cost solutions.[41]

Other principles or values that can be derived from more recent studies complete the list of Ury, Brett and Goldberg:

- *Prevent disputes and make interventions easily accessible.* Instead of focusing on full-blown disputes, focus on creating procedures to reveal conflicts early and resolve them in an efficient manner,[42] for example by using multiple access points. Incorporate clauses into contracts so that disputes will automatically be "forwarded" to ADR or other ways that meet and solve problems.[43]

- *Involve the stakeholders in the design.* Identify the nature of the problem with those affected and interested.[44] Participation in the development of the system increases the chances that solutions are durable.

- *Give parties control.* Parties should have maximum control in their choice of ADR method and selection of a neutral person[45] for example, by letting parties pick procedures from a menu.

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41 See e.g. also Costantino and Merchant *supra* note 22 at 134-149.

42 Costantino and Merchant supra note 22 at 125. See also Slaikeu and Hasson *supra* note 22.

43 Lewicki *supra* note 6 at 494. See also Costantino and Merchant *supra* note 22 at 38.

44 S. Carter, 'The Importance of Party Buy-in in Designing Organizational Conflict Management systems' (1999), *Mediation Quarterly* 17, 61-66; Costantino and Merchant *supra* note 22 at 49, 62.

45 Costantino and Merchant *supra* note 22 at 132-133.

4.5. Conflict Resolution in the Code of Conduct

In personal injury cases in the Netherlands, not many parties choose to go to court. The costs of this exit-option are simply too high (financial costs but also the time lost and the emotional energy). Going to court also increases the chance of secondary victimization. Sometimes negotiations are stuck on only a minor issue, in which case the cure (court proceedings) may be worse than the disease.

To deal with this problem, the code opts for a menu with three-layers: (A) prevention; (B) dispute management by parties themselves; and (C) low-cost third-party intervention (Principles 15, 16 and 17). Litigation is always an option, but the parties are discouraged to use it before the lower cost options have been tried.

Prevention already starts with the recommendation to use the open, integrative, problem solving negotiation approach (Principle 3). The aim here is that parties coordinate the claim-handling together and keep the lines of communication open, even in the event of conflicting interests or problems. The code encourages parties to make arrangements beforehand on what to do when negotiations fail, so as to prevent difficult discussions on the procedure once the conflict is there. They may, for example, set out agreements at the start of the procedure to regulate the approach of the claim-handling process, the priorities and how parties will communicate during the process.[46] The aim is a constructive working climate in which conflicts are prevented.

The second layer is the encouragement of a problem solving approach once an impasse is there (Principle 15). More concretely, the code encourages the parties to approach the other party to discuss the problem, or involve someone from their own organization

[46] These arrangements may be made in the web-based plan of action described under Principle 7 of the Code.

in an early phase, before a difference of opinion escalates into a full-blown conflict. The parties are stimulated to identify the underlying problem and to look for avenues to resume negotiations (Principle 16). The code provides conflict recognition and tools for conflict diagnosis, such as a list of conflicts that occur frequently. Its purpose is to help parties pick an adequate intervention and a compatible conflict resolution procedure. A selection menu helps parties to determine the most suitable intervention and procedure.

If a conflict is not resolved, the third layer encourages parties to call on a neutral third party (Principle 16). A Dispute Resolution Center will be set up that gives advice to the parties on how to proceed, and that can refer them to a suitable neutral dispute resolution professional. These are low-cost interventions.

Finally, recommendations for third parties who intervene in the conflict have been included (Principle 17). The neutral person focuses on the impasse at hand. He consults with the parties to find a solution that allows parties to proceed. He discusses with parties the conflict diagnosis, their interests, their relevant opinions, possible solutions, and objective criteria for these solutions. He may also provide feedback on their attitudes.

5. Consensus Building Processes

5.1 Theoretical Framework: Negotiated Rulemaking and Consensus Building

Methods of deliberation, such as negotiated rulemaking or consensus building, are ways for bringing representatives of key groups together to serve their and the public's interests by generating creative deals.[47] These mechanisms are used by government agencies as alternative, or as a supplement to traditional public decision- making techniques such as formal legislation. These practices are inspired by, and based on a great deal of experience of mediated dispute resolution. These interest-based deliberation methods are nowadays regularly applied in a public disputes context in response to legislative or judicial action with a mediator acting as facilitator of the process,[48] mainly in situations where multiple issues and interests are at stake. The outcome of such a process is generally a proposal that must be approved by the formal decision making bodies. A high level of transparency is required and the dialog between the parties is preferably public.

Negotiated rulemaking is a way of developing regulations that is used in administrative law by government agencies in the US and in other

47 See L.E. Susskind and J. Thomas-Larmer, "Conducting a Conflict Assessment," in L.E. Susskind, S. McKearnen, and J. Thomas-Larmer (eds.), *The Consensus Building Handbook* (Sage, Thousand Oaks, 1999) and L.E. Susskind en J.L. Cruikshank, *Breaking Robert's Rules. The New Way to Run Your Meeting, Build Consensus, and Get Results* (Oxford University Press, 2006). See also the recent turn from government agencies to best practices as approach to rulemaking, D.T. Zaring, 'Best Practices', *New York University Law Review*, Vol. 81, p. 294, 2006 Available at SSRN: <http://ssrn.com/abstract=899149>.

48 M.L. Moffit, R.C. Bordone (eds.), *The Handbook of Dispute Resolution*, (Jossey-Bass, San Francisco, 2005), 360.

countries.[49] In negotiated rulemaking as formalized in the US system of government, a negotiation process takes place before an agency issues a proposed regulation. The government agency convenes a committee consisting of representatives from firms, trade associations, citizen groups, other affected organizations, and members of the agency staff. The committee meets to negotiate a proposed rule. If the committee reaches consensus, the agency uses the agreement as a basis for its proposed rule and then proceeds according to the notice and comment provisions of the Administrative Procedure Act.[50]

Consensus building describes a number of collaborative decision-making techniques in which a facilitator or mediator assists diverse or competing interest groups to reach agreement on policy matters, environmental conflicts, or other issues in controversy affecting a large number of people. It is a process of negotiation aimed at recognizing and respecting common interests and working together for mutual benefit.[51]

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[49] See, e.g., L. Susskind and J. Cruikshank, Breaking *The Impasse: Consensual Approaches to resolving Public Disputes* (Basic Books, New York, 1987); P. J. Harter, 'Negotiating Regulations: A Cure for Malaise' (1982) 71 *GEO. L.J.* 1; L. Susskind and L. Van Dam, 'Squaring Off at the Table, Not in the Courts' (1986) *TECH. REV.* 36; W. H. Miller, 'Bypassing the Lawyers: Regulatory Negotiation Gets Test in Agencies', (1986), *INDUS. WK* 20. See (critical) on negotiated rulemaking e.g. C. Coglianese, 'Assessing Consensus: The Promise and Performance of Negotiated Rulemaking' (1997), 46 *DUKE L.J.* 1255, 1259; P. Harter, 'Assessing the Assessors: The Actual Performance of Negotiated Rulemaking' Available at SSRN: <http://ssrn.com/abstract=202808>; C. Coglianese, 'Assessing the advocacy of negotiated rulemaking: a response to Philip Harter' (2001), *NYU Environmental law journal* 386-447.

[50] Coglianese *supra* note 45 at 391.

[51] See Susskind et al. *supra* note 47.

Consensus building consists of a number of steps:[52]

1. *Convene stakeholders*: Convene the relevant parties to assess the problem(s) and the feasibility of reaching agreement. Invite them to participate in the consensus building process and seek commitment to the ground rules of the process.

2. *Agree on roles and responsibilities*: Clarify and assign the specific roles and responsibilities of the parties and the group as a whole. Specify the scope and timing and agree on the final work plan.

3. *Facilitate joint problem solving*: Make sure the process is transparent. Be prepared to adjust the work plan, agenda and pace. Facilitate brainstorm sessions, joint fact-finding and subcommittees to generate package deals that meet stakeholders' needs. If necessary, use the help of a neutral facilitator.

4. *Agree on content and procedure*: Seek unanimous or near-unanimous decisions on written packages that maximize gains for all. Agree on the decision-making procedure. Ask parties who object to the package to suggest improvements that still suit the needs of the other parties. Make sure the final agreement is known.

5. *Implement the agreements*: Convene a final meeting and ask the stakeholders to sign the package. Then, if necessary, submit the proposal to the decision-making bodies. Reconvene the

[52] See for more details on this process D.A. Straus, 'Designing a Consensus Building Process Using a Graphic Road Map', in Susskind et al. *supra* note 47 and Susskind & Cruikshank, *supra* note 47 at 169-187.

stakeholders if the decision-making bodies object to the proposal, or when circumstances change.

The theoretical advantages of consensus building processes are clear: preventing impasse, avoiding litigation about regulation, and saving time in the regulatory process. Ideally, key persons and organizations are working together on a set of rules to achieve the result that best meets their interests. In search for solutions to complex problems, stakeholders can commit their knowledge and experience. Because they actually have a say, they are able to influence the precise content, so that the rules deal with the specific problems in the field and the interests of the participants. The solutions found are tailor-made, and for that reason probably effective. Compliance with the set of rules is more likely to occur. Negotiated rulemaking may be less time and cost-consuming than government regulation, which is another benefit.

Yet, the research literature has identified some downsides. First, well-organized interest groups, for example insurers or lawyers, can exert decisive influence on the negotiation process, at the expense of less well-organized groups, such as victim support organizations, who often depend on volunteers and have fewer funds at their disposal. A second disadvantage is the asymmetry in information. Professional organizations, for instance, may have a lead over victim support organizations. A strategic risk is behind the question why any interest group would want to cooperate in designing rules that are not directly, or not at all in their own interest.[53]

These flaws may be surmountable by the involvement of a neutral third party in the process. A third party may act as a process consultant, facilitate the process, stimulate constructive

[53] See on the downsides e.g. Coglianese *supra* note 45.

negotiations, watch over power disparities, help to overcome impasses, guard the quality of the results, provide objective information, suggest options and solutions, and so on. Depending on his role or specific assignment, the third party can be less or more active and decisive. Possible third parties are facilitators from the government, judges, leading scholars, and other independent experts. Setting and timing are crucial also, as we will now show.

5.2. Negotiated Rulemaking and Consensus Building in the Project

Over the years, the Dutch personal injury field had been looking for ways to improve the claim-handling process. Although some progress had been made, for example by the guidelines from the *Nationaal Platform Personenschade* (The National Platform Personal Damages), the need for improvement became more immediate following a critical report of one of the leading victim support organizations in November 2003. The media, the Dutch parliament and the Minister of Justice put pressure on the major players in the field to make a serious effort to improve the claim-handling procedure. The Minister of Justice even referred explicitly to the project, stimulating the participants to use this as a forum for improvement.

With the likelihood of government intervention, should the project fail, the negotiated rulemaking process from then on took place in the "shadow of the law". Representatives from the Ministry of Justice attended all expert meetings, sketched possible scenarios, organized a meeting on dispute resolution, and facilitated in other ways. Regularly, the progress of the project was on the agenda of parliament, which also held yearly hearings on the subject. The way the "shadow of the law" affected the process probably has been one of the determining factors for the success of the project.

From the start on, the aim of the project was to establish an interest-based consensus building process, allowing key organizations and

other interested parties to work informally on proposals for improvement. Commitment to the process and consensus on the subject matters that had to be dealt with were essential. During the project, relationships with and between participants were constantly cultivated. The open-door policy enhanced the participation of individuals and organizations that normally would not have taken part.

Some intervention was required, however. The over-representation of insurers at the beginning had to be counterbalanced. This was done by issuing explicit invitations to victim support organizations, victims' representatives and neutral organizations. Four of the smaller victim support organizations gladly joined. Two of the three associations of personal injury lawyers, though critical and somewhat reluctant, also accepted the invitation, as well as other victims' representatives, such as legal expenses insurers, claims processing bureaus and the powerful *ANWB* (the Dutch Royal Touring Club) that also represents victims of road accidents.

Transparency helped to keep contributors committed to the process. Regularly, we organized face-to-face meetings, put up a website,[54] and provided open access to all project information. Although initially the agenda and pace was set by us, all procedural issues were open for discussion. Participants could present suggestions on procedural and substantial topics during expert meetings or start e-mail discussions that were forwarded by us to all contributors on the mailing list. The planning of the activities, all drafts, proposals, reactions and comments were made public on the website. Interim accounts and updates on the project were given in half-yearly reports.

On substantial matters, we continuously aimed at consensus, but with a focus on the consensus between the parties whose primary

[54] See <http://normering.rechten.uvt.nl/>.

interests are at stake: victims and insurance companies. The professional interests of others in the claim-handling process (lawyers, claim adjusters, medical advisers, experts, and others) were taken very seriously as well, but in case of an apparent conflict with interests of the victims and insurance companies we facilitated a setting in which the professionals were invited to be innovative and to think about the interests of their clients. First, a joint assessment of the main problems and possible outcomes was organized. Secondly, a meeting on the design of the procedural norms took place.

The result was that we would strive for a Code of Conduct containing best practices (stimulating positive thinking, instead of the negative atmosphere that can be the result if the focus is on rules that forbid certain actions during the claim-handling process). In the third meeting, we discussed the status of the code and enforcement. Fundamental discussion on the binding force of the code and sanctions took place.

On these specific topics, the participants could not reach agreement. However, they accepted other ideas for actions that would stimulate implementation, and came up with new ones: the Victims' Guide (informing victims how the code could be of use to them); a Permanent Organization (for the evaluation, maintenance and improvement of the code); the plan of action (joint coordination of complex cases through the PICE application); and the Dispute Resolution Center (establishing easy access to conflict resolution). Four subgroups developed the ideas into concrete plans and experiments.

After these preliminary activities, the actual work on the subject matter of the code began in August 2004. We presented first, second and third drafts, which were extensively discussed in meetings. Each new draft adjusted and improved the previous one on the basis of the contributions of the participants. Gradually, the drafts developed

into the present code. When the third draft was presented, the field was again asked to make official comments on the code. Several key organizations responded, and their reactions, if not conflicting, were integrated in the fourth draft. Remaining differences in opinion were discussed, and for the most part resolved, at the final meeting. The fifth and final draft was then made available for text suggestions. In the spring of 2006, the code was finalized.

Some of the expected problems related to negotiated rulemaking processes could be solved. The diversity of the participating experts made it possible to surmount problems such as information asymmetry and power imbalance. The presence of scholars, representatives from the Ministry of Justice, and other neutral persons, together with the mix of expertise and position prevented the undesirable lead of well-organized, highly professional interest groups at the expense of less well-organized participants. Not one particular organization could exert decisive influence or the power of veto over the proposed best practices and other suggested measures. We made clear from the beginning that we, as facilitators, wanted to publish the best practices in the field, based on their input, and informed by relevant research. But also that we as researchers would publish those practices anyhow, even if one or more of the organizations would walk away from the process,

Not all difficulties could be overcome during the project. The associations of personal injury lawyers withdrew at the time the third draft of the code was presented. They argued that the code denied access to justice, violated the confidential relationship between lawyer and client, and breached the principle of full compensation. Although most of their objections had already been considered, or could have been solved in some or other way, they disengaged themselves from the project. The main reasons were probably the lack of trust in the process, and reluctance to work on the code that is not in their clients (and their own?) interests. Their departure did

not stop the process, however. Other participants, including victims' representative groups, continued to cooperate, which resulted in the present code.

At this time of writing, about 95% of the motor insurers have implemented, or are about to implement the code. Most victim support organizations already have committed themselves to the code. The main Dutch victim support organization, *Slachtofferhulp Nederland*, is distributing the Victims' Guide and the summary leaflet to victims that get in touch for help. The Permanent Organization has put up a website, promoting the code and victims' guide to the public.[55]

On the legal advice side, the picture is mixed. Not surprisingly, 75% of the legal expenses insurers has internalized the code in their work processes. However, the personal injury lawyers justifiably maintain their position that lawyers in advance cannot comply with the code because of their independence. Two of the smaller personal injury lawyers associations have advised their members not to comply with the code at all. Conversely, the largest personal injury lawyers association takes a more practical approach. Although the code will not be implemented, all members are advised to discuss the application of the code with each client in the first interview. In this way, the client is offered a real choice whether the code will be part of the case strategy or not.

[55] See http://www.letselcode.nl

6. Discussion

Structuring negotiation processes through codes of conduct may be a concept that is more widely applicable. It can contribute to creating a collaborative negotiation environment, where negotiators are more likely to follow the road of integrative negotiations. This tool could be interesting for other legal systems as well. It could even be extended to other areas of recurring conflict, such as divorce, neighborhood disputes, employment disputes and disputes between business partners, to name but a few.

For those considering a similar effort, it may be useful to consider the specific cultural and institutional phenomena in the Dutch personal injury field and that helped shape the project. We will explore some of these.

We have already noted that there was some pressure of Dutch members of parliament and of the Ministry of Justice on the participants to do something about the unsatisfactory claim-handling process. Repeated press attention seems to have been a reason for insurance companies to find more cooperative ways of claim-handling. So, at least some sort of urgency, and more likely a BATNA of government intervention seems to be needed.

Moreover, the process of negotiated rulemaking is ingrained in the Dutch culture of government, which is often seen as leaning on negotiation between interest groups as the primary tool to achieve results. This culture is made possible by, and reinforces, interest groups that are rather well organized, and that have sufficient resources to participate in large-scale projects, which require long-term investments and commitment. This should, however, not be overestimated. We often heard from participating organizations that they could not find the time to participate more intensely, in particular the organizations representing victims, such as the personal injury lawyers association and the various associations of

victims of traffic accidents, which have little or no professional staff and no money to hire expertise.

More or less by accident, we also found a way to deal with a possible principle-agent problem in the relationship between some organizations representing victims' interests and the victims themselves. The personal injury lawyers associations withdrew from the project, because they were unhappy with some preliminary results, and arguably also because they struggled with their own role in such a process. The objective of the project was to establish best practices, which may not go together all that well with the traditional role of lawyers as independent agents, who are free to help their clients in any way that is within the bounds of the law.

Some individual lawyers, however, continued to participate, understanding that leaving the process had a price. The predictable public reaction from insurers and others to the personal injury lawyers leaving the project, was that the lawyers apparently had no interest in improving the process, because it would reduce the number of hours they could bill in personal injury cases (Dutch law has a fee shifting system for cases in which liability is not the issue, so the bill goes to the insurance company).

The good thing coming out of this situation, however, was that the participants had to listen more carefully to the organizations directly representing the interests of victims, and even to individual victims. This in turn stimulated them to come with even better suggestions for improvement. Giving them voice also empowered these organizations and individuals to devote more time to the process and to make higher quality contributions. In the end, both personal injury lawyers representing victims and insurers had to listen to the voices of the victims, that became the arbiters in many of the differences regarding good, not so good, or best practices. Our conclusion is that the way groups of stakeholders are represented is a key issue. Our recommendation would be to reinforce the voices of

the victims in any way possible, by listening to individuals, and by making professionals listen to them, and thus empowering these voices. Which, of course, can only happen if there is cultural support for this type of listening.

Our final remarks are devoted to incentives. We did not study those in detail, but our impression is that support for a cooperative negotiation environment critically depends on incentives for professionals. For insurance companies, cost saving is important, in particular in the Dutch situation where they often also pay for the plaintiff's legal costs. But a more powerful incentive may be that a more victim-friendly approach leads to lower payments to victims, because victims that are treated well from the start have better chances of recovery and better chances of finding the right coping strategies, both at home and in the workplace.

The representation of victims is a complicated market with suppliers having different incentives. Some 40% of victims have legal aid insurance, where the insurer who handles the claim for the victim has an incentive to save legal costs. Some 30% are represented by personal injury lawyers, usually paid by the hour (they are not allowed to use no cure no pay arrangements), who also have a monopoly of fighting disputes in court, so they can more effectively threaten to use such a procedure than other competitors. The remaining 30% of the market are served by claims processing bureaus, who often work on a no cure no pay basis, so their incentive is to generate as much money as possible, against the lowest possible costs. This incentive structure may be one of the causes of the problems in Dutch personal injury claims recovery, but it should also be taken into account when finding a solution.

7. Conclusion

A code of conduct for handling personal injury claims may—at least theoretically— contribute to a more collaborative process, with lower transaction costs and less secondary victimization. Indirectly, it may also lead to lower costs of the tort system, because of earlier and better recovery. In this paper, we showed how the Code of Conduct that was developed in the Netherlands is to some extent compatible with theoretical perspectives that predict how improvements of the negotiation climate in the shadow of tort law and the law of civil procedure can be achieved. These perspectives can serve as theoretical frameworks that may be used to evaluate this project in more detail and assess whether this process deserves a follow-up in other areas in which similar negotiation processes take place and similar conflicts occur. Whether the code will actually work in practice, is something that remains to be seen and will be the subject of future research and evaluation.*

* For the full text of the code of conduct see http://www.tilburguniversity.nl/faculties/law/research/tisco/research/completedprojects/norm/

6 Victimology: A sociology of victim as well?

Armando Saponaro[*]

1. Introduction

Since Wertham there is talk about a ”sociology of the victim”. Nowadays, victimology is regarded as an autonomous science, undoubtedly interdisciplinary and multidisciplinary. This paper tries to identify some elements of the sociological profile of victimology. It asks: on is : “What is the original contribution of victimology to social sciences” and “What is its sociological substantial essence of victimology?”

The only coherent theoretical framework generally attributed to a victimological approach in the sociology of deviance and crime are theories of lifestyle or routine activity. The sociological substantial essence of victimology is more than that.

Schafer assumed crime to be a social fact including victim’s behaviour and consequently with this behavior the characteristics of the victim. Schafer’s theoretical proposal can be seen as the original counterpart of Durkheim and Parsons’ functionalism in the sociology of deviance. The “functional responsibility” defines a kind of “victim’s deviance”, that is the risk taking behaviour, functional to social order. Victimology demonstrates that also concepts like prejudice, labelling and stigma apply to victim but in a specific way – even if

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interconnected way in respect to offender. In the end from an objective sociological point of view, the same "victim blaming", empirically proved and dynamically present in the victimologist scientific community as constructive definition process, can be inserted in the social control theoretical frame, according to a perspective hitherto unexplored by sociology of crime and deviance.

2. Heron or Eagle?

Passing over the ornithophilous metaphor, surely one of the most challenging questions for victimology at the early turn of 21st century is well posed: does victimology have a theoretical or an empirical leg to stand on?

From the seventies of last century on, a huge amount of empirical work has been performed. Again and again, research has been focused on every type of criminal victimization, homicide, rape, child abuse, domestic violence, white collar crimes, and so on. Neither victims of war nor genocide victims have been excluded. The focus has been increasingly zoomed in on each type, for example - in the crime victim field – on campus victimization, date rape, et cetera. The aim has been mainly to depict and explain the quantitative and qualitative aspects of victimization, to classify the various forms of victimizations and related behaviours. To the some extent the empirical work was combined with an interpretation of collected data. Empirical work was used for describing phenomena and/or explaining causality. That lead to results, theoretical in nature. But from a sociological point of view, these attempts are for the most part what Merton (1968) would have called “close range theories”, limited to a specific microsocial approach, limited to the situation and its context. Impact and consequences of victimization on victims, victims needs, functionality and effectiveness of victim assistance programs, have been also empirically scrutinized, checked and tested. In addition, under the lens of the empirical microscopes, thgere have been topics like these:

- the role of the victim in the criminal justice system,
- the effects of the connected formal procedures and mechanisms on victims

- the interaction between the victim and professionals of the agencies of social control (like police, judges, lawyers, jurors, mediators and so forth)
- the agencies' attitudes, prejudices and stereotypes in dealing with and handling victims.

It is enough to look at studies about the so-called secondary victimization. Sure, there are problems in the area of standardization in methods of collecting data. There is a lack of commonly shared epistemological assumptions and principles. But, anyway, it would be difficult to dispute the existence of a well-established "empirical leg" for victimology to stand on.

So the real dilemma we consider worthy to have at least a tentative or provisional answer is: "Is one leg enough? Or does victimology needs two legs, a theretical and an empirical?" Or – staying in the metaphor from the beginning of this section- : "Is victimology a heron or an eagle?"

In fact, at a cursory glance, the tendency to elaborate wider range victimological theories, appears to be the opposite: from the seventies efforts to give victimology theoretical grounds, to build its pillars and cornerstone steadily declined. It is quite easy understandable. At the beginning and subsequently in its "*adolescence*" victimology was involved in a pursuit of scientific identity. The pressing queries in the early three or four decades were "what is victimology itself?" "should it have as its object only crime victims?" and its disputed autonomy or relationship respectively from or with criminology and some other sciences or disciplines. The importance of this last issue is testified by the fact that a lot of renowned members of WSV have been discussing what Kirchhoff (1994) called the topic of "cooptation of Victimology by Criminology" until the nineties. In particular the initial theoretical endeavour was directed to find a differential

identity, or a <<*surplus value*>> to the concepts, frame and instruments set borrowed by criminology and sociology of deviance. Today the majority of victimology and victim assistance courses are still exclusively about victims of crime (Dussich 2003). Thus from a sociological perspective to which the scope of this essay is limited: criminology and especially sociology of deviance are still terms of confrontation. Has the victimological enterprise been successful at least in this respect?

Even if a psychiatrist and not a sociologist, Wertham(1949: 259) called for a science of victimology in the 1940s, and he spotted it as a "sociology of victim". He wrote about murder victim as "the forgotten man" and he based his remark on the assumption that to understand the psychology of murderer it would be necessary to understand the sociology of his victim. Considering the context in which this claim was made, today we would call it better "sociology of crime victim" (Saponaro 2004: 5). Nowadays victimology regarded as an autonomous science is undoubtedly interdisciplinary and multidisciplinary, but we can still pose the question of what is the victimology original contribution to social sciences and moreover its sociological substantial essence. It is significant that a prominent victimologist as Kirchhoff (2006) again very recently feels the necessity to restart an auto-reflexive discourse about Victimology not only as a social science but also as an interdisciplinary science. The problem of autonomy from criminology and other related sciences derives from its interdisciplinary nature. Victimologists need to trace their own "territory", to distinguish the contribution of other sciences, e.g. of sociology. The question is what Victimology is able independently to say *to* other sciences.

Two enlightening models of study of Victimology so are set against each other: on the one hand an obsolete and contributive one in

which Victimology treasure and store concepts, informations, methods and clearly theories borrowed from sociology, law, medicine etc.; On the other hand, a modern and mature substantive model one that defines and maps out the area of Victimology not exclusively determined by its contributors. Kirchhoff (2006: 39) states convincingly and strongly :" Victimology is more than the sum of contributions of other fields". The developing process of Victimology thus embraces an even more challenging task: to explore the specific victimological substance and to describe how it contributes to other science. Regarding sociological perspective did victimology at least partially realize the goal, fulfilling the "Wertham prophecy"?

We will try to follow a hypothetical and ideal type of Ariadne's thread of a sociology of victims.

3. Victimological Theories

As noted above, in victimology there is a body of theories but they at their best have a micro-social approach, generally very centred to a specific type of victimization or context, and for the most part borrowed by other sciences[1].

This becomes even more evident if we observe the "victimological theoretical leg" from an educational point of view.

When a science becomes a "discipline" in the original sense suggested by its etymological Latin root, *to learn*, that is when it is teached in courses, "history" is generally the most important part of first steps of newbies. This respond certainly to a to beneficial and practical need: transmitting the theoretical heritage gives the beginners the instruments to do more consciously their future job and in respect of scholarly research to go further avoiding errors or repetitive thinking. As underpinned by a scholar very committed to the history of our science : "We want to see the shoulders we stand on and to place ourselves into an historical line of scientific development, into a school of thoughts" (Kirchhoff 2006: 41).

Indeed when we have a look in a discipline textbook we find often a systematic depiction and explanation of theories put or categorized accordingly to a variety of criteria, sometimes chronologically as they surfaced and followed one another or grouped into school of thoughts and so forth. Garland (1994) admits the significant role of this in shaping horizons and reference points of a contemporary science as

[1] Especially if a systematic criterion is adopted: see for example Wallace H. (1998), *Victimology. Legal, psychological and social perspectives* Allyn & Bacon, Boston.

criminology. It is true not only sometimes as a framing device for subsequent arguments, a way of conducting a theoretical debate by other means, not only as a part of a discipline building process necessary when outcoming contemporary interests and understandings claim a reinterpretation of past theories, a revised history, but also to provide practitioners with a standard-issue kit of collective terms and shared values (Garland 1994: 20-21). These "positive" elements are pointed out by Garland. But his critique is sharp and biting - it would be more honest to say, he shows us lights and shadows in the histories of discipline as "textbook history", remarking habitual misuses in adopted criteria or misleading categories. "Textbook history" looks at historical perspectives as a kind of unavoidable evil. In most criminology textbooks, the ambitious task of giving a complete discipline theoretical landscape is not even attempted. But commonly the reader comes across an illustration of theories most commonly grouped in three categories, - biological, psychological and sociological ones- or schools of thought like Positivism and Chicagoans. What about Victimology?

The "theoretical leg" seems to be almost thin and fragile. *Heron* more than *eagle* especially from a sociological point of view. The only theories that have been properly considered "victimological" are the proposed macro-social theoretical frames for victimization surveys data in the late seventies. The victimization surveys launched since late 60s represented systematic sources of huge amounts of data about socio-demographic profiles of crime victims and their behaviours.

Sure there are some disputable aspects of these surveys. But in spite of them, they reflected – and they do this still! - what agreeably can be qualified as the major social theories of victimization from a "victim perspective". They are rooted in thoughts about the risk of

victimization observed as a dependent variable of victims' socio-demographic characteristics and habits. These are the well known Hindelang, Gottfredson and Garofalo (1978) Lifestyle-Exposure – models on one side, the Cohen and Felson (1979) Routine-Activity models on the other side. These models have been surely the most widely applied perspectives to account for individuals' risks and aggregate rates of criminal victimization (Meier and Miethe 1997). Meier and Miethe (1990) made an attempt to integrate these two models into what they call *the structural-choice model of victimization*.

But are these really "victimological theories"? Or is the victim considered as a social actor only in the background or better "upstream" and not in the middle of the "action"? Meier and Miethe (1997) correctly point out: originally the *lifestyle-exposure model* was developed to account for differences in victimization risks across social groups, while the *routine activity model* tried to account for crime rates change over time. Both were subsequently applied across units of analysis and in both, cross-sectional and longitudinal designs. Meier and Miethe tried to assess a social ecology of crime, the criminal opportunities social structures and offender's selection patterns of victims. From the perspective of the victim as a social actor, role expectations and social structure are correlated to lifestyles and conventional activities as the environment of crime, indeed to structural elements of crime, exposure to potentially motivated offenders. They are not related to the interaction victim-offender as a social fact. So they are not properly "victimological" but "criminological". In fact that may be the reason that they are infrequently illustrated in textbook victimology history.

Karmen (2004: 22) comments on the apparent lack of school of thoughts in victimology, very differently from criminology: victimology lacks well-developed theories of human behaviour. To put it less

ambitiously: victimology in truth lacks at least a sociology of victim. Maybe only Wallace (1998) deals explicitly with theories that qualify as truely victimological: he writes about the Founding Fathers' ones: Von Hentig's, Mendelsohn's and Schafer's model. He underlines their value in terms of theoretical heritage. Even if they have turned out later on to be incorrect, but the insight about their contribution to a real victimological theories set is important. Victimology undoubtedly has not developed yet its own theory of human behaviour. But according to a deeper analysis it is possible maybe to identify nevertheless a substantive contribution to some main sociological theories of human behaviour. We can moreover obtain hints and clues for new understanding of contemporary questioned issue and promotion of future research.

4. Functionalism approach

Functionalism fortune in European sociology has made it quite an antonomasia for the discipline itself. Its validity at least in its "orthodox" version is not seriously taken into account any more. But nevertheless, it is really widespread, in almost every wider branch of sociological work, to face uop to it, to confront and/or to openly criticize it. It is a cornerstone that shows its serious decay marks of time, but nevertheless, it is a cornerstone. "Deviance" itself was born in functionalism. There it had a first theoretical dimension. Still nowadays denotes a specific part of sociology. In other sociological traditions it is the same. Downes and Rock (Martins as quoted by Downes and Rock, 1988: 87), express this ambivalent relationship very well. They write that the demolition of functionalism is almost an initiation rite of passage into sociological adulthood or at least into adolescence. Is it possible to say that victimology has its own functionalism or has given a substantive contribution to it?

Instead of being regarded at least a dialectical term of sociological confrontation, functionalism approach in victimology has been ignored or underestimated at best. Paradigmatic for this attitude is the serious but unjust judgement of Meier and Miethe (1997: 461) about the Founding Fathers Von Hentig, Mendelsohn and Schafer. They denied almost completely that the ideas of these early victimologists could ever constitute a "history" in respect of modern victimological theories. They considered some of the concepts used by those early writers "primitive". They could not even find a sketch of victim theory ancestry in these first victimological contributions.

Such evaluation is not correct. Mendelsohn prepared the soil into Schafer put the seeds. Schafer considered crime no longer as an act of a single social actor but as a compound of two behaviours. Schafer

showed: the moral evaluation of their violation of social rules and the correspondent sanctioning are joined reciprocally and inseparable in the so called "shared responsibility". That was the real turning point. The actions o the victim constitute a moral fact, subject to bias and social reaction – however, not isolatedly, but in reciprocal relationship with the act of the other social actor, the offender. Schafer went further inserting the victim in the Durkheim's vision of crime as functional to maintain social cohesion. The Italian victimologist Balloni (2003) in Stellenbosch stressed that Durkheim theory was susceptible or better in need to be completed by this insertion: Schafer's tentatively but implicitly inserted the victim in the Durkheimian functional perspective on crime. With the concept "Functional Responsibility" Schafer's proposes a theoretical counterpart to Durkheim's and Parsons' functionalism in the sociology of deviance. The theoretical use of concept of "function" Schafer seems to have directly borrowed from Durkheim.

Durkheim most famous assertion in *Les Règle* (1895) was that crime is "normal", a factor of public health, and an integral part of all healthy societies. Crime is "functional" to maintain social order due to its contribution to social stability. Downes and Rock (1988) summarized well: The reaction of the group or community is induced by crime (or in a more generally, by deviance). This reaction, in attitude and sanctioning, corresponds in different grades to intensity and severity of the infraction. Downes and Rock 1998: 95 state that this serves to heighten collective sentiments, to sharpen perceptions of moral imperatives and to more tightly integrate the community. The acts of the transgressors in short reinforce the normative set and the values of the group. That is side of the coin.

Schafer on the other side describes the accountability of the victim as an instrument of social control. The moral response to the victim

behaviour serves to maintain and conserve social order.The "functional responsibility" defines a kind of "victim's deviance". It functions to maintain social order – in the same way as crime functions. The concepts are exactly as in Durkheim: risk taking behaviour, violation of social rules of diligence and carefulness, the moral cohesion of the group, the solidarity: all pose a moral imperative to prevent and not contribute or even provoke the illicit conduct. The one is the counterpart of the other.

5. Social construction of deviance and labelling approach

Labelling approach is part of what can be called the interactionist perspective of the wider paradigm of the social construction of deviance and "of reality" at a more general level. The "social construction paradigm" was born with the fundamental work of Mead (1939) for the symbolic interactionism and Berger and Luckmann (1966), ending in its classical pillars with Schutz (1974). The social construction of reality in its relevance for victimology is a topic of recent considerations of Barkhuizen (2007) and Kirchhoff (2007).

The social construction of deviance is a paradigm on the opposite side of functionalism. That is the reason for which we take it into account. We do not want to integrate them by the mean of a supposed unified victim's perspective. Theoretical integration has strong constraints. Some perspectives - sociological or not -, in criminology as well as in victimology cannot be integrated because they make contradictory assumptions which cannot be reconciled (Mier and Miethe 1997: 493). The scope is to follow the ideal Ariadne thread of a possible sociology of victim, to check if Victimology contributed to different areas of sociology and specifically of deviance, even not reconcilable each other's.

Victimology put a substantive contribution to complete the theory on the behalf of victim. Recently Fattah (1997) has given a summary of this social construction paradigm in Victimology. Quinney (1972) that decisively suggested that the "victim" is nothing but a social construction, Fattah argues that in every society there is a continuous process of constructing and deconstructing the victims. Fattah concludes that victimization is therefore a personal subjective and relative experience (Fattah 1997: 257). The same definition of

victims varies enormously by normative standards, specific ideologies or by law. He observes: there could be a discrepancy between the what victims define and perceive themselves as victims (Fattah 1997: 258). In sociology of deviance, the social process of construction includes not only definitions but also the social reaction to deviant behaviour. It includes them at both levels, the informal and the formal. At an informal level, we find stigma and marginalization. At a formal level, we find the institutional selective treatment of deviance by social control agencies. Deviance is the product of a process through which the members of a group, a community or a society first of all have to interprete the behaviour as deviant. They then label the individual that finally acts accordingly and so deserves themselves the treatment provided (Kitsuse 1962).

The victimology counterpart is represented by the labelling process described by Viano (1987; 2000; 2002) in four stages. At the first stage manmade harm and suffering and/or damage occurs to an individual. The problem is that the victim – in spite the real, actual and effective harm, suffering or damage - is not recognized as victim. It is not recognized first of all by him/herself and than by the group, community and the social body, as such, until the last stage of the social construction of victim's definition, role and *status* related and connected to the situation, is reached. It is necessary in the next step a kind of self-labelling, then the perception of victimization within the community or social group in which the victimizations happens, and finally the formal and informal reaction towards the victim, solidarity, empaty care and assistance to recover. This stage stepping is applied to the victim exactly the same way the process, depicted for the criminal or widely the deviant label, works, according to the social construction of deviance paradigm. Under this perspective victimology gave a significant and substantial contribution to sociology and specifically to sociology of deviance. Maybe an

unexplored and most important topic would be if blame, stigma and bias on the "deviant" victim, the victim socially perceived and labelled as "guilty", "deplorable", violating social rules or role's expectations or anyhow faulty, can be interpreted and theoretically framed the same way. That is answering the question if the social reaction and response to victimization is only in terms of solidarity, care and assistance or it is possible to stress a negative labelling process that conduces to that phenomenon called misleadingly and confusedly "victim blaming". Or on an other side that is moreover wondering if the process described by Viano come into the social reaction to event of victimization (first stage) and not to victim's behaviour as a social actor in the crime interaction and the social reaction and corresponding labels related to that. Societal response to crime seen as a complex social fact in which also the victim is acting and interacting as social actor, necessarily from a right and correct sociological approach, addresses both offender's conduct and victim's conduct before, during and after the harmful event. Social reaction towards victim's behaviour will be bias, blame in the social control perspective and negative and selective labelling in the constructivist paradigm in case of violation of social rules, role's expectations and so forth, even "it should not be" or wishable not to be.

6. Conclusion

Victimology as a social science has surely a well-established theoretical leg. Even if we agree with Karmen's remark (2004) that victimology lacks its own well-developed theory of human behaviour, nevertheless it has been possible to outline a sociology of victim perfectly inserted in the main sociological theories and into the main approach to human behaviour. As shown above, Victimology followed the same developing ladder of sociological theories specifically focused on crime and deviance- but from an autonomous and original perspective. Its contribution is not a marginal or mechanical application to victim and victimization of those theoretical frames but it is substantial. The explored path of outlined sociology of victim allows us some concrete and actual considerations about a highly controversial matter in Victimology like victim blaming. Victim blaming has been seen as an arena of ideological conflict, of opposing attitudes of researchers and scholars. In a broad and inclusive analysis Karmen describes the features of what he considers to be two opposing ideologies, *victim blaming* and *victim defending* (Karmen 2004: 110). As well known the controversy about victim blaming arose from theoretical notions like "Shared Responsibilioty" or from empirical resrach concepts like "Victim Precipitation". The same concept of victim precipitation, facilitation or more in general contribution to crime has been "accused" to facilitate and to enhance victim blaming. Considering the circular and autoreferential discourse about victim blaming within the scientific community of victimologist as a social fact *per se*, it is noteworthy that it can be seen as a part of the major and wider debate in sociology and epistemology about the "neutrality" of science and the grade and intensity of observer and researcher ideology influence on what should be "objective" scientific results and conclusions. This is confirmed by the fact that the same Karmen explaining victim

blaming ideology notes that victimology despite its aspiration toward objectivity may harbour an unavoidable tendency toward victim blaming (Karmen 2004: 110). In fact the epistemological premise under the surface is that the act of observing modifies the observation object in such a way to effectively contribute to construct or "create" a piece of reality. The famous Schrödinger's cat experiment brought into a debate that was drifted from physics up to all science fields. From a sociological point of view it pilots to the question if the act of observing and measuring a social fact modifies it, whether this creates a new social reality different from the initial state prior to observing. In the terms of victimological debate about victim blaming it becomes the query: Did theoretical approaches (like victim precipitation or causal contribution to crime) somehow create or effectively shaped victim blaming as a social phenomenon? Or is victim blaming the reflection of the observer's ideology? In truth if victim precipitative or facilitating behaviour is considered in a unicausal cause-effect relationship, in an "oversimplified stimulus-response models of human interaction" (Franklin and Franklin quoted by Karmen 2004, 113), precipitation could supply and strengthen blame over victims. It should be the reflection of a victim blaming ideology. Precipitation is a factor but only a co-factor whose determinant weight could degree until mere occasion. On the other side of the controversial issue to deny victim blaming on the assumption that *it should not be* is incorrect as well. Blame is not only a "natural phenomenon" (Underwood 2004). It is a "social phenomenon" as well.

Blame finds its well-consolidated collocation in sociology, in the sociology of deviance as well as in the victimological substantial contributions outlined above. In modern sociology the original functionalist concept has survived that blame and bias are the informal societal response to the violations of social rules to ensure

conformity, that they are – in other words - informal instruments of social control. The only difference is that the rules can't be seen as agreed by the majority. If crime is a social fact, or a drama with two social actors performing a complex play, then we must admit that social reaction to crime tackle victim's behaviour before, during and after the event. The same happens with the action of the offender. Both are evaluated and perceived according to social rules and expectations. So it is possible from a social point of view to have a "deviant" victim. As pointed out by Schafer responsibility is not only a legal issue but also a social issue. The same law is a social phenomenon under a certain approach. The behaviour of the victim may violate some social rules. The normative set of social values, the social expectations in the situational context, roles, bias and blame will be addressed to the victim - in the same way as to any other rule-breaker. In fact sometimes victims, such as female victims of male violence, are blamed and clearly presented as deviant due to their violation of accepted social mores and boundaries (Underwood 2004: 37; Meyer 1994).

It is possible to disagree that mores and boundaries are object of a general consensus. It uis possible to see them as unfair or as the product of a hierarchical cultural structure of gender role. In this view, blaming and victim deviant labelling serves and supports the dominant group subjugation of the dominated (Underwood 2004: 40; Lambert and Raichle 2000). Any other "it should be" consideration would be philosophical in nature as Underwood explicitly admits (2004: 46), therefore beyond the social science boundaries.

Moreover it corresponds to social construction and labelling approach theoretical frame in the victimological contribution as described above. It is not neccessary to involve the right world perspective that could apply only to the "innocent victim", not

perceived as deviant for social mechanisms and processes already well explained in sociology. Labelling approach founds and grounds also the understanding of the selective application of the deviant label to the victim in social groups, specifically by social control agencies like the criminal justice system. In fact while depicting the victim blaming vs. victim defending ideologies Karmen (2004: 110) notes that nearly everyone blames certain victims and defend others or finds fault with certain groups of victim (for example abusive husbands who get killed by their wives) and not other groups (such us women who have been raped by acquaintances). The victim deviant label is socially construed relying on myths, stereotypes, prejudices, beliefs and cultural values, and applied by a process influenced by this unaware ideologies exactly the same as in deviant labelling frames. Thinking about blame can lead to a better understanding, coherent to a more general social theory or sociological paradigm, strengthening the same "victimological theoretical leg" and overcoming any victim blaming taboo. It could overcome any philosophical consideration in victim favour and defence and could lead our view to the political and social commitment of both.

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7 The Study of Victimology
Basic considerations for the study of theoretical victimology

Gerd Ferdinand Kirchhoff and Hidemichi Morosawa

1. Abstract

Theoretical Victimology: A structure of knowledge in Victimology includes the core elements “victims”, “victimizations” and “reactions towards victimizations”. The paper looks at the development of knowedge about these elements. It adds to the Mendelsohnian formal requirements of victimology (society of scholars, international journal, symposia and institutes) the section on “textbooks” and “Academic Studies”. After the development of academic teaching in victimology is highlighted, the authors assemble theoretical tools for a study in victimology, based on (1) an understanding of science as construction of reality by scientists as interest groups, (2) a theoretical structure of the field. There is only one Master Study in Victimology at Tokiwa University in Mito, Japan. Background, target groups and content of this study and other victimological features of Tokiwa University are described. Highlighted are some of the developments in Japan that lead to the 2009 WSV International Symposium in Mito.

2. Early victimology discussions

When in 1979 the World Society of Victimology (WSV) was founded teaching victimology was not a popular subject At that time, no one seriously could think of studying victimology. Few academics existed from whom students could learn. The first generation victimologists had to develop victimology by themselves – there was no study guide.

In the 1979 WSV Executive Committee, there were four law professors with a specialization in Criminology and three social scientists - two psychologists (from Israel and USA) and a sociologist (from Canada). That reflected the way in which criminology was taught at that time – in Europe and in Asia it was a domain of the criminal lawyers, in USA and Canada it was more a matter of social scientists. With a little sarcasm masked in humor, social scientists talked about "self styled" victimologists. Of course they were right – in the beginning of this field, who could teach or certify experts as victimologists? The experts were on their way to a professional structure. Besides the basic symposium in Jerusalem 1973, an informal yet influential victimological expert group met in the "Bellagio Institute" 1975, convened by Emilio Viano[1]. In the symposia 1979 and 1985, Cressey and Drapkin (Cressey 1982, p.504; Cressey

[1]. Both co-authors started at about the same time to teach victimology in their countries, Morosawa in Japan 1971, Kirchhoff in Germany 1973. Both authors started their cooperation 1975 in the Bellagio Institute. From the scientists mentioned in this article, the following participated in the Bellagio Institute: Dussich, Drapkin, Fattah, Kirchhoff, Mendelsohn, Morosawa, Smith, Straus, Waller, Weis and Viano. Both authors teach now at the Tokiwa University in Mito, Japan, where Morosawa is the Chairperson of the Incorporated Educational Institution Tokiwa University. Both are professors of victimology in the Graduate School of Victimology (Master Program) and the Graduate School of Human Sciences (Dr. Program) and members of the Tokiwa International Victimology Institute.

1988, Drapkin in Geis et al. 1988) called victimology merely a "hodgepodge of ideas, intersts, ideologies, and research methods that have been rather arbitraily grouped". "Tyranny of language": the name implies a theoretical or conceptual basis which – according to Cressey – did not exist[2]. Fattah (1989) sets apart a "humanistic victimology" (represented by victim assistance activists) and the "scientific victimology" which he interpreted as part of criminology – the first is not a victimology at all, buyt object of victimological study.

Victimological teaching was not impressed by these "doomesday visions". Is victimology an independent science or is it merely a part of criminology? This question became more and more unimportant (see Weis 1979). The vivid discussions between followers of the universal independent perspective and adherents of a criminological social science victimology became kind of academic. The main dimensions of the controversies in this time are informatively summarized by Mawby and Walklate in a concise way (Mawby & Walklate 1994 p. 8f).

[2] Cressey (1982) "feel free to call it victimology!" In 1985 he repeated his "doomesday view" (Cressey 1988 p.52).

3. The Study of Victimology: Assembling the formal ingredients

If a science at all can "behave", Victimology surely behaved like a science. For this science to thrive, Benjamin Mendelsohn found four formal ingredients necessary. These "ingredients" are discussed and enhanced in the next part.

3.1. The international society of victimology

The WSV in the aslmost thirty years of its existence has solidified its international position. It is a group of, lawyers, criminologists, psychologists, sociologists, therapists, social workers, nurses, victim assistance specialists, scientists as well as practitioners, who feel that a special international interest group is needed to keep the issue "victim" on the international and national agendas for research and for legislative and social action. The onset of WSV was clearly a scientific society, dominated by criminologists who concentrated their activity on victim issues. The vast majority of first generation victimologists came from this campus. Of course, this society of newcomers had a difficult position in the beginning. For obvious reasons, the criminal law/criminology oriented majority of established fields had mostly negative reactions, but social scientists too were not at all free from "aversions" against the new "kid on the block" (see Weis 1979 p.15f.). Practitioners usually lamented in the same way: The victim assistance community did not feel any trust in the scientific approach to what they saw as their territory, to victim assistance. They saw in victims their exclusive clientele. We will return to the aversive reactions of existing stakeholders in another context. This "aversion" is well knwon in social work and can be plausibly explained by interests. We will do this later on.

In 1985, the EC of WSV attempted to bridge the existing gap between science of victimology and practice of victim assistance. It awarded Marlene Young 1985 the Hans von Hentig Award). Marlene Young was a seasoned academic with a PhD and a JD. Since 1976, she followed John Dussich as Executive Director of the Victim Assistance roof organization in the USA, the NOVA. The award came in the year in which the UN decided on the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, generated from within the WSV (see Separovic 1988). It seemed more and more difficult and obsolete to maintain the bifurcation between victimology as a science on one side andon the other side, victim assistance as a socio – political movement that was truely active in many nations of the developed world but not yet international. Elections of the EC of WSV in 2003 can be interpreted as a peak of the influence of "victim assistance activists" in the EC of WSV. The motto and title of the Orlando Symposium was completely in the lingo of a movement: "Enhancing the Mission".

3.2. International symposia on victimology

The International Symposia were held since 1973 tri-annually. The location of these symposia followed the centers of gravity in the field. The two symposia before the foundation of WSV (1973 in Jerusalem, organized by Drapkin and Viano and 1976 in Boston, organized by Schafer) were adopted so that the Muenster Symposium – founding symposium of WSV - counted as nr.3 in the series. The 13th WSV Symposium will be hosted by Tokiwa University in Mito, Japan in August 2009 (Tokiwa 2007)

3.3. Institute of victimology

The third postulate of Mendelsohn was the foundation of a reseach institute. Koichi Miyazawa started his Institute of Victimology 1968 in Keio University in Tokyo[3] while Emilio Viano convocated and directed the extremely influential Bellagio Institute 1975 (Viano 1976). The Tokiwa International Institute of Victimology, an official International Research Institute of the Tokiwa University opened 2003. One year later, the first scientific victimological research institute in Europe, the "Intervict", started its work in the University of Tilburg, Netherlands, close to the capital of Europe. Other institutes followed, e.g. in Jakarta or in Spain. Usually, a stable institute implies a research program, permanent institutionalized funding and independence of the institute from individual persons. Some associations use the word institute in a more generous meaning.

3.4. The journal of victimology

The fourth Mendelsohnian postulate, the Journal of Victimology, became reality 1976, the founding year of "Victimology – an International Journal" edited by Emilio Viano. The NOVA Newsletter followed soon. The World Society was without success in founding its own journal. The "International Review of Victimology" became for decades the leading periodical in victimology. The "International Perspectives on Victimology" edited by John Dussich appeared in 2004. Numerous specific journals with victimological compete now on an active market[4].

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[3] It was closed in 1992. For the early history of victimology in Japan see Richardson 2006).

[4] Here is an unsystematic incomplete list: The Security Journal, Journal of School Violence, Police Crisis Negotiations, International Journal of Cyber

So far the text follows Mendelssohn's design, but it is not difficult to add to Mendelsohn's requirements.

3.5. Textbooks

Certainly a science would be expected to produce a variety of textbooks in which the field is presented to the students. Such textbooks exist in great numbers, especially in English where the teaching style in universities – usually a textbook is base of lecturing – invites authors and publishers to supply the needed books. Another advantage is the giant market for English texts. Outside this market, only few texts "survived" (Schneider 1975 in German, Manzanera in Spanish since 1988 8 editions, Morosawa in Japanese since 1992 3 editions.). There are numerous textbooks in English that compete successfully on the market, to the advantage of our field: some examples are Karmen (since 1984), Mawby and Walklate (1994), Elias (1986), Doerner and Lab (2005), Wallace and Wallace (1997), Moriarty 2002, Moriarty and Jerin 2007, Jerin and Moriarty 2007, Goodey (2004), Walklate (1988, 1989 and 2007 (Ed.). An abundace of informtive readers and monographs are available. Today, there is a wealth of material availabe for academic teaching. No wonder, geared to an English speaking market, it is still open whether the dimensions followed and developed here, are useful in other countries. Friday (2000) looked at globalization in victimology. This does not liberate us to study whether structures and theories from other countries are really applicable in societies for which they were not developed.

Ccrimes and Criminal Justice, Contemporary Justice Review, National Women Studies, Violence against Women, Journal of Interpersonal Violence, Torture – Journal for Rehabilitation and Torture Victims and Prevention of Torture, International Review of Victimology and International Perspectives on Victimology.

3.6. Academic study

If a scientific field is solely owned by its promoters and if they do not take care that their field enters sustainably the university lecture halls, the knowledge in the field will die with these "selfish" owners. This paper deals with the academic study of victimology. Before we can describe this academic study – there is only one at this time in the world -, some light will be shed on the developemtn of academic teaching.

4. The development of academic teaching

Victimology behaved like a science – that became clear. Genuine victimological activities were seen in victim caring, preventing, protecting, assisting, reducing suffering and restituting (Sessar, K 1986 p.919.) – indeed, victimology invaded a much wider field. All these efforts would be in vain if not victimology had entered the classrooms of the universities. In academic analyses, different frameworks or schools were identified. Positivist, radical and critical victimology – concentrating on crime victims - are impressively clearly described and discussed in by Mawby and Walklate (1994 (p. 8-22). The relevance of Truth and Reconciliation Commission did not escape victimological attention.

Teaching victimology developed alongside with these activities. Many participants of the Bellagio Institute started to regularly lecture victimology in their home universities[5]. In 1984 the first Postgraduate Course in Victimology convened in Dubrovnik (Croatia) with G.F. Kirchhoff, P.C. Friday, I. Waller and Z.P. Separovic as co - directors. In the time of the Iron Curtain, one year later in 1985, the first workshop for "Young Victimologists" in the Zagreb Symposium opened the floor for student presentations. The symposium in Adelaide 1994 featured among others a well attended workshop by M. O'Connor, A. Hauber and G. F. Kirchhoff on "Teaching Victimology". Basically the three speakers presented their curricula in the studies of police science, law and social work. Hauber, A., Kirchhoff, G.F. and Ben David, S. cochaired a workshop on „Teaching Victimology"at the 10th International Symposium in

[5] In Japan, H. Morosawa started regular Victimology lectures in Keio University with the support of Koichi Miyazawa in 1971 and in Tokiwa University in 1983, Japan.

Montreal. Here over 80 participants demanded from WSV to develop and publish a curriculum in victimology. It was obvious: victimology had entered the classrooms of the universities and continued to attract the attention of students of many faculties. In 2006 in the Orlando Symposium, Jerin and others convened a workshop that turned out to become a brainstorming for curricula development in the US.

Post Graduate Courses on Victimology and Victim Assistance – the title serves marketing perspectives; otherwise it is quetionable under theoretical perspectives - under the auspices of WSV were founded, following the great success of the Dubrovnik Courses. Such courses exist in Croatia (25 years), Japan (7 years), South Africa (3 years), San Salvador (5 years) and USA (1 year). The Dubrovnik course alone produced ca. 800 graduates. Many of them are now professors and teach victimology in various countries. Some of these courses are organized in tandem with the international symposia (e.g., Rio de Janeiro 1991 Amsterdam 1997, Montreal 2000, Stellenbosch 2003, Orlando 2006, and Mito 2009). WSV for a while took great care that the student members were treated with equal respect in the General Membership. *Lately – deplorably - this was abolished. Courses and symposia contributed vitally to the stream of victimological teaching into the lecture halls.*

In numerous universities, colleges and academies we find now lectures on victimology. Abundant are professional trainings for practitioners and volunteers in victim assistance – developed withgreat success for the practitioners in victim assistance by their interest groups. Especially in the USA, Canada, Great Britain, New Zealand and Australia excellent training material was developed. Since the legal cultures in these countries have the same colonial roots and since these trainings used of course English, these

trainings exercised influence over national boarderlines. Prime reputation acquired the National Victim Assistance Academy, funded by the Office of Victims of Crime, Office of Justice Programs, US Department of Justice. It was developed by leading American experts in victim services, criminal justice, from non profit organizations and criminal justice organizations and held annually from 1995 on. For many of these trainings, academic credit has been granted on both, undergraduate and graduate level, by e.g. the California State University at Fresno or the Medical University of South Carolina in Charleston with its National Crime Victims Research and Treatment Center playing a leading role in the field of Trauma Recovery and in the training for related professionals, attracting scientists and students equally.

More restricted to the Spanish speaking world, special courses in victimology were developed by Hilda Marchiori in Cordoba and by Elias Neuman in Buenos Aires who opened a private “scuola victimological” for interested citizen outside academia. The Maestria de Victimologia in the of the Instituto National de Ciencias Penales INACIPE in Mexico Ciudad was soon suspended. In the Canaries, a series of special international courses were given.

In 2003, Tokiwa University in Mito, Japan, opened its Master Study in Victimology while its Graduate School of Human Sciences in its doctorate installed a specialization in victimology. Before this study is described, a theoretical structure of such a study is explored.

5. The Study of Victimology

5.1 Assembling theoretical tools in studying victimology Scientists as interest groups

It is impossible to design an academic study of victimology without a theoretical structure.

Victimology draws its knowledge from sociology, psychology, medicine, social work, political science, criminology, and law, especially from criminal law and procedure. A field with so diverse sources has not only its problems in finding a "home faculty". This is one of the reasons why a study of victimology was only recently institutionalized. In addition to that, it does not have a single unifying theory – that is no wonder in a field that integrates informations from so many faculties. This is one of the reasons why victimology might not be regarded as a science – but it behaves like science. And it is more and more accepted as such. That is very important as we will see when the principle of social construction of reality is dicussed.

The history of victimology is rich in arguments for and against an independent science, independent from criminology (see Fattah 1992 and Elias 1985). When we deal with the "History of Victimology", we recall the critical remarks of Walklate (1998 p.2). She observes: despite their multi-disciplinary character, young disciplines (like criminology or victimology) try to create (that is "to construct") for themselves an intellectual history. Are these constructions superfluous? Are they driven by a quest for prestige and recognition? Certainly not alone: At a certain point in time, a historical view discovers a series of repetitions and ruling explanations, in each science. These repetitions and patterns are the paradigms of the

community of scientists as they become clear in their textbooks, lectures and publications (Kuhn, T.S. (1962 p.57). Studying them, rereading them, and "rethinking" them are the way in which young members of the community learn their subject. This way a canon of knowledge is established.

Many useful insights can be gained from the sociology of social movements.

Scientists form an interest group (Berger & Luckmann 1966). As the name says, interest groups are guided by interests, are "interest driven". These interests are formed by invested "capital", by scientific convictions certainly, but too by an interest in being recognized, in being funded, in being acknowledged by peers and of course by students and "followers". Theories – in this respect tools in the competition and identity marks, are validated more by social support than by empirical evidence. The intensity of that support determines the ultimate success of this interest group – like of any other interest group - in their efforts to promote a cause, a problem, a "science".

"Scientific theories" in any field of science are a kind of *social construction of reality* (Maus 1975 p.19). This is not different for victimology. Positivist, radical and critical "versions" of victimology as described by Mawby and Walklate (1994) are just different competing constructions in victimology. Articles like this here present one among competing definitions of "reality" or "truth" based upon distinctive assumptions accumulated from the culture and from the discipline of which we authors personally are part. In all sciences, quite obvious is a social distribution of science (Berger & Luckmann 1966): not all societies can afford to have scientific theories in their "social distribution of knowledge". Victimology is a good example for such distribution and for such cionstructions. Individuals and

interest groups generate social problems out of their interests, whether there are data in objective reality that justify this or not. In victimology, there is a deplorable amount of facts and data in objective reality, no doubt. That does not change the fact that scientists are interest driven. How do special sciences develop? Special knowledge is formulated and administered by specialists whose social prestige depends on their special ability and possibility to teach, to write, to appear in the media – or on their inability to do other things except academic teaching, research and writing. Is science itself a special kind of construction of reality, then history of this science can not constitute an exception – it is necessarily constructed (see Barkhuizen 2007, Kirchhoff, 1988, 2007).

Maus has developed a convincing model to explain how society in general reacts towards to "new kids on the block", to starting new movements that fights for recognition. This model is already applied on victimology (Kirchhoff 1991). Victimology was "received" by the relevant existing groups, the publics of criminal law, criminology, social sciences and the related political stakeholders exactly like new social movements. The host society is first hostile, tries to coopt, and only when there is enough public noise and attention demanding activity, the stakeholders of the traditional way of thinking or of the existing social order) will listen and will finally react. (See Kirchhoff 2007a).

5.2. The assembly of theoretical tools in studying victimology Organizational System to Structure Knowledge

Victimology does not have a theory of its own that explains all territories of interest for victimologists. But that does not mean that it is impossible to organize victimological thoughts theoretically. That is done in an attempt to enable students to learn "the field". In the

next paragraphs, an attempt is made to organize the knowledge in our field. This is not a new theory. It is a system of "drawers". These "drawers" make it possible to learn victimology, to place each scientific contribution, article or book or research report, into a somehow suitable place in shelves, under suitable headlines. We will not describe a canon of theories that contribut to the knowledge in victimology. That is impressively done in e.g. Saponaro (2008).

5.2.1. Victims and victimizations in Victimology

Victimology is the social science of victims, of victimizations and of the reactions towards both, towards victimization and towards victims. This copies the classical definition of criminology and transfers it to our field.

In this context it is important to distinguish between victimology and the contributions of other sciences towards victimology. Especially in the first period of academic teaching the field depends on scientists from various disciplines who lecture about the contribution of their home faculty to the emerging field. This is unavoidable and very useful, a precondition for the stepwise achievement of an own profile (see Kirchhoff 2007). But: victimology is more than the sum of the contributions of other sciences to it.

A caution in the beginning: these drawers are installed for analytic purposes. They are not at all exhaustive. They do not cover the whole field of victimology. By creating these "drawers", we include what we believe to be the main issues. Necessarily we exclude. That means necessarily "victimization" in itself – words are "forced" to create – it is impossible not to do so. Words necessarily silence what is not said. So do systems. If we express everything at once, then we produce

nothing but noise (compare Lyotard 1983, Luhmann and Fuchs 1989 p.10f.). This is very well known in the field of communication.

For analytical purposes it appears as if the wood of the drawers is solid, as if the material does not allow for mutual influences between the drawers. In "reality", there is mutual influence and interdependence, it is in reality a cybernetic endeavor with feebacks and loops. This theoretical structure is informed by the very useful conceptualization of Smith and Weis (Smith and Weis 1976, Weis 1979). It is here adjusted and widened to incorporate new developments.

As a social science, victimology will have to define the term victim. In the textbooks of victimology, basically three definitions of the victim are in the catalogue, and each definition is center of a special school in victimology: 1. the "crime victim" in following the path of early victimologists like von Hentig and Schafer: such a victimology is part of criminology. 2. The "universal concept" of Mendelsohn and the general victimologists – victimology as a special subject. 3. The perceived need to widen the narrow concept (1) and to narrow the universal concept into manageable form: the victim of violations of Human Rights including crime. That is the concept that gained more and more social support – see the title of the Declaration 1985 and the language of further UN documents). As a social science, victimology is not bound by legal national definitions of Human Rights. Karmen (1990 p.9f.) describes a traditional conservative street crime oriented tendency, a liberal service oriented tendency and a radical-critical tendency that includes victimizations by agents of power and privilege).

Here, in this localization of the structure of victimology, the student can place all contributions that try to determine the limits of this science. Victimization in victimology – so the definition here – is always victimization by human activities or omissions (in the face of duty to act). According to this way of thinking, virusses, bacteria, earthquakes and other "stark misfortunes" (WSV- Website, obviously with a different position) are outside of the scope of victimology. Of course, this limitation serves interests: to limit victimology in a manageable scope. Societal structures directly can not victimize. Living in miserable conditions, being homeless, being poor or fatally ill, being desperate is "victimization" only in everyday language – science is licensed to define terms as they are needed for the science.

Victimizations include human omissions – the passionate claim of Elias Neuman to turn to the socially neglected is a statement of ommissions. If we analyze the contribution of victimologists to the agencies and agents in the management of natural catastrophies, then victimologists analyze the way out of these omissions. Victimologists have nothing to contribute to the study of causes – here General Victimology argues not exactly enough. Victimologists offer their knowledge to the alleviation of the burden for the victims. They demand justified social actions to alleviate the burden of victims, and ommitting such alleviation is victimization when it has repercussions on victims. This comes close to general victimology and is nevertheless theoretically different.

The mainstream of victimologists would be found under an invisible umbrella that can be located in the UN Crime Commission and its Vienna Crime Center. This does not exclude that victimology must soon be more responsibly aware of the neighborhood of the UNHCR in works for refugees and displaced persons. Bridges must be built to the International Labor Organization ILO since globalization and

internationalization of markets and production exacerbbate the uneven distribution of victimizations and an hitherto unprecedented intensity of exploitation of workers, illegal and legal. In the same line the connections to the work of the International Organization of Migration IOM are neglected for a too long time. Victimologists simply must not take over social constructions of ruling groups. They must widen their horizon to incorporate corporate victimizations and grand scale organized victimizations (Tombs and Whyte 2007). Victimologists have for too long neglected the field of exploitation by human traffickers and their networks, have taken over too naively the ruling social constructions of sexual trafficking (see Agustin 2007), have neglected the field of man as victims, have overlooked slavery. All this is due to a paradigm of victims that has too closely found a home under the umbrella of the UN Crime Program. We plea with Neuman, Elias and many others to widen the scope. That plea sees victimology closer connected to the perspectives of the UNHCHR.

Victims are "socially constructed". It is not sufficient that persons claim the status of victims without sufficient social acknowledgement. This is a consequence of the "social construction of reality", - the claim must be socially supported- and in this sense the term "victim" is a social construction (see, Barkhuizen 2007, 2008 Kirchhoff 2007, 2007a, Saponaro 2008 in this volume.).

The social movements that define the claims and produce finally the support are object of the study of victimology. Victimology is not victim assistance – it studies victim assitance under scientific categories. Victim Assistance as subfield of the structure developed in this paper belongs into the department of "reactions" and is dealt with later on.

The next task is to define victimizations. The term has a double meaning.

First it describes the damage done to the victim. This damage is principally measurable in three dimensions: emotional, physical and financial. Often neglected by people and scientists, the emotional aspect is often neglected or high jacked. This is why this aspect is listed first. Physical aspects become important in all victimizations – either as a direct consequence (e.g. in case of assault) or as a consequence of emotional consequences (emotional stress has often physical consequences, as every house physician knows. Financial aspects of victimization are obvious and often most easily measured in the area of individual victimization. In the field of large scale organized victimizations, that is different. Other important distinctions are the short term effects and the long term effects. These "effects" are damages and belong therefore here, but they are reactions as well, better understood under dynamic perspectives. Therefore they are dealt with under the section "Reactions".

Second, victimization addresses the process of victimization – there are simply very different ways, in which victimization can occur, from raid victimization that hit the unprepared unguarded victim to stepwise victimizations (many examples are classical stepwise victimizations like genocide or street robbery). The victimization process can be a one time event or a repeated event. More and more victimology has sharpened the sensitivity for the fact that many victimizations are repeat victimizations, not only those who are target of police analysis.

A Victimologist measures victimization. Victimology of course does not restrict itself on only working on victim definitions. As a social science, it is interested in knowing "how many of them are out

there". This is the entrance door to the methods of empirical social research into our field. Without solid methods of empirical research, victimology is without adequate tools. As victimologist, one has not only to undertand and to master the methods of scientific inquiry in social science. There is an abundance of literature about measures of victimization and its social correlates, e.g. the International Crime Victim Surveys.

Victimologists are interested in "what goes hand in hand with victimization". Is victimization a chance event? If yes, scientific analysis would be extremely difficult. It is easily shown that victimization correlates with gender, age, localization, lifestyle and other dimensions that make up the social correlates of victimization. As a social science, victimology is interested in theoretical explanations. Patterns and correlates are meaningfully directly measurable only if suitable theory guides the collection and the analysis of the observations, the data. Observations are simply impossible without a theoretical background. The begining student can gain this important insights by studying Kuhn (1962, 1970). The process of social science analysis prescribes a certain way of thinking, a familiarity with possibilities and probabilities, less than causalities. Ultimately the aim is to formulate abstract theories to explain and to predict.

5.2.2. Reactions in Victimology

The central part of victimology is the field of reactions toward victimization and towards victim. Here is not the place to unfold all aspects of reactions. Basic principles of analysis must suffice.

Reactions are analyzed in different dimensions. First we deal with the question: who reacts, then what kind of reactions are there.

5.2.3.1. Who reacts?
The reactions of the victim

The victim reacts. Guiding principles of study can be a sequence of thoughts like these: :
Victimizations are seen here as invasions into the self of the victim. These invasions cause crises. Crises are escalating situations of insecurity and uncertainty, stemming from the experience that the normally available potentials of the individual to manage difficult situations are blocked. That in turn increases insecurity. Typical reactions of victims are described. They go from short term reactions to long term reactions. All victimizations produce at least some of the crises consequences. Here is the locus of studying coping meachanisms and coping styles of victims, their strengths and their weaknesses.

A minority of victimizations cause severe trauma, emotional, and/or physical. These traumata gave reason for the rise of the field of psycho - traumatology. It deals with different traumata of the soul, a very important part of victimological knowledge. Less severe consequences are made manageable by counseling, by interventions of trained volunteers. Of course, here various interests are champions of the discussion, from professional, ideological and not at least financial interests.

5.2.3.2. Who reacts?
Reactions of the social environment

The social environment reacts, helpful often for victims and often not helpful but damaging. Here is the locus of “secondary victimization”, the damaging reactions of the social environment of the victim. The victim does not react isolated in a social vacuum – there is an active

social “auditorium” that reacts and communicates its reaction to the victim, verbally and non verbal. Spouses, family members, friends, colleagues, workplace, and community – all react. Here is the locus of fear of crime – usually a criminological problem but as far as it is communicated to the victim, it is a victimological problem as well. Damaging reactions of the social environment reinforce the primary victimization.

Avoiding secondary victimization is a goal that guides victimological considerations. Often secondary victimization seems avoidable. Then every effort is victimologically justified to avoid secondary victimization. Of course it is a matter of interests that drives the definition of avoidability. How far are we willing to go to avoid secondary victimization? Aare we willing to “sacrifice” cherished legal positions in favor of protection of victims, in favor of abvoiding secondary victimization? In professional interactions with victims, it is of high importance to avoid secondary victimization – this is one main reason why professionals as well as volunteers in victim assistance must be trained to avoid secondary victimization.

Reactions of the social environment can be very predictable. This is the locus of so called “structural victimizations”, a term introduced by Nagel (1974, 1979). A closer analyses shows that structures always must be “translated” into reactions. Structures mold how interactions and communications with victims are done and perceived. Structures alone do not suffice for victimization. Structures influence indirectly the communications with the victim. If these communications, the reactions, are almost uniform, then it is justified to speak of “structural victimization” – behind structures, there are always humans (Separovic 1985). In this way we read the eye opening contribution of Tombs and Whyte (2007).

We see in the study of “fear of crime” primarily a criminological than a victimological topic. Therefore it is mentioned here without elaboration. If placed into a taxonomy of fears, then “fear of crime” may not rank very high – nevertheless it is of central importance for reactions in crime politics.

5.2.3.3. Who reacts?

Professional Intervention and Victim Assistance

Victim assistance is strictly speaking not simply a reaction on victimization but a reaction towards the consequences of victimization. Victim assistance is necessary only when the consequences of victimizations – the reactions of the victims – make help necessary. That is, when the victim alone is unable to cope productively.

Of course, victim assistance may be necessary in all three dimensions of victim’s damage. There are systems of restitution and compensation to help in material damages. But usually, this location is the place of that part of victim assistance that deals with helping the victim to cope with the emotional consequences.

It is an extremely broad and deep field. It can only be “scratched” in the frame of this article. Not only all the helping interventions must be dealt withbhere, also all the helping professions. Who should help the victim? Professionals or volunteers?

Not all societies have a differentiated system of mental health services like in industrialized western countries. These different states of affairs cause different interests of various interest groups. And: in most societies different groups are subjectively and objectiveley called upon to help victims. Obviously there are different

interests behind different groups, e.g. behind therapists and behind assistance organizations that rely on volunteers. No doubt: treatment of psychotraumata is impossible by volunteers – they can at best serve as an "emotional first aid emergency service", called upon to avoid more damage until the professionals are available. Early intervention can minimize the probability of severe psychotrauma (Fischer 1999)..

Society can not leave victim assistance solely to volunteers. Social politics and therapists must work together to use creative financing in victim assistance – e.g. in a creative interpretation of victim compensation laws. Often there are no trained professionals - or not enough of them. A first step to improve such situation is organizing continuing education and certification in psychotraumatology for therapists (e.g. Fischer & Riedesser 1999, Fischer et al 1998). The field of psychotraumatology deals with severe trauma of the soul. Recently the needed bridge between psychotraumatology and victimology is constructed by F.W. Winkel (2007). His contribution forces to rethink cherished convictions e.g. the "Just World Theory" and the approach of "Shattered Assumptions". It also challenges cherished convictions of victim assistance using trained volunteers (Winkel 2006, 2007, all further references there). It scratches on ideologies that are partly grounded in economic interests, partly in recognition of grass root movements and lay sympathizers that make up the social movement. This text belongs to the obligatory study texts for victimology students.

In spite of their deficiencies for other purposes, for the study of victimology theories on traumatic stress, Just World Theory and the concept of Shattered Assumptions are of great value. They open the way for a first understanding of emotional consequences of victimization. They help in understanding and avoiding secondary

victimization. They reach further than previously assumed (Kirchhoff & Mundy 2007).

5.2.3.4 Who reacts?

Professional Intervention and Victim Assistance 2.

Form of reactions: informal and formal

Reactions can be grouped into informal reactions and into formal reactions. Informal reactions are reactions that are not prescribed in written norms – if written down, reactions become formal.

Most reactions towards victimization are informal, certainly most reactions of the victim and of the immediate social environment. The reactions are in no way described in written norms.

A remark to avoid misunderstanding: The beginner might have difficulties in looking of the reactions of a judge: they are informal reactions to the extent that they are reactions of individuals and they are formal reactions to the extent that the law prescribes these reactions. But the connection is more complicated: of course the judge reacts personally and informally when he interacts with a victim – but in the same moment he is the representative of the formal system of social control. He is perceived as a representative of the criminal justice reaction. The victim perceives often his activity as symptomatic and characteristic for the whole system. So if the judge learns personally to interact with victims in avoidance of secondary victimization, then this has repercussions for the "reactions of the formal system". Likewise, intervention on side of the formal system, hre the administration of justice, in training personnel to avoid secondary victimiozation, is of course a reaction of the formal systen that has repercussions for the behavior of individuals. This informal behavior is so relevant for victims!

The interaction between informal and formal reactions is part of the analysis of what has been called "structural victimizations". For us, this is a patterned form of reactions.

The informal reactions have been touched already in the location of the structure that deals with "reactions of the social environment". This here is the localization of the formal reactions in the system of victimology.

Formal reactions are reactions prescribed by laws. This place is an extremely important place for victimology.

An "incarnation" of formal reactions toward victimization can be seen in the criminal justice system, in criminal procedure. Many victimologists from the campus of law see here the center of the science.

This is no wonder given the described role of interest and expertise. The role of the victim in different criminal justice systems is still a central part of this department. The central role of the criminal justice system as dealing with victims was first restricted to witnesses.
Participation of the victim in criminal proceedings is a focal concern.

While neglected in the common law systems, it is quite developed in the criminal procedures modeled according to German and French system. In Japan it has just recently found the cautious attention of the legislator.

In other parts of the world there is the discussion about a "new paradigm in criminal justice", restorative justice. It would burst the frame of this article to look into the relationship of restorative justice

to victimology. Key words here are mediation, victim offender reconciliation, truth and reconciliation commissions worldwide, and the role of the victim in transitional justice or in the UN international instruments (Kirchhoff 2007a).

The dynamic of the discussion in this field is of utmost importance. Traditional and cherished concepts of punishment and state control seem often to be threatened by participatory concepts. That is most unfortunate. Victimology has to analyze the different social forces that determine the legislative and practical attempts to solve the power struggle in this field. The "solution" in different legislative and practical endeavors reflects the momentary strengths of the power of diverse social movements, the participatory movement and the traditional criminal justice movement. Laws can be interpreted as an attempt to fix momentarily a solution between the interests and the powers. The ideological differences between conservative and progressive positions make a dialogue very difficult. Solutions can be found only in compromises.

The difference between victimological thinking and traditional ways of problem analysis is: a victimologist looks at the situation at hand "standing in the shoes of the victim". Key criterion is "What does this do to victims? Does it have negative repercussions on victims?" These questions, rarely asked before, are typical for victimologists. Certainly, different victims are different in their desires and in their perceptions of their role in criminal justice. Certainly these cannot naively be equated with the voices of the interest groups that argue "in the interest", that is: using the perceived interest of the victims. Victimology has to describe and to analyze these dynamics.

The victimological principle guiding these considerations is the "Avoidance of Secondary Victimization".

6. Studying victimology

6.1. The general situation in Japan

The implementation of the Graduate Study of Victimology – the Master Study and the Doctoral Study – can not be seen isolatedly. Victimology was introduced in Japan in 1958 (Richardson 2006). It was and is clearly dominated by lawyers. The Japanese Association of Victimology, founded 1990, is an association for scientists, not for practitioners. Members are almost exclusively lawyers. Few members are psychiatrists, social psychologists or therapists. Victim assistance practitioners usually are not members.

The Japanese situation can be interpreted in terms of interests. Certainly there are interests which seek to prevent that social change is too rapid and that consequently changes are not produced too radically and too quickly. That is one reason why societies react to new social activities in an absorbing or even unfriendly way. The Japanese political leaders – as all most all over the world – were in the past rather negatively positioned towards victim related innovations. Victim related research and activity soon found itself dominated and controlled by scientists whose felt very little inclination to challenge the government to move in the interest of victims. The establishment of a network of Japanese Victim Support groups, mostly somehow dependent from government funding, was important for the development of victim assistance. That does not exclude that such official support in reality serves to control further developments. In the natural history of a social movement, such attempts of the established forces to control and influence developments in their own interests are rather typical. The Japanese National Network of Victim Support was often seen as lacking the necessary political initiative for victims.

A nice example for strategies to boycott an already fully financed research project happened in 1992. Members of the Japanese Soiety of Victimology wanted to explore the situation of crime victims nationwide. Funds for this research came from the Relief Fund for Crime Victims. To reach a representative sample of several hundred victims, the support of the police was needed. The police agency was willing to send the research questionnaires to the victims, but found themselves in the position to send the questionnaire to not more than five or six persons. Therefore, the research project had to change the method of inquiry.

The controlling and impeding attitude of the official reactions changed when the Japanese Victim Assistance Movement Asunokai – as a private organization not member of the National Network – launched a petition to the government to give up its hesitant attitude: In a grassroot attempt, ASUNOKAI collected over 500 000 signatures. Together with regular injections into the mass media, this caused sufficient political pressure to make the government aware of a till now rejected social force. Indeed, ASUNOKAI was effective in changing the scene fundamentally: The parliament passed the Basic Plan for Victims 2005 that followed the Japanese Basic Crime Victim Act 2004. Several hundred issues in the Japanese system were addressed in the Basic Plan for Victims. At about the same time excellent influential scientific proponents who had set the scene till now, retired. That opened the way for a younger generation of victimologists who are more open to social science. These dynamics favored considerably the efforts to implement a Graduate Study at Tokiwa University.

In 2003, the Tokiwa Graduate School of Victimology was established, with the support of the Mombusho, the central ministry of education.

There is no doubt that victimology is needed and that such a study will find its market.

According to the new legislation, the 50 prefectures (states) are in a stand-by situation to establish and realize plans for victim support activities, training and new institutions will be needed. But not only there:

There is a dire need in the helping professions. In the wake of the described move clinical psychologists will need special knowledge in victimology and in victim oriented psychotraumatology. The therapeutic community in Japan needs certified specialists in psychotraumatology. The search for trained counselors in our field will start soon. Victim support is greatly facilitated by volunteers, but even volunteers need training!! There is a dire need in the field of social work – traditionally, social workers have not heard any victimological lectures during their university studies.

There is a dire need for judges, prosecutors and lawyers generally to get information on victimology – and all over, the teaching specialists are missing. We have international examples: more and more victimological knowledge is needed in other professions. There is a need to train the future forensic experts in victimological work. Experts are needed who assist the criminal courts and prosecutors in evaluating the credibility of victim statements, of statements of adult victims as well as of child victims of sexual assaults. Practicing lawyers will need victimological knowledge to substantiate victims' claims in civil courts. The international trend to incorporate elements of restorative justice in the criminal justice system will not stop at the borders of Japan: The increase in importance of victim compensation by the state and victim restitution by the offender will give rise to a

demand of victimologically educated people who can work in the corresponding administrations and programs.

Till now, we looked to the service victimology can deliver for the helping professions and for the victims in the legal system- but the need is in other areas as well. Japan is a country with many earthquakes. Victimologists are called upon- in the concert of other academic faculties - to develop and to evaluate existing methods of alleviating the burden for victims of natural catastrophes

Till now, most universities do not have developed the knowledge in victimology that is needed in our country and in the whole Asian region. Innovations are often developed in Europe, Australia and North America. In addition to all mentioned fields, Japanese victimology has the task to explore whether – and with what modifications – abroad developed knowledge is applicable and useful in Japan.

To better prepare for the solution of all these tasks, we need an academic study of victimology.

6.2. Studying victimology in Tokiwa University

Having sketched the need for such a study, we turn now to the study of victimology in its practical organized form. This study was carefully prepared.

Victimology experienced a strong and dedicated promotion in Tokiwa University. Tokiwa is an educational trust, typical for Japan's educational system, with all kinds of educational facilities from Kindergarten to Doctorate (except a primary school).
H. Morosawa a disciple of Koichi Miyazawa, taught here victimology since 1971. Morosawa, participated in the seminal Bellagio Institute

1975 (Viano 1976). *He later served as President of Tokiwa University. Till the ninetees, the university built systematically and step by step the subject victimology as an academic field in undergraduate studies. The university hired professors who were actively engaged in victim studies*. In 2003 he became Chairman of the supervising body for all the Tokiwa educational institutions including the Tokiwa University. In 2003, the university opened the Tokiwa International Victimology Institute with Dussich, American social scientist with teaching experience in Tokiwa since 1993, as Director. In 2003, the Graduate School of Victimology opened the master Course in Victimology with the internationally respected social scientist Nishimura as Dean. In 2003, the Graduate School of Human Science installed a doctoral program with a specialization in victimology.

Students of the Master Course have to pass an entrance exam that is designed to test the abilities of the students to complete the Master Study in the prescribed four semesters. Students come from very different background with verty different previous studies.

Lectures are given in Japanese and in English. The core faculty consists of seven professors, 4 Japanese (Dean Nishimura, Vice Chair Tomita, Morosawa and Nagai) and three non-Japanese professors (Dr. Chockaligam, Dr. Dussich and Dr. Kirchhoff). About twenty part time lecturers – mainly from victimologically relevant practical fields, augment the core curriculum. The professors Chockalingam, Dussich, Kirchhoff, Morosawa and Dean Sato are in charge of the Victimology Spezialization in the Doctorate of Human Sciences.

In the next part, details about the Master curriculum are described.

The curriculum of the Graduate School of Victimology is described in the Recruitment Manual of the Master's Program of the Graduate School of Victimology (last available edition Tokiwa 2007). It consists of four main areas. Central units are obligatory while in each area there is a host of seminars from which the student can select.

Four central areas make the structure of the Master Study:
1. Fundamental Studies
2. Victimizations – situations, causes, countermeasures
3. Rights and legal status of victims
4. Victim Support and Advocacy

The first area, "Fundamental Studies of Victimology" focuses on basic principles in victimology. Here the seminars "Introduction into Victimology" and "Introduction into victimological research methods" are compulsory. Several legal subjects like "Criminal Law for Victimologists", "Civil Law for Victimologists" and "Criminal Procedure for Victimologists".

"Victimization: Situations, Causes, Countermeasures" represents the field in victimology that is least developed in Japan. Here an overview of the actual situation of various victimizations is given. Focus is on the studies of prevention and countermeasures. Countermeasures include counseling and therapeutic interventions. This area features such contemporary issues as the study of victimization through dishonest sales and manipulation of stock prices on both a national and international level, victimization by medical malpractice occurring both in and outside Japan, and bioethical questions arising under the research on genomes and genes.

"The third area "Rights and legal Status of Victims" covers not only the study of domestic laws under comparative perspectives but also

international perspectives and policies for the implementation of the UN "Declaration of Basic Principles for Victims of Crime and Abuse of Power" and related UN Conventions. "Justice for Victims" is the obligatory element, augmented by several seminars on different "Rights of Victims". The proper understanding of the concept of "Victims Rights" is indispensable for every student of victimology.

The fourth area "Victim Support and Advocacy" features research and development on the knowledge and skills for victim support and advocacy, focusing on victims and/or family members and bereaved victims and their families. The curriculum in this area includes various seminars with the aim of developing Guidelines for various groups that deal with victims: e.g. professionals in the justice system, paramedics, firefighters, and journalists in mass media.

From 34 credit units required, six of them are obligatory in the first area, 4 in the second area. 18 credit units can be selected freely according to the needs of the individual student.

Students can use the facilities of the Tokiwa Library or the Tokiwa International Victimology Institute where more than 2500 books are collected. There is a special Institute for Clinical Psychology on campus. While students from abroad usually live in Mito, Japanese students can study victimology either in Mito (Tokiwa Main Campus) or in Tokyo, in the Shibaura Satellite Campus. Shibaura is one of the many towns within Tokyo with an own railway station. Both localities are connected with an audio-visual communication system of highest technical standards. This two way communication system provides simultaneous classes in Mito and in Tokyo. The Shibaura Satellite Campus features supervising graduate assistants and a growing library. The development of internet teaching is on its way.

From the beginning on, the Master students are individually guided by their mentors in scientific work that leads to the Master thesis. Obligatory are 4 credits in the supervision of the Master Thesis research. Under the guidance of their mentors, students select their field of specialization. The mentor guides the student in the development of the research. Mentors guide the students during the four semesters and meet them during two hours per week. The thesis is graded by mentor and by second reader and accepted by the faculty.. Special attention is given to non - Japanese speaking students. While Japanese knowledge of language is helpful, the curriculum is adjusted to the indiviual needs of students so that the Master Course can be studied in English language.

The same is true for the doctorate: The doctor course in Human Science features a specialty in victimology. This PhD doctorate was installed in 2003. The first doctoral candidate finished his degree in less than three years, fully financed by a Grant of the MEXT, the Japanese Minister of Education, Science and technology (Barkhuizen 2008).

International students can take advantage of grants of these Japanese Ministry of Education etc. through the embassies of Japan in their respective countries. Available too are special Tokiwa grants from the “Prof. Machiko Fukuhara’s Fund for Science Promotion” administered by the Graduate School of Victimology and by the Tokiwa International Victimology Institute. Details can be found on the website of Tokiwa University (http://www.tokiwa.ac.jp).

Till now (as of March 2008), ten students graduated with a Master degree in Victimology. They wrote their theses in the field of violence against the family, victims of school bullying, elderly victims, mentally challenged victims of consumer fraud, attitude changes

after victim related trainings, assistance for victims of traffic accidents, and stereotypical perceptions of victims. They work now in the police, in research institutions, in insurance companies or they pursue a doctoral study.

Exporting programs described here to other countreis will be rather difficult, due to the fact that an installed study is always dependent on unique cultural ways to find compromises between the different interests, needs and motivations. However, these two programs show that such a compromise is indeed possible. This conveys an optimistic outlook.

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8 Does victimology have a theoretical leg to stand on? Victimology as an academic discipline in its own right?

Marc Groenhuijsen

1. Introduction

This contribution aims to clarify the status of victimology as an academic discipline. It is about methodology, epistemology and about the role of concepts and theories. In short: it deals with the foundations of our profession. There are several reasons for choosing this topic. A prominent one is derived from the concept of 'evidence based lawmaking'. During the past quarter century, many criminal justice systems have been reformed with the objective of improving the position of victims of crime. It has often been argued that many of the relevant changes in the law of criminal proceedings originate from empirical findings in victimological research.[1] If this is the case, it raises the question of the legitimate academic status for victimology. Does it provide a solid basis for legal reform? What kind of academic discipline are we speaking of? Can we speak of an academic discipline to begin with? Which criteria should we employ to answer questions like these? These are the focal points of the paragraphs below.

[1] See e.g. my publication 'The Development of Victimology and its Impact on Criminal Justice Policy in The Netherlands', in: E. Fattah & T. Peters (eds.), *Support for Crime Victims in a Comparative Perspective. A Collection of Essays dedicated to the Memory of prof. Frederic McClintock*, Leuven: Leuven University Press 1998, p. 37-54.

1.1. Victimology, an interdisciplinary study

There is extensive literature on the question whether legal research should be qualified as an academic discipline at all.[2] The same phenomenon occurs with respect to victimology. Repeatedly the issue is raised whether the subject matter of this field of research is sufficiently defined to merit the academic status. The first question I would like to raise here is *why* this is put forward as frequently as it is. Why do victimologists again and again seek confirmation of the legitimacy of their academic status? Why is it that this happens so much more frequently than in - at first sight comparable - disciplines like psychology and economics?

Allow me an attempt to sum up the main reasons for this recurring doubt of the credibility of victimology as an autonomous academic study.

First, victimology suffers from the fact that it is interdisciplinary in nature.[3] Traditionally, all interdisciplinary studies are looked upon with suspicion by representatives of the monodisciplines involved.[4]

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2 This holds true for many countries. For the sake of convenience, I will only list some references most illustrative of the Dutch 'methodology debate': R.A.J. van Gestel et al, 'Rechtswetenschappelijke artikelen. Naar criteria voor methodologische verantwoording', *Nederlands Juristenblad* 2007, p. 1448-1461; C.J.J.M. Stolker, '"Ja, geléérd zijn jullie wel"; over de status van rechtswetenschap', *Nederlands Juristenblad* 2003, p. 766-778 ; and, more recently the rather presumptious doctoral thesis by J.A.I. Wendt, *De methode der rechtswetenschap vanuit kritisch-rationeel perspectief*, diss. Rotterdam, Zutphen: Publisher Paris 2008.

3 In this paper I chose to ignore the – in itself legitimate – difference between interdisciplinary and multidisciplinary approaches (also 'cross-disciplinary' or 'trans-disciplinary' are often used). Victimology without a doubt sees instances of both; therefore, these terms alternately occur in this paper.

4 See e.g. Ymkje de Boer et al, Building bridges. Researchers on their experiences with interdisciplinary research in the Netherlands, RMNO/KNAW/NOW/COS 2002. Compare also Philip Fruytier et al (eds.), Multidisciplinaire bestudering van de rechtswetenschap, special issue of Ars Aequi, November 2007.

These 'monodisciplinarians' mistrust activities off the trodden path, because it redefines the prevailing criteria for results and progress. Moreover, those choosing a multidisciplinary approach often encounter the reproach that it is impossible to fully adhere to the methodological demands of the monodisciplines involved.[5]
Although these traditional reservations are in themselves quite understandable, in reality they do not live well alongside the aims of genuine academic institutions.

The nature of the objections is remarkably conservative, whereas academia is supposed to be innovative and supportive of new ways of thinking and reflecting.

This is further illustrated and compounded by the fact that the well-established monodisciplines tend to suffer from a tendency toward overspecialization. In psychology and sociology, for instance, the problems studied in research projects appear to be getting smaller and smaller. For reasons of optimizing the validity of expected research results and of protecting sound methodological standards, elements of human behavior can be reduced to a simple discriminating factor, which can then be simulated in laboratory-like circumstances.[6] This Lilliputian downsizing of science may be condusive to academic purity, but it in my view it also entails the

[5] Read the more than interesting response to these reservations, from the point of view of the Legal Realists by Wouter de Been, *Realism Revisited*, diss. Tilburg, Tilburg 2005 (self-published), p. 28-29: "Such disciplinary overspill might seem to be beyond the capability of a single scholar to deal with and to demand a Faustian pact with Mephistopheles to pull off. Yet, the complexity is not as serious as it might seem. (…) (T)here is method in their madness, and coherence in their disciplinary eclecticism. This coherence is provided by their common theoretical outlook, however, rather than by the methodological constraints of their shared discipline."

[6] I also see this tendency in some legal specialists. A rigid definition and demarcation of research questions causes the issues to become 'smaller'. E.g. instead of research on correct rules of procedure in civil procedural law, there is research on 'merely' the corrective role of unwritten principles of procedure in civil appeal cases in the Netherlands compared to those in Germany.

risk that the real problems of real people tend to be disqualified as legitimate topics for research. And that is not where we should go.
I mention just one concrete example to underscore this discrepancy in academic vision. In an ideal world I would envisage a research project on the life time job career effects of criminal victimization. Using longitudinal panel data we should gain an insight in the impact of serious violent crimes on various aspects of the victim's life following the crime; these data of course have to be compared to those from a control group of non-victims. The basic parameters to be scrutinised are absenteeism, job loss and unemployment, career change (forced and voluntary) and divorce. I am convinced that gaining knowledge of these essential issues would be of the utmost importance and relevance to society as a whole, even though the outcome might still be tentative and some reservations might still be in order. Developing theories in this field would have an immediate impact on a wide range of policies of both governments and NGO's. However, a project of this kind does not entirely fit the 'mainstream' of current psychological and sociological research. Therefore, their representatives are quick to denounce such efforts as being too broad to produce valid scientific results.

And then, alas, there is a more profane reason for - predominantly - social scientists to be critical of the autonomous status of victimology. That reason is the absence of peer reviewed A-journals in this specific area. Similar to what legal professionals experience time and again, these journal rankings and connected concepts like 'impact factors' and 'citation indices' seem to be the sole criteria of success.

Let me add yet another complicating factor. As is the case in legal academia, in victimology, too, skepticism does not only originate in the outside world. It is also frequently fuelled from within. A well-known example is the often quoted claim by Donald Cressey: "Victimology is (…) a non academic program under which a

hodgepodge of ideas, interests, ideologies and research methods have been rather arbitrarily grouped (…) and is characterized by a clash between two equally desirable orientations to human suffering: the humanistic and the scientific. (…) The humanists' work tends to be deprecated because it is considered propagandistic rather than scientific, and the scientists' work tends to be deprecated because it is not sufficiently oriented toward social action. Each set of victimologists would probably be better off if it divorced the other and formed alliances outside the shadow of the victimology umbrella."[7]

Is this true? Does Cressey offer sound advice? I don't think so. Of course we should make a conceptual distinction between victimology as an academic discipline on the one hand and victim advocacy on the other. These are different issues. But that does not mean that scientists cannot learn from advocates and vice versa. In victimology per se it is true that practice and theory feed on each other. Cressey's call for a divorce just reflects his own personal insecurity as an academic victimologist.

[7] D. Cressey, 'Research implications of conflicting conceptions of victimology', in: Ezzat Fattah (ed.), *Towards a Critical Victimology*, New York: St. Martin's Press 1992, p. 57-73; quoted by R. Elias, 'Paradigms and Paradoxes of Victimology', in: C. Sumner a.o. (eds.), *International Victimology: Selected Papers from the 8th International Symposium*, Canberra: Australian Institute of Criminology 1996, p. 9-34.

2. Defining and meeting criteria

From here we can approach the key to the question under consideration. What are the requirements, the standards, to determine whether a field of study can be acknowledged as an academic discipline in its own right?
Here, again, opinions differ. Conventional wisdom dictates that at least three standards must be met:

a. There must be a clear understanding of the subject matter of the field of study.
b. There must be consensus on the methodology of research.
c. There must be some basic concepts and theories to structure/organize perception and analysis.

It must be noted that the methodology and the theories taken together also constitute the epistemology of the discipline. The epistemology ultimately determines the nature of the knowledge we are seeking and it sets the standards for reliability and conclusiveness of research findings.

How does victimology fare if we apply these three criteria?
At first sight it does not look good. The reason for this is primarily that there appears to be quite some confusion about the scope of victimology. In other words: it looks as if we still have to agree on the subject matter of our discipline. Many publications have appeared focusing on the question which types of victims could or should be included in our field of study.[8] In many of these publications the

[8] I mention: Gerd Ferdinand Kirchhoff, *What is Victimology?*, Tokiwa International Victimology Institute, Monograph Series no. 1, Mito 2005; Sam Garkawe, 'Revisiting the Scope of Victimology – How Broad a Discipline should it be?', *International Review of Victimology* 2004, Vol. 11, p. 275-294; D. Knudten, 'The Scope of Victimology and Victimization:

issue was taken up by expounding extensively on the definition of the word 'victim'. In general this exercise turned out to be less than fruitful when – in the end – it was discovered that the offender also qualified under the terms of the carefully worded definition. By contrast, in a mature and generally recognized discipline like mathematics one does not see continued controversy about the edges or the margins of the profession. For instance, no one in his right mind would publish a paper on the question whether simple computing at grade school (adding, subtracting, dividing and multiplying) does or does not come under the subject matter of the science of mathematics.

This, however, does not conclude the matter. Allow me to elaborate and there is a fair chance the picture may change. Perhaps we have relied too much on an effort to attain watertight definitions of the subject matter of victimology and of the quintessential concept of what a 'victim' is. It is rather questionable whether that is the best way to initiate progress.

For inspiration I turn to Karl Popper, known for some outspoken views on the role and meaning of definitions in academic discourse:
"The development of thought since Aristotle could be summed up by saying that every discipline, as long as it used the Aristotelian method of definition, has remained arrested in a state of empty verbiage and barren scholasticism, and that the degree to which the various sciences have been able to make any progress depended on the degree to which they have been able to get rid of this essentialist method. This is why so much of our 'social science' still belongs to the Middle Ages. (...) The attempt to solve a factual problem by

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Towards a Conceptualization of the Field', in: Sarah Ben David & Gerd Ferdinand Kirchhoff (eds. *International Faces of Victimology*, Mönchengladbach: WSV Publishing 1992, p. 43-51; and C. Birkbeck, 'Victimology is What Victimologists Do – But What Should They Do?', *Victimology – An International Journal* 1983 (8), p. 270-275.

reference to definitions usually means the substitution of a merely verbal problem for the factual one."[9]

For Popper, the way to achieve progress in research is not to start from definitions, but to start from *problems*. Once the problem has been identified, a *theory* is needed to address or solve it. The next step should determine if the theory is equipped to deal with all aspects of the problem. Without exception this shall turn out not to be the case, thus urging the need to find a better theory to tackle the problem. But interestingly, the problem is no longer identical to its original, as our theoretical effort of dealing with it has already changed the situation. Popper suggests that progress in science is best assessed by the differences between the initial problem and the status quo after the first rounds of theoretical testing.

Back to victimology. The purport of Popper's remarks for our discipline is that now it need no longer unnerve us that we cannot agree on a watertight definition of our subject matter or of a key concept like 'victim'. Actually, it is a common phenomenon in other areas as well. Staying close to home, I mention legal research as an example. Assuming that this qualifies as a legitimate and autonomous academic discipline, yet no one has so far been able to agree on the exact correct definition of key concepts like 'law' or 'justice'.

What *does* matter is that a clear understanding of the core business of an academic field can be evidenced by the kind of

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9 Karl Popper, *The Open Society and its Enemies*, (5th edition) London: Routledge & Kegan Paul 1966, p. 9 and p. 295; see also Karl Popper, *Autobiografie*, Utrecht/Antwerpen: Aula 1978, p. 25: "Laat jezelf er nooit toe verleiden problemen over woorden en hun betekenis serieus te nemen. Wat wel ernstig genomen moet worden, zijn feitelijke vragen en beweringen over feiten: theorieën en hypothesen; de problemen die deze theorieën oplossen; de problemen die ze scheppen." [Never be tempted to lose time over semantics. What *has* to be taken seriously is real questions and factual statements: theories and hypotheses; the issues solved by these theories; the issues arising from these theories. – quote translated]

problems that are researched and by the methods and theories used to conduct this research. If we approach the theoretical standing of victimology from this angle, I am convinced that it can be established beyond doubt that we are dealing with an autonomous academic discipline in its own right.

3. Victimology as an autonomous academic discipline

Victimology as a concept and field of research originated when a specific group of pioneers identified a category of people with special problems and needs. These problems were not addressed individually nor comprehensively by any pre-existing academic discipline. Evidently, I am referring to the problems of crime victims. After identifying this group, structural research was initiated into the position of these individuals. The research design comprised a number of research questions generally recognized as relevant by all academics. To mention the most characteristic ones: What kinds of criminal victimization take place? How often? Which types of victims can we identify? What types of adverse consequences follow from crime, especially for the victim? How can mental coping be promoted and how can inevitable suffering be limited? What is the best response to criminal victimization? Which individuals, institutions and authorities should assume responsibility in this respect?[10]

It will be relatively simple to add to this list many more similar and equally relevant questions. This, however, would be of limited use. We need a more in-depth approach. As mainstream victimological research has traditionally been focusing on the questions above – that is, at least since the 1960's – it follows that a lot of attention was given to the rather unique fact that the suffering of crime victims is intentional and man-induced. This unique feature justifies separate research of the emotional impact on these particular victims. For that same reason it seems logical that the subject matter of

[10] It is interesting to compare these questions with the definition of victimology according to the constitution of the World Society of Victimology: "the scientific study of the extent, nature and causes of criminal victimization, its consequences for the persons involved and the reactions thereto by society, in particular the police and the criminal justice system, as well as voluntary workers and professional helpers".

victimology was for quite some time identified with victims of crime, rather than any other type of victim.[11] Finally, this historical background also explains which monodisciplines were involved (psychology, but not mathematics; economics and criminology, but not history) and it clarifies why the legal perspective has been relatively overrepresented.

It is my contention that the issues mentioned above have been researched with a sufficient degree of theoretical and methodological coherence. This is further evidenced by the numerous handbooks on victimology that have been published over the past few years, in the main world languages.[12] Academia generally agrees that the existence of a range of handbooks covering a well-defined area of relevant theoretics, is an indicator of the maturity of an academic discipline.

[11] Since 1985 victims of abuse of power are included. See the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 of 29 November 1985.

[12] Some of the most relevant publications are: Jo-Anne Wemmers, *Introduction à la victimologie*, Montréal: Les Presses de l'Université de Montréal 2003; J. Goodey, *Victims and victimology*, Harlow: Longman 2005; Luis Rodríguez Manzanera, *Victimología. Estudio de la víctima*, (séptima editción) Mexico: Porrúa 2002; B. Spalek, *Crime victims. Theory, policy and practice*, New York: Palgrave/Macmillan 2005; Linda Davies & Rika Snyman (eds.), *Victimology in South Africa*, Pretoria: van Schaik Publishers 2005.

4. Methodology, theory and epistemology

I would like to elaborate somewhat on method, theory and epistemology relevant in victimology. As might be expected, I have chosen to do so by using an example from my own academic (legal) background.

A typical victimological problem is the issue of the rights a victim should have in the criminal justice system. This is obviously a normative question. The method used to approach this issue is basically similar to what is common practice in legal research. It comes down to balancing a number of different and to some extent mutually competing interests. This balancing act acquires an academic dimension once it is guided by theory. In this context 'theory' stands for a coherent and comprehensive view of the various demands or interests that apply to the legal order in question and the limits of its flexibility.[13] The resulting type(s) of knowledge cannot be classified as 'true' or 'false', but rather as 'valid' versus 'not convincing'. Yet in victimology this normative balancing act is supported and supplemented by an empirical dimension. If, for instance, use of the oral victim impact statement in court is debated, the empirical validity of the pros and cons merits serious attention at an early stage in the discussions.[14]

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13 This apodictic remark is further elaborated in my paper 'Het slachtoffer in het brandpunt van dynamiek en stabiliteit van het systeem van strafprocesrecht', in: A. Harteveld, D.H. de Jong, E. Stamhuis (eds.), *Systeem in ontwikkeling. Liber amicorum G. Knigge*, Nijmegen: Wolf Legal Publishers 2005, p. 171-187.

14 In this context the term 'ex ante evaluation of legislation' is used. Cf. R.A.J. van Gestel, 'Evidence-based lawmaking and the quality of legislation; Regulatory impact assessments in the European Union and the Netherlands', in: H. Shäffer & J. Iliopoulos-Stranpas (eds.), *State modernization in Europe*, Berliner Wissenschafts-Verlag 2007, p. 139-165; and, by the same author *Wetgeven is vooruitzien*, inaugural address Tilburg, The Hague: Boom Juridische Uitgevers 2008, which exemplifies

The next step is of an even more empirical nature. Once a legal order has decided to adopt new victims' rights, the problem arises how to implement these rights effectively. This is plainly and simply a question for the social sciences. The method to be employed can be described as 'conjecture and refutation'.[15] The underlying theory is about kinds of stimuli likely to affect or change human behavior, and the role of criminal law institutions and institutional interrelations.[16] Epistemologically, the criterion of success in this case is 'truth'.

Here ends a – somewhat elaborate – example of introducing new rights for crime victims. It goes without saying that a large number of other issues – e.g. the psychological impact of victimization, victim surveys, increased vulnerability in specific victim categories – have been extensively researched and studied, with a similar level of methodological and theoretical accuracy. All the above leads me to conclude that victimology indeed qualifies as a mature, legitimate and autonomous academic discipline.

The above, however, still leaves the question which categories of victims would unequivocally fit the subject matter of victimology. I explained that our discipline originated from a sincere interest in the position of victims of crime. At some point in time various authors argued that there are no objections to widen the scope and include in our research those victimized by other forms of suffering.[17] Although I am in principle sympathetic towards this view, I must once more stress that science is problem-driven. Let me give an example. Should victimology also include victims of extreme economic

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that 'evidence-based lawmaking' is rooted in the victimological discipline, more than anywhere else.

15 Karl Popper, *Conjectures and refutations*, (4th edition), London: Routledge & Keegan Paul 1972.

16 Cf. Frans L. Leeuw, *Gedragsmechanismen achter overheidsinterventies en rechtsregels*, inaugural address Maastricht, Maastricht 2008, includes additional references.

17 This is argued by e.g. Sam Garkawe, *op.cit.* 2004.

poverty?[18] Here, the question rises whether the problem – extreme poverty – can be researched by means of the same theories and tools we employ to study the domain of criminal victimology. Are concepts like victim precipitation, PTSD, repeat victimization and restorative justice equally relevant for the poverty category? If the answer is affirmative (with, possibly, some reservation), then existing victimological theories would have to be adjusted and the scope of the discipline broadened. However, if the answer should be negative – and that might well be the result of research – the conclusion would have to be that these issues are for the moment outside the scope of the victimological discipline. After all, it cannot automatically be assumed that victims of other types of misfortune show the same needs as victims of crime. There may be more common ground than we would instinctively expect, as is suggested by Marlene Young in her general theory on victimization.[19] However, this is something not to be decided on by (mere) hypothetical reflection. Empirical research is essential in order to decide which elements of mainstream victimology might also apply to other or new categories of victims.

[18] It is often said that poverty is "the biggest killer of all".

[19] Marlene A. Young, 'Stress, Trauma and Crises: The Theoretical Framework of Victimization Reconsidered', in: Koichi Miyazawa & Minoru Ohya (eds.), *Victimology in comparative perspective*, Tokyo: Seibundo Publishing Co 1986, p. 188-198.

5. Preview and conclusion

The preceding sections of this paper were intended to throw light on the academic status of victimology. Obviously, victimology is a new branch on the academic tree. Much remains to be done. Our knowledge is still fragmented and incomplete. It would be well nigh impossible to list in just a few paragraphs the major gaps in the already existing body of knowledge. Nevertheless, it would seem useful to briefly mention some challenges that will most certainly be addressed in the following years.

First, there is the need to develop 'differentiating victimology', thereby following the example of criminology. So far, too many research questions and prevailing theories have been focusing on 'the victim' in general. Of course, many studies did focus on the specific circumstances of victims of specific (categories) of crime, but this approach and the resulting theory building would greatly benefit from an even more systematic design. Individual properties of victims and specific crime type characteristics could well be the cornerstones of theory building in victimology in the near future.

My second example relates to the economics of victimization. The economic consequences of victimization and its longer-term impact have – so far – hardly been researched systematically. There are some research data on the cost of crime, but that is about all there is. It still surprises me that no one has, as yet, initiated any research into the cost-benefit ratio of victim support. It is my impression that even with limited budgets victim support is yielding enormous economic advantages for society as a whole. However, this is just an 'educated guess' which would have to be corroborated or disproved by thorough empirical research.

To conclude I quote John Dussich, one of victimology's pioneers: "Victimology is not an exercise to amuse the curious, it is not an

activity to enhance the careers of scholars, and it is not a ritual to soothe the conscience of politicians. In the final analysis it is a sincere endeavour to improve the human condition."[20] I could not agree more. The ultimate aim of successful victimological research is to reduce suffering. That is an underlying source of inspiration for those engaged in it. Making the world a better place for victims is not a substitute for strict academic standards of research, it is a bonus for observing those standards.

[20] J. Dussich, *History, Overview and Analysis of American Victimology and Victim Services Education.* Paper submitted to the 11th International Symposium on Victimology, 13-18 July 2003, available at www.victimology.co.za/papers.htm

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9 Female Victims Who Use Violence against Their Partners and Their Levels of Aggression: Role-overlap from a psychological perspective

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1. Abstract

Intimate Partner Violence (IPV) appears to be a social problem in many countries. Some female victims appeared to use violence as a response to their previous victimization, yet sometimes their use of violence may lead to an escalation of violence and they are likely to become more vulnerable. Thus, it is important to explore factors behind women's use of violence to reduce potential victimizations. This study examined four behaviors: physical and psychological IPV, *offending* and *being victimized.* It aimed at exploring the relationships between women's victimization and their offending behaviors. It specifically examined differences in aggression scores based on how participants were involved in IPV related behaviors with the data collected from a medium-sized Japanese city. The aggression scores presented were obtained using the Buss-Perry Aggression Questionnaire. The results suggested role reversals in violent intimate relationships. Also they suggest that while female victims who become offenders tended to have higher aggression scores. Female victims who kept their role as victims tended to have lowest aggression score.

Intimate Partner Violence (IPV) appears to be a social problem in many countries. The World Health Organization (WHO, 2005)

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measured the prevalence of IPV including physical, sexual and emotional violence in 10 countries. Although there were some differences among those countries, the results revealed that IPV was a widespread form of victimization all over the world. This WHO study also included a Japanese sample and it was reported that Japanese women were least likely to have experiences of IPV compared to other countries.

According to a survey regarding IPV conducted in Japan (Gender Equality Bureau, 2006), among 2,888 people (1,310 males and 1,578 females) 13.7% of men and 26.6% of women reported victimizations of physical IPV and 8.1% of men and 16.1 % of women reported victimizations of psychological IPV from their partners. This result reveals that women appear to be more likely victims of IPV than men. Also, the impacts of IPV seem more severe on female victims than on male victims. For example, women tend to get physically injured more, receive more medical treatment, and lose more time at work than male victims (Tjaden & Thoennes, 2000). Women are likely to have more intense feelings of fear (Hamberger & Guse, 2002). Also, women are generally not as violent as their male partners (Temple, Weston, & Marshall, 2005). As indicated, women appear to be more vulnerable, yet the research results also indicate that some men also are victimized by their female partners to a considerable degree; it suggests that some women use violence against their partners. In fact, several studies revealed that there are some women who experience both roles as victims and offenders (Abel, 2001; Swan, Gambone, Fields, Sullivan, & Snow, 2005).

The present study primarily refers to female victims who change their roles to offenders. This phenomenon, which is an exchange of roles in a violent relationship, will be called IPV role reversal in this article. The role reversal can be seen in other types of violent relationships as well. For example, violent juvenile offenders are significantly more

likely to be victims in the year following their offense, and juvenile victims of violence are significantly more likely to be offenders in the year following their victimization (Shaffer & Ruback, 2002). Violent victimization is a warning signal for both future violent victimization and violent offending (Shaffer & Ruback, 2002). Thus, so as to reduce potential victimizations in violent relationships, it is necessary to first understand role reversals and factors behind it.

Role reversal in intimate relationships also appears to be a significant concern. Studies on why women use violence against their partners have been conducted. Women have quite different motivations for their use of violence than men (Hamberger, Lohr, Bonge, & Tolin, 1997). Swan and Snow (2006) classified motivation of women's use of violence into two groups: defensive motivations and active motivations. Defensive motivations include self defense and protecting children. A majority of the women who use violence claimed that self defense is the main reason that they use violence (Hamberger et al., 1997; Swan & Snow, 2003). Especially, female victims of severe violence are more likely to report the use of violence to defend themselves (Swan & Snow, 2003; Stuart, Moore, Gordon, Hellmuth, Ramsey, & Kahler, 2006; Hughes, Stuart, Gordon, & Moore, 2007). Women typically use violence only after the nonviolent means are clearly not helping to protect themselves from their partners (Downs, Rindels, & Atkinson, 2007). In terms of active motivation, some women use violence as retribution for previous violence from their partners (Hamberger et al., 1997; Swan & Snow, 2003) and to feel more powerful, (Hamlett, 1998; Stuart et al., 2006).

In addition to those two motivations, some women seem to use violence as emotional responses (Hettrich & O'Leary, 2007; Winkel, 2007). Anger is also an important factor related to the use of violence (Hamberger, et al., 1997; Swan et al., 2005) Women with more symptoms of posttraumatic stress were more likely to express anger outwardly toward others. Expressing anger outwardly toward others

predicts an increased likelihood of using aggression against partners (Swan, et al., 2005; Winkel, 2007). Also, it was reported that women's anger toward the partners who victimized them often leads the women to either leave or to use violence, depending on the available resources (Kirkwood, 1993).

Another study (Robertson & Murachver, 2007) suggests that hostility to women is the most significant factor associated with offending, and some female victims may use violence to express their hurt or frustration (Hughes et al., 2007). Those women appear to use violence in response to their partners' violent behaviors, and in order to decrease the odds of future victimization (Hamlett, 1998), yet their behaviors do not always bring them positive consequences. Some women reported that violence used for self defense was effective in stopping violence from their partners (Swan & Snow, 2003). However, it is apparent that some women's use of violence as a self-protection can make their situations worse and they end up with being more vulnerable. Their behaviors do not only make offenders' violence worse, but also they have more severe physical injuries (Bachman & Carmody, 1994). Usually, women's use of violence facilitates major escalation of violence from their partners. Even though women use minimal violence against partners who use violence, male partners respond with much more severe violence (Downs et al., 2007). In fact, many women who received court orders for treatments as offenders have reported experiences with severe violence (Hamberger & Guse, 2002). Also, previous studies (Swan & Snow, 2002; Hamberger & Guse, 2002; Hendy, Weiner, Bakerofskie, Eggen, Gustitus, & McLeod, 2003; Sullivan, Meese, Swan, Mazure, & Snow, 2005; Swan et al, 2005; Hughes et al., 2007) suggested a mutual relationship between their violent behaviors and their victimization. In other words, the more their partners use violence against them, the more female victims use violence against their partners and vice

versa. In sum, exposure to IPV as victims seems to facilitate victims' suffering as well as increases their aggression.

Aggression is defined as any form of behavior directed toward harming or injuring another living being (Baron, 1977). Most people have negative reactions to the aversive event; this is the "fight or flight" response (Berkowitz, 1998). Both types of response are elicited at the same time, with usually one dominating. Whether the fight tendency dominates or the flight tendency dominates, depends on a person's genetic make-up, prior conditioning, learning, and aspects of the situation. While flight is an escape tendency which derives from the experience of fear, the fight tendencies lead to aggression that ranges from irritation to anger. In fact, both female victims and offenders of IPV reported more feelings of anger and fear than did person non-involved in IPV (Hamberger & Guse, 2002). Thus, female victims who face an aversive event may respond to their victimization with aggression and it may enhance their aggression and possibility of becoming offenders. If aggression is rewarded, it will be increased as a useful behavior under similar situations in the future (Geen, 1998).

This study examined two behaviors of IPV, *offending* and *being victimized.* It aimed at exploring the relationship between women's victimization and their offending behaviors. Furthermore, factors behind female victims' use of violence were explored by focusing on differences in aggression among female victims.

2. Method

2.1. Participants

The questionnaire used in this study was originally created for a survey conducted by a local domestic violence support group in a medium-sized city in Japan. Out of 1,450 distributed questionnaires, 1,086 were completed, resulting in a 74.8% completion rate. Participants were 339 males (31.2%) and 699 females (64.4%). For the purpose of this research, only the female sample was used. Participants ranged in age from teenagers in college to persons above sixty (10.0 % were in their teens; 18.7% were in their twenties, 14.3% were in their thirties, 18.0% were in their forties, 24.3% were in their fifties and14.6% were in their sixties or more). Of the participants, 90.2% reported that they currently had intimate partners.

2.2. Measures

Demographic questions

Respondents provided information on their age, gender, and family structure.

Experience of Intimate Partner Violence

Participants were asked questions about each experience of physical and psychological violence from their intimate partners. Participants were asked about their involvement in violence as both offenders and victims. They also were asked about the frequency of their involvement in each of the following behaviors: a) slapping a partner, b) beating and/or kicking c) severe violence with injuries, d) throwing things (these were asked to determine the experience of physical violence); and, e) threatening with words, f) ignoring a partner, g) restricting a partner's relationships, and h) ordering a partner

and/or making fun of a partner (these were asked to determine the experience of psychological violence). The response choices for these behaviors were 0=never, 1=once or a few times, 2=often. After all scores were combined, the participants' behaviors were broadly divided into four groups based on their experiences: *offending*, *being victimized*, *both offending & being victimized*, and *not involved*. *Offending* was only for those who victimized their partners and had no experience being victimized by their partners; *being victimized* was only for those who were victimized by their partners with no history of violence toward their partners; *both offending & being victimized* was for those who victimized their partners and also were victimized by their partners; and, *not involved* was only for those who had no involvement in any violent behavior as either an offender or a victim. Furthermore, three behaviors, *offending*, *being victimized*, and *both offending & being victimized*, were divided, based on the frequency of the involvement. Lastly, all participants were divided into 10 behavioral groups: 1) offending- a few times, 2) offending- some times, 3) offending- often times, 4) being victimized- a few times, 5) being victimized- some times, 6) being victimized- often times, 7) both offending & being victimized- a few times, 8) both offending & being victimized- some times, 9) both offending & being victimized- often times, 10) not involved. For the participants who had experienced violent behavior(s) a few times, they were assigned to the category "a few times." For the participants who had experienced behavior(s) relatively frequently, they were assigned to the category "often times." Participants who had experienced behaviors a few times and often were also included in the category, "often times." The same process was done for both physical and psychological violence.

Levels of aggression

The Japanese version of the Buss-Perry Aggression Questionnaire (BPAQ) (Ando et al., 1999) was used to assess the levels of the

proneness to aggression. This questionnaire is a self-report measurement and consists of 24 items measuring four components of aggression: anger, hostility, physical aggression and verbal aggression. “Anger” measures the affective aspect of aggression, “hostility” measures the cognitive aspect of aggression, and “physical and verbal aggression” measures two aspects of aggression (Palmer & Thakordas, 2005). A five-point Likert scale was used for each question: with “it applies to me very well” at one extreme and “it never applies to me” at the other extreme. In the current study, instead of focusing on each component of aggression, the four components (as mentioned above) of aggression were combined, and the aggression score was shown.

3. Results

3.1. IPV-related behaviors

In this sample, most of the participants reported that they had not been involved with IPV behaviors (see Table 1). The percentages of those who did not report any behaviors in each category were: 84.8% for *physical IPV offending*, 75.4% for *physical IPV being victimized*, 69.5% for *psychological IPV offending*, and 65.9% for *psychological IPV being victimized*. Psychological IPV appears to be a more common involvement than physical IPV in this sample. Also *being victimized* was more likely to be experienced than *offending*.

Correlation analyses were conducted to examine relationships among four IPV related behaviors: physical IPV *offending*, physical IPV *being victimized*, psychological IPV *offending*, and psychological IPV *being victimized*. As shown in Table 2, each behavior was significantly and positively correlated with each other. The results especially indicated strong association between two different behaviors in the same type of IPV. In other words, the more frequently respondents physically victimized their partners, the more frequently they were physically victimized by their partners and vice versa. Role reversal and escalation of violence was also seen in psychological IPV and strong correlation was found. Moreover, the results revealed the same behavior was likely to be experienced beyond different types of IPV. That is to say, respondents who were physically victimized by their partners were likely to also be psychologically victimized by their partners and vice versa; and, respondents who physically victimized their partners were likely to psychologically victimize their partners and vice versa. Interestingly, psychological IPV *offending* and physical IPV *being victimized* were also highly associated.

Table 1: Experience of Intimate Partner Violence as Victims and Offenders

	Physical IPV *Offending* N (%)	Physical IPV *Being victimized* N (%)	Psychological IPV *Offending* N (%)	Psychological IPV *Being victimized* N (%)
Not	495 (84.8)	448 (75.4)	404 (69.5)	387 (65.9)
A few	60 (10.3)	84 (14.2)	69 (11.9)	72 (12.3)
Some	20 (3.4)	31 (5.2)	61 (10.5)	52 (8.9)
Often	9 (1.5)	31 (5.2)	47 (8.1)	76 (12.9)

Table 2: Correlations among IPV Related Behaviors and Aggression Scores

Variables		1	2	3	4	5
1	Physical IPV- *offending*	-				
2	Physical IPV- *being victimized*	.478***	-			
3	Psychological IPV- *offending*	.384***	.465***	-		
4	Psychological IPV- *being victimized*	.262***	.586***	.675***	-	
5	Aggression	.247***	.086**	.252***	.127***	-

**p< .01 ***p< .001

3.2. IPV related behaviors and aggression scores

Aggression scores were positively and significantly correlated with each IPV related behavior (see Table 2). Aggression scores were more correlated with physical and psychological IPV *offending* than physical and psychological *being victimized*.

ANOVA was used to compare the average aggression score among 10 IPV related behaviors. The mean aggression among female participants was 58.8 points. Figure 1 and Figure 2 show the differences in aggression scores based on how individuals involve in physical and psychological IPV. In physical IPV, a significant difference in the aggressiveness among these groups emerged ($F(9, 496) = 5.565$, $p<0.001$). As shown, the *being victimized* groups had lower aggression than other groups including participants who did not get involved with any physical IPV related behaviors. On the other hand, *both offending & being victimized* group and *offending* group had higher aggression scores than the *being victimized* and the *not involved* group. In the *both offending & being victimized* group, as their frequencies of involvement went up, their aggression scores increased. In terms of the tendency of the *offending group*, the levels went up from a few times to some times, yet it went down from some to often.

There was also a significant difference in aggression score among those groups in psychological IPV ($F(9, 495) = 4.078$, $p<0.001$). Aggression scores for the *both offending & being victimized* group and the *offending* group went up as their frequencies increased, and their scores were higher than the *not involved* and the *being victimized* groups. Furthermore, aggression scores for the *being victimized* groups were lower than other groups, and decreased as frequency increased.

Figure 1: Comparison of Aggression Scores among 10 Physical IPV Related Behaviors

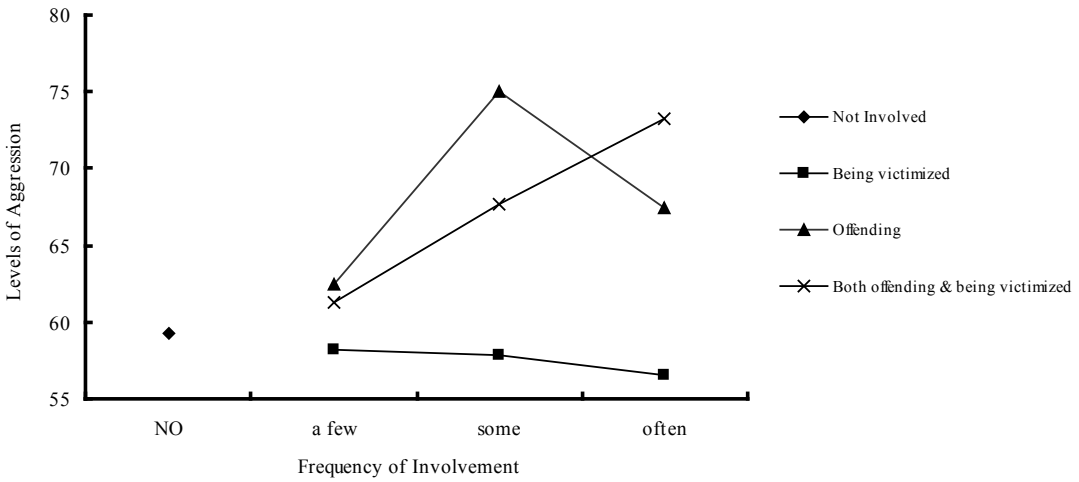
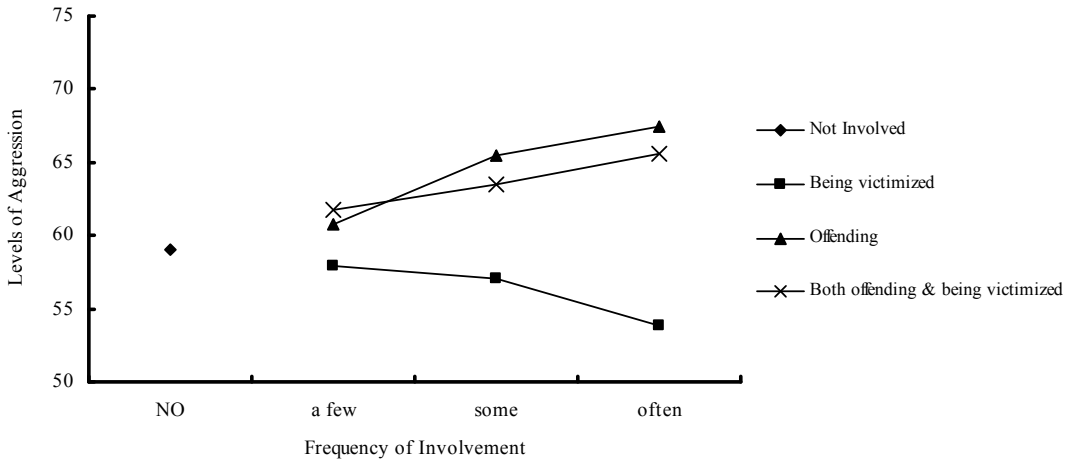


Figure 2: Comparison of Aggression Scores among 10 Psychological IPV Related Behaviors



4. Discussion

This study was conducted to explore factors of female victims' use of violence. It specifically examined differences in aggression scores based on how participants were involved in IPV related behaviors with the data collected from a medium-sized Japanese city. The aggression scores presented were the results of the Buss-Perry Aggression Questionnaire. The scores did not focus specifically on aggression in intimate relationships, yet it did show the levels of aggression in general. The results suggested several interesting associations between the *physical* and the *psychological IPV*-related behaviors and aggressiveness.

Among female participants, 24.6% of them reported their experiences of *being victimized* by some degree of physical violence from their partners, and 34.1% of them reported their experiences of *being victimized* by some degree of psychological violence from their partners. Compared to the national survey (Gender Equality Bureau, 2006) the prevalence shown in this current study was higher.

The correlation analysis revealed positive and significant associations between both types of IPV related behaviors: physical IPV *offending*, physically IPV *being victimized*, psychological IPV *offending*, and psychological IPV *being victimized*. Consistent with previous studies conducted in the USA (Swan & Snow, 2003; Hamberger & Guse, 2002; Hendy, et al., 2003; Sullivan et al., 2005; Swan, et al., 2005; Hughes, et al., 2007), there were mutual relationships between females victims' use of violence and their partners' use of violence in this Japanese sample. This result suggested that IPV role reversals appeared with the escalation of violence. The response to violence received with violence returned, enhanced the possibility of victims remaining in a violent relationship with the same or different roles and increased the frequency of violence involvement. Moreover, the current study demonstrated that this role reversal occurred not only

within the same type of IPV (between *physical IPV* situations and between *psychological IPV* situations), but also beyond the same types of IPV (e.g. *physical IPV* victims were likely to become *psychological IPV offenders*).

According to Berkowitz (1998) and Winkel (2007), facing an aversive event facilitates negative affects and the first reaction to this negative affect is flight or fight. If victims perceive their situations as aversive events and they react based on their negative affects, it can be inferred there would be two types of victims: victims who have flight tendencies and victims who have fight tendencies. With flight tendencies, possibly victims may experience fear and become more passive and end up being victims continuously. On the other hand, with fight tendencies, there is the possibility that victims' anger, hostility and aggression behaviors will be enhanced. Since their tendencies are determined by prior learning and conditioning, the use of violence would likely be reinforced and continuously used. Also, it might be possible that the use of violence gets rewarded, for example by stopping their partners' violence. In fact, some women perceive violent behavior as a useful way to prevent violence from their partners (Swan & Snow, 2003). As victims successfully protect themselves in this way, for even a moment, their violent behaviors may be reinforced.

Routine Activity Theory (Cohen & Felson, 1979) suggests that crime is likely to occur when three conditions come together: a suitable target, a motivated offender & the absence of a guardian. Since most IPV occurs when both parties are together at home, females victims are easily accessed by their partners and female victims can be motivated to use violence against their partners because of previous violence given by their partners. Also, these situations are not seen by outsiders and thus there is usually a lack of guardianship. IPV has the three conditions required to apply Routine Activity Theory. Thus, a violence inhibitor (a guardian) is absent and there are more

opportunities available to continue the violence. In this unique situation, both offender and victim can become vulnerable to their mutual victimization.

While there are female victims who become offenders, there are also male partners who receive violence from female victims. Male partners who received such violent behaviors from their female partners could also react in the same violent way and that could facilitate more violence between them. Supposedly, this role reversal may emerge based on changes in the behaviors and/ or emotions of the victims. Interestingly, the current study suggested that role reversal was more likely to occur in psychological IPV interactions. It is possible that psychological violence is easier to use since it does not require other resources such as physical strength.

Another interesting finding from this study was that the more frequently individuals were victimized physically, the more frequently they were victimized psychologically. From previous experiences, they might adopt increased flight tendencies since it is reinforced. Additionally, some victims might not know how to behave due to a lack of resources; therefore, they seem to be always victimized in any type of violent situation. Persons with fewer resources are victimized more and cope less well than those with more resources (Dussich, 1988). Also, they might not have appropriate coping skills. Correlations between the experience of being victimized and avoidant coping are founded and it suggests the negative consequence of the use of avoidant coping (Sullivan et al., 2005). Dussich (2006) suggested that victimization is an event where one is unable to cope with a problem due to inadequate resources specific to a particular life style. Therefore, as a result, those victims may likely remain within their role as victims.

This research also compared the frequencies of involvement in each of the IPV-related behaviors to aggression scores. Overall, there are differences in aggression scores between female victims who became

offenders and female victims who did not become offenders. While female victims who became offenders had high aggression, female victims who remained within their roles as victims had lower or similar scores than persons who were not involved with IPV. It suggests that it is not appropriate to categorize victims of IPV simply as one type.

In terms of relationships between aggression scores and the frequency of involvements in both *offending & being victimized* in physical and psychological IPV, aggression scores basically tended to be proportional to the frequency of IPV involvements. Since the time sequence was not measured in this study, it is difficult to determine if aggression exists prior or after victimization, two possible hypotheses emerged. The first possible hypothesis is, supposing aggression exists prior to their victimizations, females' behaviors might somehow facilitate their partner's violence. They might have a sort of aggression tendency prior to the relationship and it might facilitate their victimization. If victims use violence to cope with violence from their partners and using violence helps to stop their victimization, their aggressiveness will further be reinforced. The next hypothesis is, supposing their aggression emerges after their victimizations, female victims might have learned aggressiveness as a coping skill. If it helps to stop their partners' violence, learned aggressiveness will be reinforced. Aggression is maladaptive coping. It may reduce their anxiety, yet gives unhealthy side effects (Andrews, 1990; Dussich, 2006).

Either way, having higher aggression seems to make female victims vulnerable and increases their risks. If these hypotheses would be supported with future research, it would suggest that therapeutic interventions would be helpful to deal with victims' aggression since it is a likely contributor to the violence.

Although some interesting results were revealed from the current study, several limitations should be noted. First, since this research

used a self-reporting questionnaire, it might be possible that each participant had different perceptions of each behavior. Some might have overestimated or underestimated their behaviors. Moreover, the sequence of variables was not measured which could have helped to infer causality. Although the data from this study could suggest IPV role reversals, it is not clear whether the experience of *being victimized* may evoke offending or offending behaviors may evoke their victimization. Also causality of relationships between aggression and victimization are not clear.

Despite these limitations, the current study provided some insights into victimization in intimate relationships as well as other types of violent relationships. Because the results suggested that role reversals sometimes occur in violent relationships, and there are two types of victims with higher and lower aggressiveness, it is important to focus on both types of victims separately in future research. It is also important to consider these escalations of violence and aggression so as to focus on coping methods for victims to help them end their violent relationships. Although levels of aggression were focused on in this study, further studies on both offenders and victims are needed to confirm common characteristics. Finally, more research is needed to identify those persons who have a high potential to be victimized and to find ways to break their continuous involvement in IPV.

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10 Feelings that Offenders Have Towards their Victims: Role-overlap in intimate partner violence

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1. Abstract

In the field of victimology, the literature on the relation between prisoners and victims is very scarce. Researches about the relationship or interaction between the offender and the victim before the crime are frequent. However, after conviction it seems that the interest for this relationship is over, whereas the interaction itself is not necessarily over. Some prison workers, mediation or probation services promote meetings between victims and offenders of which impacts are reported to be positive to the healing process of both. This paper pretends to provide information about the feelings that offenders have towards their victims, highlighting the positive aspects of verbalizing such feelings. We conducted a qualitative study interviewing eight female inmates convicted of property and

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drug crimes which showed that common feelings are shame, remorse and guilt. Yet, some offenders blamed the victims for their contribution to the criminal act and others did not succeed in their attempts to contact the victim. However the ones who succeed declared to feel relieved. The interaction between these two participants increases the possibility of healing for both and therefore we agree with the promotion of a restorative and humanistic justice.

2. Feelings that Offenders Have Towards their Victims

As soon as the victim decides to report the crime to the police he/she loses the ownership of the case (Christie, 1977; Hulsman & Célis, 1997) and the control over the case whereas the crime is transformed into a symbolic and bilateral formal conflict between the state and the criminal, excluding the victim. "Conflicts are taken away from the original partners" (Kirchhoff & Baltes, 2003, 3). Meanwhile, victims are disregarded and have their interests neglected.

In most of the criminal justice systems victims are excluded from the criminal proceedings and uninformed about the evolution of the case, despite the efforts of the victims' movement to bring justice to victims or victims to justice. In some cases, the judge may determine confrontation, and the victim may meet the defendant in the court room although not to have a dialogue about the criminal event but to accuse her or his and to bring evidence to the criminal lawsuit. There is a distance between the victim and the offender, not necessarily as a request of the victim, but imposed by the adversarial model of criminal justice.

Thus victim and offender, who were not strangers to each other before the crime, as it is demonstrated by several victimization surveys and other studies, become apart after the crime. In most of the criminal justice systems, victims and offenders are not given the opportunity to come together and to discuss about the criminal event. Restorative justice and mediation programs are not common ground and public policies in general are not oriented to victim-offender conciliation. Offenders and victims had experienced and continue to have different feelings about each other and are very rarely given the opportunity to verbalize those feelings or dialogue about the criminal event in a non-judicial or neutral atmosphere.

This paper pretends to demonstrate that contrary to the popular notion of "criminals belong to a world apart of the victim" and

"criminals are people without sympathy for victims", victims and offender have an interaction before the crime in most of the cases. And even if strangers to each other, they have interests for conciliation. Based on field research, we will demonstrate that offenders have empathy to their victims and feel shame, remorse and guilt. Yet, some offenders blame their victims for contributing to the criminal act. However, all of them would like to meet their victims and have the opportunity to dialogue about the event.

Once the interaction between these two participants increases the possibility of healing for both, we believe that restorative and humanistic justice would contribute to the real meaning of justice for all, or for both offender and victim, and are from far better models than the classic model of criminal justice.

2.1. The relationship between the offender and the victim before the crime

Contrary to a popular perception of offenders as strangers to the victims, depending on the type of crime, closer examination reveals that most of crime victims knew their offenders before the aggression had occurred. Some even had a closer or intimate relationship with the offender. Statistics and the reviewed literature support this statement, as follows.

The International Crime Victims Survey 2004-2005 (Van Dijk, van Kesteren & Smit, 2007) revealed that offenders were known to the victim in about half of the incidents of both assaults and threats. The Bureau of Justice Statistics for the United States (U. S. Department of Justice, 2004) demonstrated that among violent crimes, 48.1% were committed by strangers and 51.9% by nonstrangers. Herman & Wasserman (2001) in a study on the role of the victim in the offenders' re-entry confirmed that victims know their offenders well.

Similar are the results of different researches or surveys on women victimization. Violence against women is primarily partner violence committed by a current or former husband, partner or date (Herman & Wasserman, 2001). “Regardless of age, race or ethnicity, or location of residence” (Jaquier, Fisher & Killias, 2006) women are most like to be raped or sexually assaulted by an intimate or someone they know, rather than a stranger (Gillioz, De Puy & Ducret, 1997; Killias, Simonin & De Puy, 2005). For example, the International Crime Victims Survey 2004 (Van Dijk et al, 2007) revealed that offenders were known to the women victims of sexual offences in half of the incidents. The European comparison for the same survey revealed that in cases where the perpetrator was known by name, it was an ex-partner (spouse or boyfriend) in 22%, colleague or boss in 17%, current partner in 16% and close friend in 6% of the cases (Van Dijk, Manchin, van Kesteren & Hideg, n.d.).

Regarding homicide, many criminological studies found that it is a crime which occurs often among people who knew each other before the criminal act, more than that, people who were closely related. Homicides appear to be more often a result of a vitimogenic relation established before the offence than a result of sudden conflicts (Separovic, 1985).

As for crime against juveniles, Herman & Wasserman (2001) pointed out that 80% of juvenile victims had declared that the offender was a family member or an acquaintance.

Indeed, to know the offender seems to be a pattern in case of personal crimes of violence. On the contrary, due to the nature of the offence itself, most of the victims of property crimes did not know their offenders in advance (Van Dijk et al, 2007).

In sum, although the popular notion of offenders is that they are strangers away from one’s world, it seems that they are much closer than we think and sometimes even sleeping in the same bed.

2.2. The interaction between the offender and the victim after the crime

What happens after the crime? As we mentioned before, in most of the cases victims and offenders come apart after the criminal act. On the one hand, as a result of the penal proceedings, on the other hand as a voluntary decision of the victim. The reader might be however wondering if victims would like to meet their offenders. Some studies concerning restorative justice and mediation programs provide such information. For example, according to Umbreit, Bradshaw & Coates (1999) 60% to 70% of the victims of property crimes and minor assaults wanted to have contact with the offender. In the same study, victims of attempted homicide, sexual assault and survivors of murder had also requested the opportunity to meet the offender, although in a lower prevalence and many years after the crime. Likewise, the second British Crime Survey revealed that 49% of victims would have accepted to meet the offender, one third of whom where victims of violent crimes (Reeves, 1989). The 1999 Canadian Social Survey also revealed that 51% of the victims would be interested in participating in restorative justice programs (Wemmers, 2003) although victims of property crime are more interested than victims of personal crimes.

Other studies highlighted the interest of the victim to receive apologies rather than financial compensation of the harm. The contact with the offender means having the possibility to ask questions, understand the event and analyze the criminal event from a rational point of view. Learning the reasons behind the criminal event, hearing a sincere admission of responsibility, observing remorse in the offender and receiving apologies are possibilities raised by restorative justice which often have a positive impact in the healing experience of the victims (Bazemore, 1999; Dignan, 1992). It is important for the victim to learn more about the offender and to

learn how the crime came about (Reeves, 1989; Wright, 2003), as well as it is important to the offender to learn more about their victims and to be apologized. Both are things which are unlikely to happen in the classic model of criminal justice. Often, it is more important than substantial or financial reparation (Van Dijk, 1986; Marshall & Merry, 1990). Statistics on what comes out from mediation programs in Britain confirm this statement: of the agreements, 57% involved only an apology and 26% combined an apology and another form of reparation, such as financial (Bazemore, 1999). It is important for the victim to learn more about the offender and to learn offenders' reasons for committing the crime (Reeves, 1989).

However, practice shows that the contact between victims and offenders is already being promoted by different criminal justice systems. For example in the United States members of penalty execution or probation services organize conferencing in prison, which means bringing the victim together with the offender in order to discuss the offence in a safe atmosphere and create a favourable environment for apologies. In Switzerland, for different reasons, lawyers and prison staff encourage offenders to write letters to their victims, explaining their reasons for having committed the crime and asking for apology. As a result, after having received the letter, some victims had voluntarily contacted the prison and had asked for a meeting with the offender.

Yet, the feelings that offenders might have towards their victims is an issue that lacks of interest. As far as we could see, most studies conducted are from the point of view of the victim and their feelings before or after such kind of meetings with the offender. For example, Wemmers & Cyr (2005) in a study about the therapeutic effects of mediation between victims and young offenders observed that 90% of the victims agreed that the mediation program was a good initiative and declared to feel safe prior to the meeting. Furthermore a bit more

than a half (54.5%) declared that the participation in the program helped them to put the event behind; 64.1% declared they felt better after having met the offender and most victims declared that they had benefited psychologically from the meeting. These results reinforce the argument according to which victim-offender meetings are positive to the victim rather than a further exposition to trauma or secondary victimization.

However more knowledge on such interaction from the point of view of the offender could be helpful for the rehabilitation process of both victims and offenders. As a result, we decided to study the feelings that offenders have towards their victims. In order to gather this information, we interviewed eight female prisoners convicted for property and drug-related crimes.

Below are the research questions:

- What was the motivation for having committed a crime?
- What kind of relationship the victim and the offender had before the crime?
- What are offenders' feelings towards their victims?
- Was there any kind of contact between the victim and the offender after the crime?
- Did the offender repair or compensate the harm or damage to the victim?

3. Research design

3.1 Method

Qualitative methods are particularly advantageous when the topic of interest is difficult to discuss and when dealing with a sensitive subject. Agreeing with Strauss and Corbin (1998) the qualitative method can be applied in order to obtain the details about phenomena such as feelings and emotions that are difficult to learn or extract through more usual or traditional methods of research. Moreover, employing the qualitative method, researchers are more likely to get closer to the individual's perspective through detailed interviewing and observation and to give rich descriptions of the social world (Denzin & Lincoln, 2005).

The object of this research – offenders' opinions towards their victims – is delicate and difficult to discuss, requiring sensitivity during investigation. Certainly, the material derived exclusively from a qualitative research has to be treated with the utmost care once the information given by the interviewee is likely to be based on personal and subjective opinion. However, the results showed in this study can be interpreted as an indication of what practice may be like (Brienen & Hoegen, 2000).

For this reason, the qualitative method is more appropriate. Moreover, it is a method characterized by the search for meaning and understanding, which fits the theme under study ideally because certain research questions would not be replied to with other methods.

Thus, the source of information was basically interviews, which were held in a semi-structured way. The original protocol of interview was designed to collect descriptive data, enabling the participant to reply with freedom and to give more details about the phenomena in study. Some of the questions were elaborated with the option of a

multiple choice list of replies in order to facilitate the researcher to find patterns. However replies that were different from the suggested multiple choice list were respected and considered in the descriptive analysis.

Interviews were of approximately one hour in length and were conducted in French. Interviews were not authorized to be recorded. In this case, the researcher was careful enough to make notes about the major points of discussion, during the interview, as well as to do debriefing notes after the interview.

Those notes were afterwards analyzed following the method of content analysis suggested by Grbich (2007), Silverman (2006) and Taylor (2005).

3.2. Field description - La Tuilière

The research was conducted in the female prison *La Tuilière* which is situated in the city of Morges, in Switzerland. This is the only prison with a sector for women in the French-speaking part of the country. The selection was based in two major aspects:

- *La Tuilière* is known in Switzerland for its best practices in what concerns the rehabilitation of prisoners;
- The social workers responsible for the female section had already experience with victim-offender mediation or conferencing. Female inmates are encouraged to write letters to their victims demanding excuses and explaining their reasons for having committed the crime and in some cases, victims are invited to visit the offender in prison.

La Tuilière has place for 50 female inmates. At the time of this research (August 2005) there were 43 female inmates, among which

27 were convicted and the others were under pre-trial detention.[2] They were in majority young, varying from 18 to 30 years old and foreigners coming from other countries in Europe, particularly Eastern Europe and Africa.[3] Drug trafficking and consumption are the most frequent crimes which inmates were accused of. Among 27 convicted women, ten were convicted for drug dealing and seven for drug consumption. The majority of women involved with drug dealing had committed the crime in small scale by selling cocaine or heroine in discos and bars. Others had transported drugs in small quantities from abroad to Switzerland and were caught by the immigration police at the Geneva airport.

Crimes against property and drugs are related. Of seven women charged as drug users, five had also been convicted of property crimes that have been committed allegedly under the effect of the substance. All women convicted of drug-use were treating the addiction with methadone.[4]

3.3. Sample selection and description

For security reasons alleged by the director of the prison, we had contact only with women who had been already convicted. Our first expectation was to interview 14 convicted inmates who had committed personal crimes of violence and crimes against property. These 14 inmates were selected through their personal files where one can find the description of the offence that they were convicted

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2 At this point it is important to highlight that in the year 2006 in Switzerland, 5.7% of the population in prison and 14% of the convicted were females (Ofice Fédéral de la Statistique, n.d.)

3 Statistics for 2006 in Switzerland show that 69% of the population in prison is foreigner (Ofice Fédéral de la Statistique, n.d.).

4 Methadone is a synthetic narcotic used as medication for the treatment of narcotic withdrawal and dependence. It has been used to treat opioid addiction.

of. These inmates had either physically or psychologically offended someone; they had committed a crime against an individual victim reason why their experience would fit to the research questions.

However, after discussing the aims of this research with the director of the prison, we reduced to the number of eight. The criteria for selection were: inmates who had recognised or confessed the crime, inmates that were psychologically stable and who had accepted to participate.

Finally, eight female inmates participated in this study. Seven were ranging from 27 to 40 years old and one was 52 years old. Four were Swiss and four were foreigners. Concerning charges, three had been convicted of theft, one of theft followed by assault, one of fraud and one of robbery. The last two respondents were convicted of drug trafficking. Although it is an offence whose victims are the society and the State, not an individual, these two inmates were appointed as potential participants by the director because they had declared to recognise their victims in the drug-users that they had met in prison. They were sensitized by the physical and psychological diverse reactions that drug-addicted inmates had had due to drug abstinence and after the suggestion of the director, they volunteered to participate and to report their experiences and feelings towards the victims of drug-addiction.

Inmates interviewed were sentenced with two to five years of imprisonment in average. Judges had considered not only the criminal act with a victim, but also recidivism and other numerous crimes they had committed. However, for the purpose of the interview, we asked the inmates to focus on the personal crime that they had committed.

4. Results

4.1. Case histories: crime description and offenders' sentences[5]

Nadia, 27 years old, Swiss, was convicted of robbery and drug trafficking and sentenced to 30 months in prison. Under the influence of drugs, she attempted to still an overcoat from a department store. She entered the shop; she took an overcoat from the hanger and hid herself in the restrooms. One of the shop sellers realised and followed her. The seller arrived at the restrooms and threatened her by calling the police. She panicked and injured the seller by using a pepper spray. However, the victim succeeded to grasp Nadia and called the police.

Savia, 32 years old, Swiss, was convicted of theft and sentenced to two months in prison. In fact, she found out a very easy way to gain some money in order to maintain her drug-addiction. Carefully, and with the help of a partner, she used to enter at a Hospital in Lausanne, go to the employees' restrooms and steal from the employees' lockers personal values such as jewels, money and credit cards. She was captured after the third theft, just by chance. While she sat in a corner next to the Hospital and was sharing the gains of the theft with her partner, a police officer passed by. He suspected and arrested both.

Carine, 32 years old, French, was convicted of theft and drug consumption and sentenced to ten months in prison. She had no money to feed her addiction. While she was chatting with a friend in a bar she profited from her friend's trust and stole a bank card from

[5] The names mentioned in these case histories are pseudonymous.

her purse. They said goodbye to each other and Carine went to the bancomat to take money from her friends account. She took the sum of 1,000 Swiss Francs from her friends' bank account. The day after, her friend realised that she had been robbed and made a complaint against her to the police.

Catrine, 35 years old, Swiss, was convicted of pick pocketing and purse snatching of five victims. She was also convicted of assaulting the police officer who captured her. She was sentenced to 18 months in prison. She did not give further details on how she proceeded in each of these criminal actions.

Sabine, 30 years old, Turkish, was convicted of robbery, drug consumption and sentenced to three years and six months in prison. She needed money to feed her drug addiction so together with a friend, they entered a small coffee shop and asked for money from the cashier. She threatened the victim by saying that she had a syringe filled with HIV infected-blood. The victim was paralysed and did not give the money. She became furious and injured the victim with the syringe. Finally the victim gave the money and they ran away.

Maria, 53 years old, Spanish, was convicted of fraud and sentenced to 18 months in prison. She used to convince elderly people to give her some money by saying that she would make investments in the stock market. Once she did the same to a friend, who suspected of her loyalty and reported to the police. The police then informed the victim that the offender was used to commit the same fraud against other elderly people.

Denie, 38 years old, Brazilian, was convicted of drug trafficking and sentenced to two years in prison. It was her first trip to Europe in the

company of her Italian boyfriend. He convinced her to help him to transport one kilo of cocaine from Brazil to Switzerland. He promised her they would get an amount of 20,000 Swiss Francs. The drug trafficking was not noticed by the immigration police at the airport. They arrived at the hotel were they would stay and her boyfriend went out with the intent to deliver the drug to the buyer. However, the buyer was being observed by the police and her boyfriend was caught. Hours later, the police arrived at the hotel as a result of her boyfriend's deposition and also arrested her for drug dealing.

Dani, 38 years old, Italian, was convicted of drug trafficking and sentenced to two years in prison. Dani began her career as a drug dealer when she was 15 years old. She used to sell cannabis at her school in Italy but in a small scale. When she came to Switzerland, she improved her skills and became one of the most popular drug dealers in Lausanne. She was caught by the police and charged for selling cocaine.

4.2. Crime from the rational point of view: the reasons behind the crime

Most of the offenders declared to have committed the crime for money. In four cases, the crime was drug-related because they needed the money to feed their addiction. One of these offenders added that she had committed the crime only because she was under the effect of drugs. The other three offenders declared that they were seeking for easy money but they were not drug-addicted. One of the offenders convicted of drug trafficking highlighted that besides the money, trafficking gave her a sensation of power over other people, reason why she enjoyed committing.

4.3. Victim's selection: the occasion makes the thief

Two offenders had declared that they had a relationship with the victim before the crime. Victim and offender were friends and offenders profited from the opportunity and from victim's trust.

Four offenders had selected their victims just by chance. For three offenders, the selection was not even based on the victim but on the local where the victim was placed. For example, in one robbery, the crime scene was a coffee shop. The offender declared that it was very early in the morning and there was almost no one in that particular coffee shop. The cashier was not selected as a potential victim but the coffee shop. However, things did not turn as she had imagined and although she had planned only to threat the cashier, she became nervous and injured the victim. Another example, in the case of the thefts in the Hospital, there was lack of security and facility to enter in that establishment. The offender had never met the victims before court trial.

4.4. Feelings that Offenders Have Towards their Victims

After a thematic analysis, we concluded that the more frequent feelings are shame, remorse and guilt.

Both offenders convicted of theft were full of remorse. In one case, the offender was regretful because she knew that the money stolen was victim's monthly income, which would be needed for her living expenses. She wished she could "turn back the clock however it is too late." Another offender convicted of robbery of the department store was ashamed of the victim. One more offender convicted of robbery was ashamed as well as afraid of victim's reaction and the possibility of revenge once she is released.

The two respondents convicted of drug trafficking declared that they feel depressed every time they look to the females which are in prison

for drug consumption. By witnessing the effect of drugs and the consequences of the abstinence to the body of those addicted, they think about the harm people like them, drug dealers, do to drug-users. One offender declared that now she understands what addiction means and feels compassion for drug-users. Besides, she pretends to work for the benefit of drug-users once she is released.

At the same time, offenders have a tendency to blame their victims. For example, one offender declared that the victim should have given the money from the cashier when she had asked once it was clear from offender's appearance that she was drugged. If she had been prudent and had given the money, she would not have hurt the victim with the syringe. In the case of fraud, the offender declared that because of victim's mistrust, she was sent to prison. In effect she had asked for money for other elderly people and she had misused this money but she would not do the same with her friend's money. Even though, they are still friends, the victim frequently visits the offender in prison and the offender declared to feel compassion towards the victim because "she is an old and alone woman." The offender who had stolen money from the employees of the hospital declared that "I am upset with the victims". Even though she had returned to victims their properties, they had not withdrawn the complaint and had not showed any sign of forgiveness. According to her point of view, since there was no loss or damage, victims could have withdrawn the complaint. Furthermore, she expected compassion from the victims because they knew that she was drug-addicted.

It is important to highlight that two of these offenders who 'blamed' their victims, were not able to have contact with them. This suggests that the process of acknowledgement of the harm and reflection about the criminal act might be motivated by the interaction with the victim.

4.5. Offenders compensating the harm or the damage

Three offenders were also sentenced to compensation. One offender had to pay for the overcoat that she had attempted to steal. Other two offenders had to pay a certain amount of money to the victim every month. These payments are directly deduced from offenders' salary for working in prison.

Besides restitution or financial compensation, in order to reduce or repair the harm, offenders tried to have contact with the victims in order to apologize. For this, they had two choices: ask for apologies during their deposition in court or write a letter of excuse.

At the prison *La Tuilière* inmates were encouraged to write letters to their victims explaining their reasons for having committed the crime and apologising. The social worker and the psychologist who work in the prison are responsible to contact the victims, explain the program and to ask for permission to send the letter.[6] As a result of this program, three of the offenders had written such kind of letters.

In one case, the victim visited the offender in prison and tried to withdraw her complaint. However she did not succeed because robbery is a crime prosecuted ex officio and independent on victim's complaint

A second offender also convicted of robbery was not so luck. Her letter had not even been sent to the victim because contacted by the social worker of the prison, she did not accept and declared to be terrified. The offender regretted and apologized during her deposition in court, although not in the presence of the victim who clearly did not accept the confrontation.

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[6] This is a good practice because such kind of letters can do more harm if the victim is not expecting or not willing to receive anything from the offender.

A third offender had written letters of excuse to the six victims of theft, among which, two withdrew their complaints.

It is also important to highlight, as informed by the prison officers, that judges responsible for these cases considered these letters of excuse as a show of remorse and regret. These letters of excuse meant that the offender though about her acts and decided to change her life style; they were a sign of criminal's rehabilitation. They certainly had an impact in the judge's decision to allow some benefits to the prisoners, such as spend holidays or weekends with their families at home or work in prison. Even thought this practice can turn to offenders' benefit we did not observe in the offenders a tendency to write such kind of letter only in order to receive a label of 'good behaviour' or some benefits. On the contrary, the offenders who had had the opportunity to contact their victims by the means of a letter or personally, had done this because of an intimate wish to be forgiven, to reduce their feelings of guilt and to feel relieved.

5. Discussion

Contrary to a popular perception, researches reveal that in most of the cases, victim and offender know each other, except for property crimes which is a crime committed usually by strangers to the victim.

However, independently of the former relationship between the victim and the offender, studies concerning mediation and restorative justice showed that victims are willing to have further contact with their offenders. The personalization of the conflict proved not to be of damage to the victim. On the contrary, it proved to contribute to the victim's healing process and even more than the traditional model of criminal justice (Koss, Bachar, Hopkins & Carlson, 2004).

For these reason, victims are open to a dialogue with the offender mostly in case of property crimes and minor assaults, but also in case of attempted murder or sexual assault, although in a lower prevalence. The purpose of this interaction would be at one, to contribute to the victims' understanding of the event and at two to give both offender and victim an opportunity to discuss about their feelings towards each other, thus solving the conflict and contributing to their healing process.

In this study we looked into practice and we tried to identify some patterns concerning the interaction between the offender and the victim after crime, particularly in case of property and drug-related crimes. Besides the small size of the sample, the qualitative method enabled the researcher to gather descriptive information which can provide some indications for future studies.

On the one hand, results showed that the more frequent feelings of offenders towards their victims are shame, remorse and guilt. On the other hand, blaming the victim is also a common reaction of offenders. We also observed that, encouraged by the psychologist and social workers of the prison or as a result of judge's decision, the

majority of the offenders tried to repair the harm/damage or apologised for the crime they had committed. Offenders had written letters of apology, had returned victims' stolen properties and had paid for compensation. And this is what victims are seeking for: apologies and understanding about the criminal event, which is often more important than substantial or financial reparation.

In the traditional model of criminal justice, the State steals the conflict from the victim. As a result "the offender has lost the opportunity for participation in a personal confrontation, and to receive a type of blame that would be very difficult to neutralise" (Christie, 1977, 9): the blame which appears when the offender is introduced to the real, not the legal, consequences of the crime.

A formal criminal trial or judicial punishment is unable to ensure that offenders will become aware of the harm that they have caused. Furthermore, it meets few of victims' needs. Victims need healing; they need to be repaid, they need to restore their sense of security that comes from receiving care and support from the community and sometimes from the reconciliation with the very same people who have hurt them (Ness, 1990). Crime is more than lawbreaking and justice should be healing, although "when people harm each other, the criminal justice system may not be the only, or the best, way of helping victims, and it can even make things worse" (Wright, 2003, 173).

For the reasons outlined in this paper, criminal justice should propose more and different ways of interaction between victim and offender after crime. "Victim-offender mediation or dialogue provides victims with the opportunity to confront their offender in a non-judgmental forum, receive answers to questions and to develop a plan to attempt to repair the harm to the greatest degree possible." (Bazemore, 1999, 313)

The myth of the criminal as a powerful or threatening person shall be dismissed and meeting the offender in a safe atmosphere can enable

the victim to see the criminal as an ordinary person. This might help to reduce victims' feelings of powerless and fear. This impact was already observed by Sherman et al. (2005, 391) in a randomized study on the effects of face-to-face restorative justice, who reported that conferencing "succeed in 'normalizing' victim contact with an offender, as required by Cognitive Behavioural Theory, in order to make discussion of the crime and the nature of the criminal a topic less threatening by virtue of becoming more familiar."

Offenders shall be ready to reply to victims' questions about why they were victimized and to explain their acts. Moreover, offenders' apologies might help the victim to understand that:

- His or her contribution, if so, was not essential to the criminal act to occur;
- The event was not under her or his control but under offenders' control;
- He or she would be unable to avoid the event.

This process might contribute to decrease victims' feelings of guilt, thus put the past behind and continue with his or her life. It might also help for the process of rehabilitation of the offender whose feelings of shame and remorse might be dispersed with the forgiveness of the victim. The function of forgiveness in particular has been studied and while anger often remains even after economic reparations and punishment, forgiveness is gaining recognition as a powerful therapeutic tool for releasing anger and resentment (Gehm, 1987). Harris, Walgrave and Braithwaite (2004) note that an apology can sometimes represent the turning point. By asking for forgiveness, the offender recognizes the victim as a bearer of rights while recognizing his or her own guilt and wrong doing. The roles are thereby reversed: "whereas the offender exercised power over the victim in the offense it is now the victim who has the more decisive power" (p. 202, 203), to accept or refuse the apology. This empowers the victim who may feel restored in dignity and citizenship,

contributing to his or her well-being. Umbreit et al (1999) adds that "there exist many anecdotal stories from victims and offenders who often speak of their participation in a mediated dialogue as a powerful and transformative experience which helped them in their healing process." (p. 328).

Therefore bringing people together or the model proposed by the restorative justice could be an alternative to the classic model of criminal justice. Restorative justice brings to the center of the discussion the harm which crime had inflicted upon the direct or indirect victims (Walgrave, 1999) and provides for "accountability because it creates awareness in offenders of the harmful consequences of their actions for victims and requires them to take action to make amends to victims" (Friday, 2003). Whereas the classic model of criminal justice takes into account mainly, the damage that crime provokes to the social and legal order. Bringing people together means provide a range of opportunity for dialogue and for reestablishment of emotional and material losses.[7] The key element is interaction between the participants in a safe environment, focusing on acknowledging the past hurt and the emotions it has generated, disabusing stereotypes of each other and providing a future orientation which is mutually discussed and agreed upon (Shapland et al., 2006). Resolution is therefore achieved by the mutual agreement of the two parties.

Strang (2002) affirms that restorative settings or relational justice more often provides the opportunity to confront one another directly and thus for synergy of emotion than traditional courtroom justice. The purposes of this interaction would be to contribute to the victims' understanding of the event and to give both offender and

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7 During lecture "Corrections-Based Victim Services and Victim Awareness Programs" at the 2nd North American Post Graduate Course on Victimology and Victim Assistance, World Society of Victimology and University of Central Florida, 13-25 August, 2006.

victim an opportunity to discuss their feelings towards each other, thus resolving the conflict and contributing to their healing process.

Either reestablishment of emotional losses of victims or accountability can only be met if criminal justice works for the rehabilitation of victims and offenders, that is to say with emotions. Having said that, offenders should have the opportunity to declare their feelings to their victims and victims should be given the opportunity to ask questions to offenders and understand his or her reasons for having committed the crime. Moreover, offenders should be exposed to the real consequences of their actions and therefore acknowledge responsibility.

Emotions are the essence of human beings. By excluding personal contacts during criminal proceedings or after the conviction, criminal justice neglects the feelings of the people involved in the conflict. It also excludes the humanistic character that it should have and that is necessary for resolution of the conflict, not only in paper, but in people's minds and hearts. In other words, working more with emotions may allow us to reduce the cruelty of both offenders and criminal justice system (Sherman, 2003).

This is what is called by Umbreit et al. (1999) as humanistic mediation, which is grounded in a paradigm of healing and peace making. "The new paradigm criminology could build is one in which a justice system becomes emotionally intelligent in all of its interactions with suspected, accused, and convicted offenders, as well as victims, their families and communities." (Sherman, 2003, 25)

The personalization of the conflict is not harmful to the victim. As far as both victim and offender agree to meet and this confrontation is organized in advance, both being prepared and the victim supported during the meeting, the risk of secondary victimization is not higher than in the classic model of criminal justice. After all, confrontation between the victim and the offender also happens in the classic

proceedings of the court.[8] Victims and offenders should also receive proper debriefing after such a meeting.

For a victim's rehabilitation, however, it is important that the model of restorative justice applied not be offender-centered (Johnstone, 2002). This means that it should not function in order to enhance the offender's rehabilitation or in order to reduce his or her charges. Indeed, it is a risk that should be considered since restorative justice stems not only from the victims' movement for the reorientation of the criminal justice system towards the victim (Zedner, 2002) but also from the abolitionist movement[9] (Wemmers, 2003). Restorative justice should aim to resolve the conflict, which means finding a balance between offenders' and victims' needs and expectations. "It cannot be part of a standard sanction because it can be offensive to the victim, or the victim can believe that the offender excused himself for the purpose of receiving some benefits, or a lesser charge, from criminal justice" (Bazemore, 1999, 311).

Wemmers (2007

As far as both victim and offender have agreed to meet, the risk of secondary victimization, augmentation of fears or post-traumatic stress is reduced for the victim, as well as the probability of healing is increased for both. Victims should be aware that they may feel better and that their point of view might be taken into consideration by the offender, but there is not guarantee of this (Wright, 2002). Anyhow, it is a risk that might be taken under the circumstances that victims and offenders are prepared for engagement in a dialogue in advance to the meeting. Besides, the classic model of criminal

8 Although lately judges have been trying to avoid it, mostly in the case of sexual offenses.

9 The abolitionist movement proposes the abolition of the prison system and the criminal justice system. For more on this topic, see Hulsman, Louk & Célis, Jacqueline Bernat. Peines perdues - Le système pénal en question (1982). Paris: Edition du Centurion.

justice with its disregard is definitely not less traumatic for the victim than a victim-offender mediation or conferencing.

Crime is more than lawbreaking. Crime is more than damage or harm to the physical integrity or property of a person. It is also harm to the belief of security and control that people think they have over their lives. Thus justice should be more than punishment or restitution; justice should be restorative in a broader sense and healing. Justice should be therapeutic. Justice should be an instrument of healing and rehabilitation (Wexler & Winick, 1991; Wexler, 1991; Winick, 2008). For this purpose, justice should consider and work more with emotions as they are the essence of human beings (Sherman, 2003; Umbreit et al, 1999). The criminal justice system should embrace a humanistic approach according to which the proceeding would involve the different parts of the conflict – offender, victim and state – with the aim of finding explanations and restoring emotional losses, rather than only punishing offenders.

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11 Intimate Partner Violence: Role Reversals

Paul C. Friday[1]

1. Abstract

This research is a snap-shot sample of domestic violence cases with each suspect and each victim tracked through the system for both prior and subsequent involvement in domestic violence incidents and the role each person played. The data revealed that on average about 16% of the cases reflected a pattern of role reversal; that is, where a suspect had previously been a victim, a victim previously a suspect and situations where there was then subsequent role reversal with a victim becoming a suspect and a suspect becoming a victim. The strongest role reversal model found is the situation where the suspect in the study was female but previously she was a victim. Male victims in the study are more likely than females to subsequently become suspects. Suspects continue to be predominately male with both prior and future incidents as suspects. These findings suggest that more attention needs to be focused on the proximal interaction process in explaining a perpetuating dynamic of violence and role reversal.

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2. Intimate Partner Violence: Role Reversals

While the pervasiveness of domestic assault as well as the seriousness of individual acts warrant attention from scholars and policy makers, crimes of violence among intimates, more than other forms of violent instances, are under-reported and underestimated (Gelles & Cornell 1985; Lagan & Innes 1986). Indeed, Bachman (1994) estimates that almost half of all incidents of violence against women by intimates are never reported to the police. Further, the National Coalition Against Domestic Violence claims that only one in one hundred incidents of domestic violence is reported (Welch 1994). Even with a majority of the abuse incidents not being reported, woman-battering incidents constitute the largest category of calls screened by police officers each year.

The Violence Against Women Office reports that U.S. federal funds for domestic violence programs have dramatically increased to $1.6 billion in the 5 years since the passage of the VAWA (Clark, Biddle and Martin 2002). Moreover, national surveys have consistently estimated that domestic violence is the leading cause of injuries in women aged 15 to 44 (Bachman & Saltzman 1995; Tjaden & Thoennes 2000). Research has repeatedly reported that men tend to batter women in approximately 95 percent of the battering incidents[2] (Bachman 1994; Belknap 1996; Dobash & Dobash 1992). Specifically, according to The National Crime Victimization Survey (NCVS), women are 10 times more likely than men to be victims of violence inflicted by their intimate partners (Zawitz 1994).

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[2] Thus, this research focuses on women as victims in light of the fact that women are most often the victims of domestic violence. The pronoun "she" will therefore be used to refer to the abuse individuals, and the term "woman battering" will be used interchangeably with "domestic violence" "domestic assault" "intimate partner violence" and "domestic abuse."

General consensus is that intimate partner violence (IPV) is pervasive in American society and that women experience more intimate partner violence as victims than do men. The National Violence Against Women Survey found that nearly 25 percent of surveyed women and 7.6 percent of surveyed men said they were raped and/or physically assaulted by a current or former spouse, cohabiting partner, or date at some time in their lifetime; .5 percent of surveyed women and 0.9 percent of surveyed men said they were raped and/or physically assaulted by a partner in the previous 12 months (Tjaden and Thoennes, 2000). According to these estimates, approximately 1.5 million women and 834,732 men are raped and/or physically assaulted by an intimate partner annually in the United States. Because many victims are victimized more than once, the number of intimate partner victimizations exceeds the number of intimate partner victims annually. Thus, approximately 4.8 million intimate partner rapes and physical assaults are perpetrated against U.S. women annually, and approximately 2.9 million intimate partner physical assaults are committed against U.S. men annually.

These findings support data from the Bureau of Justice Statistics' National Crime Victimization Survey (1995), which consistently show women are at significantly greater risk of intimate partner violence than are men. Similar findings have been suggested by Shafer et al. (1998) and Straus (1995). However, they contradict data from the National Family Violence Survey, which consistently show men and women are equally likely to be physically assaulted by an intimate partner (Bachman, 1994; Bachman, R., and L.E. Saltzman, 1995).

All the recent research initiatives suggest that while intimate personal violent crime is still underreported, there has been a notable increase in victims' reports to law enforcement. According to the Bureau of Justice Statistics (2000), reporting increased from 48% in 1993 to 59% in 1998. A plausible explanation to the increased reporting comes from the proliferation of pro-arrest mandates across

the country. Variations of mandatory arrest policies have been established for some time, however, their central concept, that arrest deters, is currently a debated topic. Initial research suggested that arrest and incarceration were effective ways to deter domestic violence (Sherman and Berk 1984);[3] however, subsequent studies questioned their effectiveness (Schmidt and Sherman 1993; Berk et al., 1992)[4] as well as thwarting victim's discretion (Hutchinson & Hirschel 1993). To further examine this issue, the Spouse Assault Replication Program (i.e., SARP) was intended to replicate the seminal Minneapolis domestic violence experiment conducted by Sherman and Berk (1984).

While there were a number of important differences across the replication sites, overall the SARP data reported there were mixed results on the effectiveness of arrest in domestic violence cases (Maxwell, Garner and Fagan 2001). In Michigan, Friday, Metzgar and Walters (1991) found that arrest had the greatest impact in instances where there had been no previous domestic violence response by the police and least effective in those instances where the pattern of violence was well established. Clearly, although the results of pro-arrest policies have been inconclusive, there has been an increase in arresting suspected batterers and an increase of availability of victim services (Cho and Wilke 2005).

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[3] The Minneapolis Domestic Violence Experiment tested three different police officer response conditions with randomization to groups: (1) arrest of the suspect; (2) separation of the victim and offender; and (3) mediation or crisis intervention.

[4] According to Sherman (1992), arrest of the suspect was found to yield fewer repeat incidents of violence within 6 months after the initial police intervention.

2.1 Female Perpetrators

One of the effects of pro-arrest and mandatory arrest policies directing police to treat domestic violence as serious violent crime has been a significant increase in the arrest rates of women for domestic violence (Miller, 2001; DeLeon-Granados et al. 2006). In some police departments the percentage of domestic violence arrests of females has increased 30 to 40 percent (http://www.justicewomen.com/ handbook/index.html). According to Miller (2001) women are increasingly being arrested for domestic violence charges as part of dual arrests (when their partner is also arrested) as well as a result of their own actions. The reasons are not clear but could be explained by women's greater willingness to use violence against their abusive partners or by a stricter adherence by police and prosecutors to follow mandatory or pro-arrest laws without examining the context of the incidents.

Intimate partner violence has generally been examined through a framework that is based on male-perpetrated violence against women. Existing research suggests that IPV became recognized initially as a critical threat to health of society because of the severity of consequences among female victims (National Center for Injury Prevention and Control 2003) and the high prevalence of male-perpetrated IPV victimization among women in the United States and abroad (Heise & Garcia-Moreno 2003). By contrast, no evidence has demonstrated that female-perpetrated violence against male partners has been a threat to the health of populations of men. Additionally, studies that have compared the prevalence of female and male-perpetrated violence against partners have had various limitations—namely, that male-perpetrated violence against female partners is highly stigmatized and likely underreported and not comparable to violence perpetrated by women against their male partners. Further, unlike male perpetrated IPV against female partners, which has been

linked to assertion of male control and is likely rooted in gender inequalities, female-perpetrated violence against intimate male partners has often been documented to be more likely a result of self defense or poor conflict management in relationships. With the exception of self-defense, female perpetration of violence against male partners is likely more closely related to other forms of non-gender specific unhealthy relationship behavior and is not likely to be considered a major concern for the field of public health. Such recent focus on female IPV perpetration may be a result of IPV measures that have often been limited to items assessing only physical violence (often including measures such as "hitting or slapping" a partner); such items lack specificity to capture other core elements of IPV (e.g., control, patterning of abuse, intimidation).

In 2001 the National Longitudinal Study of Adolescent Health reviewed data about the health of a nationally representative sample of 14,322 individuals between the ages of 18 and 28 (Udry 2001). The subjects were asked questions regarding romantic relationships over the past five years, including violence in them. Of the subjects reporting heterosexual relationships (11,370) there were 18,761 relationships and among these 24 percent were violent (Whitaker et al. 2007). Their research sought to examine the prevalence of reciprocal (i.e., perpetrated by both partners) and nonreciprocal intimate partner violence and to determine whether reciprocity is related to violence frequency and injury. The study analyzed data on young US adults aged 18 to 28 years from the 2001 National Longitudinal Study of Adolescent Health, which contained information about partner violence and injury.

The results were that nearly 24% of all relationships had some violence, and half (49.7%) of those were reciprocally violent. In non-reciprocally violent relationships, women were the perpetrators in more than 70% of the cases. Reciprocity was associated with more frequent violence among women but not men (Udry 2001). Regarding

injury, men were more likely to inflict injury than were women and reciprocal intimate partner violence was associated with greater injury than was nonreciprocal intimate partner violence regardless of the gender of the perpetrator. They concluded that the context *of* the *violence* (reciprocal vs. nonreciprocal) is a strong predictor of reported injury.

Nonetheless, little attention has generally been paid in the domestic violence literature to female aggression in relationships (Ridley and Feldman 2003). However, Straus *et al.* (1980) and Straus and Gelles (1986) found nearly equal percentages of males and females reporting aggression toward their spouses at least once within the past year. This study looks specifically at situations where the victim-suspect roles reverse between males and females over time.

2.2. Charlotte, North Carolina Research

The research on which this paper is based is a comprehensive evaluation of the specialized domestic violence unit of the Charlotte-Mecklenburg Police Department. This unit was established in response to general criticism of the criminal justice system's perceived ineffective response to domestic violence and in response to the tremendous drain on resources of the department to respond to over 33,000 incidents a year. The original objective of the research was to evaluate the efficiency and effectiveness of how the cases are handled by the unit compared with the responses of regular patrol units. The specialized unit is designed to handle the most serious and repeat incidents.

3. Research Design

The population from which the sample was selected consists of all police complaint numbers for cases involving domestic violence in 2003. From a methodological standpoint, we limited our population to only the 2003 data to allow for an ample and meaningful follow-up period with which to document repeat offending and repeat victimization. These follow-up data were collected in 2005, thereby establishing a follow-up period of as much as 24-months. A total of 6,892 domestic violence complaint numbers were included in the population.

The preliminary sample used in this evaluation consisted of 1000 cases. The unit of analysis is therefore the domestic violence incident. These cases were selected using a randomized stratified sample (stratifying by month) that also triple-sampled DV Unit cases. The decision to over-sample these cases was based on the low base-rate of DV Unit cases in the population (approximately 8%). Whereas a proportional stratified sample would have theoretically included just 80 DV Unit cases, the disproportionate stratified sampling technique generated 255 DV Unit cases for inclusion. This provides a range in the severity of the cases.

As a result of some methodological and statistical concerns, all cases involving multiple victims, multiple suspects and/or dual aggressors were dropped from the preliminary sample of 1000 cases. The final sample therefore consists of 891 domestic violence cases, each involving one victim and one suspect.

3.1. Data

The data used for this evaluation come from multiple sources. While the DV Unit is largely a police-based program, police departments do not operate independently from the remainder of the criminal justice

system. Therefore, our study utilized police, court, and correctional data. The primary data came from the police department's *KBCOPS* system. The KBCOPS database includes fields pertaining to the nature of the crime, victim information and suspect information. These include suspect and victim demographic information, victim/offender relationship, highest offense category, weapon usage, victim injury and case disposition status. Police narratives, which are not public record, were also used to gain more insight into each situation.

The KBCOPS data management system was also used to identify future domestic violence cases involving the offenders who were included in the sample. Domestic violence cases involving the suspect and victim that occurred prior to the incident in the sample were also reviewed. Given, however, the sample of 891 suspects and 891 victims a decision was made not to attempt to code *all* past- and future-cases. Instead, we recorded as many as two prior assaults and as many as three future assaults. While these were the only cases that were coded for detail, we were able to determine the total number of times the suspect and/or victim appeared in a police incident report in a software system called KBCOPS.

The general characteristics of the sample are:

Overall, victims were:	**Over all, suspects were**
66.6% Black	71.2% Black
83.7% female	85.7% male
59.6% single	54.3% single
Mean age: 31.9	Mean age: 33.4

Prior Legal Factors: Victim

Prior criminal justice contact (Victim, witness, or offender)	57.3% (n=419)
Mean number of prior contact	1.6
Range	0-51
Involvement in prior domestic violence calls	64.1% (n=571)

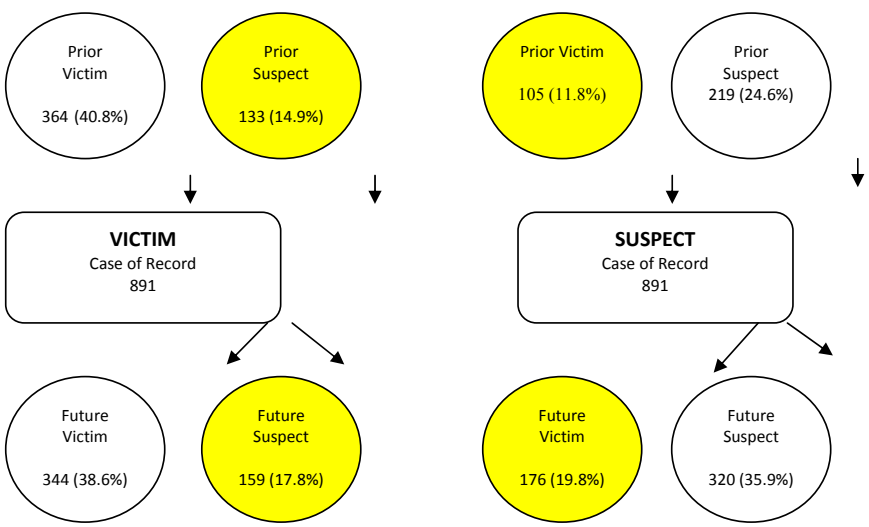
Prior Legal Factors: Suspect

Prior criminal justice contact (Victim witness, or offender)	67.7% (n=581)
Mean number of prior contacts	2.2
Range	0-41
Prior domestic violence record	48.3% (n=277)

4. Findings: Victim as Aggressor and Aggressor as Victim

Looking at the records of both victims and aggressors prior to and after the incident of record used for this research revealed a small but unique dynamic: Some victims have prior domestic violence records as suspects, and some suspects have prior records as victims. This is also true for future events: some suspects are later victims of domestic violence, and some victims are subsequently suspects. We call this role reversal. Of course the caveat to be noted is that we only tracked cases for a specific window of time. This phenomenon of role reversal was found for about 20 percent of the cases, consistent with findings from two representative national surveys (Straus *et al.*, 1980; Straus and Gelles, 1986) where they found 11% of males and 12% of females aggressive toward their spouses. Our data can be conceptualized as follows:

Figure 1: *Schematic Representation of Victim/Suspect Role Relations Over Time*



The shaded areas reflect role reversals

- Victims who were *suspects* in prior domestic violence incidents: 133 (14.9%)
- *Suspects* who were victims in prior domestic violence incidents: 105 (11.8%)

  NOTE: 51 (39.5% of victims with previous records as suspects and 46.6% of suspects with previous records as victims) are the same persons suggesting a longer-term relationship between the battering couples.

  Of the **victims** with prior domestic violence incidents recorded at least once *as suspects* (N=133)
- 67.8% of the first prior incident of DV was with the same partner
- 57.1% of the second prior incident of DV was with the same partner
- 60.0% of the third prior incident of DV was with the same partner

  Of the **suspects** with prior domestic violence incidents recorded at least once *as victims* (N=105)
- 70.5% of the first prior incident of DV was with the same partner
- 72.2% of the second prior incident of DV was with the same partner
- 71.9% of the third prior incident of DV was with the same partner

The role-reversal phenomenon situation occurs in future events as well. There are some suspects in our sample who are recorded in future events as victims (N=176, 19.8%), and some victims who are later seen as suspects in future incidents (N=159, 17.8%).

This finding reaffirms the complexity of domestic violence cases and the difficulties police have in clearly identifying the aggressors. Whitaker (2007) found 47% of his sample to be reciprocal in their violence. Our data are more consistent with Whitaker's if we look only at the initial suspects. Looking at future victimization, based on the role played in the incident of record, male victims are more likely

than female victims to reverse roles and become suspects in the future while female suspects are more likely than male suspects to become victims in future incidents (see Table 1). 41% of male victims in our sample are suspects in the next subsequent incident while 26% of the female victims are subsequently reported as suspects. The proportions are nearly the reverse when the suspect is female, 44% subsequently become victims while only 26% of male suspects become victims in the next incident.

Table 1: *Current Victim or Suspect by Future Role*

	Victim's Gender*		**Suspect's Gender****	
Role Reversal	**Female**	**Male**	**Female**	**Male**
Percent No (N=636)	73.7 (549)	59.3 (86)	55.6 (70)	74.1 (562)
Percent Yes (N=255)	26.3 (196)	40.7 (59)	44.4 (56)	25.9 (196)
	745	145	126	758

*1 missing **7 missing X^2=12.28, p<.001 X^2=18.31, p<.000

5. Role reversal patterns

For heuristic purposes, we have identified four role reversal models as depicted in Figure 1: 1. Victims who were suspects before the incident of record (Table 1); 2.Suspects who were victims before the incident of record (Table 2); 3. Suspects of record who then become victims (Table 3), and 4.Victims of record who then become suspects (Table 4). Regression analysis shows that all patterns, with unique variations, prior domestic violence and gender are the most significant variables in identifying those who change roles.

Table 2A: *Model 1: Analysis of Variance*

ANOVA

Model		Sum of Squares	df	Mean Square	F	Sig.
1	**Regression**	13.391	7	1.913	19.222	.000
	Residual	52.547	528	.100		
	Total	65.938	535			

Table 3: *Model 2: Suspects Previously Victims*

Coefficients

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
2	**(Constant)**	.200	.085		2.338	.020
	Suspect Any DV prior	.428	.041	.529	10.553	.000
	Suspect Before*	-.203	.046	-.227	-4.413	.000
	Suspect's age	.001	.002	.036	.680	.497
	Suspect Male*	-.150	.054	-.139	-2.767	.006
	Suspect Hispanic	-.095	.330	-.014	-.287	.774
	Suspect White	-.012	.050	-.012	-.247	.805
	Suspect married	.076	.050	.082	1.517	.130

*Note negative B (NOT a prior suspect; female, not male) Model 2: R=.605; R^2=.366; Adj. R^2=.349

Table 3A: *Model 2 Analysis of Variance*

ANOVA

Model		Sum of Squares	df	Mean Square	F	Sig.
2	**Regression**	16.560	7	2.366	22.165	.000
	Residual	28.711	269	.107		
	Total	45.271	276			

Table 4: *Model 3: Suspects Who Then Become Victims*

Coefficients(a)

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
3	**(Constant)**	.259	.164		1.582	.115
	Suspect - Any DV prior	.067	.051	.082	1.329	.185
	Suspect Before	.033	.059	.036	.550	.583
	Victim Before	.150	.054	.181	2.784	.006
	Suspect's age	.000	.003	-.010	-.161	.872
	Suspect Male*	-.214	.066	-.194		.001
	Suspect Black	.012	.127	.012	.091	.927
	Suspect White	.014	.136	.014	.104	.917
	Suspect married	.003	.060			

Note negative B, female; Model 3: R=.276; R^2=.076; Adj. R^2=.050

Table 4A: *Model 3: Analysis of Variance*

ANOVA

Model		Sum of Squares	df	Mean Square	F	Sig.
3	**Regression**	3.709	8	.464	2.871	.004
	Residual	44.897	278	.161		
	Total	48.606	286			

Table 5: *Model 4: Victims Who Then Become Suspects*

Coefficients(a)

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
4	**(Constant)**	-.005	.322		-.016	.987
	Victim Any DV case Proir	.192	.033	.279	5.758	.000
	Total number of prior records	.015	.005	.144	2.992	.003
	Victim's age	-.002	.002	-.061	-1.285	.200
	Victim Married	.083	.037	.107	2.234	.026
	Victim Male	.104	.044	.107	2.377	.018
	Victim White	.020	.319	.027	.061	.951
	Victim Black	.025	.319	.035	.079	.937
	Victim Hispanic	.030	.388	.006	.077	.938
	Victim-Serious Injury	.005	.068	.003	.068	.946

Model 4: R=.379; R^2=.144; Adj. R^2=.126

Table 5A: *Model 4: Analysis of Variance*

ANOVA

Model		Sum of Squares	df	Mean Square	F	Sig.
4	**Regression**	7.236	9	.804	8.017	.000
	Residual	43.119	430	.100		
	Total	50.355	439			

The results show that there are distinct patterns in reversing roles. Suspects who were victims in our sample but previously suspects in cases before this one were significantly more likely to be male with prior domestic violence incidents in their records. Likewise, those who were victims in our sample and then appeared in future records as suspects were *married* males who had previous domestic violence incidents; they also had a higher number of incidents.

Role-reversing suspects who were previously recorded as victims also had prior domestic violent incidents but they were significantly more likely to have previously been victims and female. The same variables are also significant for suspects in our data who subsequently were found to be victims: they had previous domestic violent incidents and were female.

6. Discussion

This research incorporated a number of variables. Data were collected from a snap-shot sample of domestic violence cases and then each suspect and each victim were tracked through the system for both prior and subsequent involvement in domestic violence incidents and the role each person played. We specifically analyzed the role reversal patterns of a suspect becoming a victim, a victim becoming a suspect and subsequently each role reversing situation where the victim subsequently became a suspect and when a suspect became a victim.

There is a general tendency to consider domestic violence a situation of males battering females and in some instances females battering males. This is true but the male-female roles do not necessarily remain static. We have discovered that on average 16% of the situations involve a change in role relationship between the partners. The strongest role reversal model we found is the situation where the suspect in the study was female but previously she was a victim. 36% of the variance was explained by the suspect previously being a victim in prior domestic violence incidents. Suspects who then become victims are also most likely to be females with prior victimization.

This finding supports the argument made by Ridley and Feldman (2003) that more attention needs to be focused on the proximal interaction process in explaining domestic violence. The fact that we found these reversals for persons with the same partners in close relationships (especially married) suggests that there is an on-going set of conflict situations where domestic violence is a mode of resolving the conflict. This may be their “normative” conflict resolution style. Unlike Whitaker (2007), however, we did not find an increase in injury with reciprocal violence. In fact, injury never emerged as a factor in any of the models.

These findings are preliminary and more research is needed to look at the pattern of victim-suspect role reversals. But our findings suggest that there are a substantial proportion of domestic violence incidents that are part of a fluid dynamic between male and female partners that is not easily extinguished by arrest. The findings suggest that there are a significant number of situations where the domestic violence of the immediate incident is a part of a relationship dynamic that requires more than simple arrest or transport to a shelter.

As has often been said, there is no simple solution to a complex problem. If the community wants to relieve the police of the burden of numerous domestic violence calls, it needs to address the need to assist persons in learning adequate conflict resolution skills. Police must also learn that what appears at the moment to be true may only be a role reversal that requires more resources than the police are in a position to provide.

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12 A nuanced position: restorative justice and intimate-partner violence

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1. Introduction

One of the most important criminal justice developments of the past decades is undoubtedly the development and rise of restorative justice. Restorative justice purports to shift attention from the punishment of the offender to the repair and healing of the victim (Johnstone, 2002), preferably using non-coercive and voluntary means. A popular definition describes restorative justice as 'a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.' (Marshall, 1999). Restorative justice practices involve a form of mediation, conferencing or sentencing circles (e.g. Aertsen et al, 2004). In addition to the process-oriented definition of restorative justice, Walgrave has proposed an outcome-based definition in which restorative justice is characterized as an option for doing justice that is primarily focused on repairing the harm caused by crime (e.g. Walgrave, 2008).

Restorative justice has been championed as a victim-focused improvement on the criminal justice system (see f. e. Zehr, 2003, Strang, 2002, Sherman, Strang et al., 2005). Nevertheless it has already been shown that the main intellectual foundations of

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restorative justice are in fact ambivalent to the victims' position (Dignan, 2005). In restorative justice theory there is a tendency to employ a stereotypical, unitary notion of victims, which allows restorative justice proponents to make sweeping statements about the benefit of restorative justice for all victims (Young, 2002).

In a recent contribution to the *Handbook of Restorative Justice* Green (2007) addressed some of the potential pitfalls associated with this lack of a victim epistemology in restorative justice. In the first place it is unclear for whom and under what circumstances restorative justice may benefit victims and why (although theories are developing, see below). Most of the research until now has shown positive effects for victims (e.g. Strang, 2002, Paulson, 2003, Sherman & Strang, 2007). However at present restorative justice programmes typically target less severe offences, involving juvenile offenders (Miers and Willemsens, 2004). It is unclear whether the experiences of victims in these situations can be translated to all victims, particularly those who have experienced more severe crimes (Pemberton, Winkel and Groenhuijsen, 2008).

Second Green stresses that due to the lack of a clear notion of victims in restorative justice, the possibility is that restorative justice procedures will simply employ notions prevalent within criminal justice or allow other objectives, like efficiency of the process, to trump victim concerns. Restorative justice could then evolve into a cheaper, quicker way of doing criminal justice and in the process lose much of its potential, not only for victims, but for all parties involved.

Pemberton, Winkel and Groenhuijsen (2008) therefore stress the need for a more diversified understanding of restorative justice, which reflects contextual and individual differences between victims. What are the factors that make restorative justice procedures more or less applicable to the situation of individual victims (and offenders), what goals should these procedures preferably try to

reach and what does this more diverse view imply for the structuring of these procedures? Or in Walgrave's terms, what harm needs to be repaired and what are the most productive ways of attempting to repair this harm? We will return to these questions in the final section.

In fairness, advances have been made in the research into victims' experiences in restorative justice. The main developments are related to the proposed outcome of restorative justice procedures and the impact of the procedure itself. Initially the outcome of a restorative justice procedure was conceptualized solely in terms of material repair (e.g. Barnett, 1977). This has expanded to include forms of emotional restoration (Strang, 2002), with a particular emphasis on the importance of receiving a sincere apology (see Strang, 2002, Sherman and Strang, 2005, Daly, 2005, Wemmers & Cyr, 2005). Furthermore the importance of the procedure is stressed. Following Tyler's work on procedural justice (Tyler, 1990) and the shortcomings of the traditional criminal justice system for victims from this perspective (Shapland et al, 1985), it is suggested that the restorative procedure represents a value in itself (Strang, 2002). This line of reasoning has been supplemented by theory and research that derives concepts from victimological developments outside of the criminal justice system. The similarities between a restorative justice encounter and other methods aimed at achieving benefits for victims are used as a starting point for theoretical development. Sherman, Strang and their colleagues (2005, 2006, 2007) base their theory on Foa's work on imaginal exposure therapy for victims experiencing post-traumatic stress disorder (PTSD; Foa et al, 1995) and Collins' notion of interaction ritual chains (Collins, 2004). Pemberton, Winkel & Groenhuijsen (2007) and Winkel (2007) similarly apply social-psychological theories of anxiety and anger to their understanding of restorative justice. They draw on cognitive models of post-traumatic stress (e.g. Ehlers and Clark, 2000; Frazier, 2003) and on recent

research into the relationship between anger, forgiveness and justice (e.g. Exline et al, 2003; Hill et al, 2005). However where Sherman and Strang's approach suggests that restorative justice encounters will be beneficial for victims, Pemberton et al (2007)'s central idea is that a restorative justice encounter may serve to reduce feelings of anger and anxiety in victims, but that a variety of factors relating to the context, content and purpose of the encounter may make this type of outcome more or less feasible. An encounter could prove to be a negative experience for victims depending on these circumstances. In any case, these theoretically grounded notions of victim effects in restorative justice will provide a more comprehensive answer to the questions mentioned above.

Besides the ongoing research into the experiences of the victims currently participating in restorative justice programmes, much is to be learned by reflecting on some of the 'hard cases' for restorative justice. These are the types of crimes that are often seen as less suitable for restorative justice and are therefore seldom included in its remit. An example is mass political violence, like terrorism (Cairns et al, 2005) or genocide (Staub, 2006).

This article will focus on another potentially difficult case, that of intimate partner violence (IPV). Due to the considerable prevalence and consequences of IPV and other forms of domestic violence (e.g. Campbell, 2002), it has increasingly attracted much needed research and policy attention over the past thirty years. A development that has coincided with the rise of restorative justice. However, the use of restorative justice procedures in cases of IPV is problematic. We will discuss the presumed problems at some length, but evidence of the problematic nature is given by the fact that the staunchest supporters of restorative justice doubt its use for situations of IPV. Daly and Stubbs (2007) quote Howard Zehr, often quoted as the founding father of modern restorative justice practices, who states

'that domestic violence is probably the most problematic area of application and here great caution is advised'.

This article is an attempt to provide a more nuanced position on the pros and cons of restorative justice in situations of intimate partner violence. Can restorative justice procedures be applied in IPV-situations, and if so, under which conditions?

The article is divided into three sections. First we will review the criticism of domestic violence scholars concerning the way restorative justice views victims. Central tenet is that the way victims, their aims and roles are commonly constructed in restorative justice does not bear sufficient resemblance to the actual experience of IPV-victims.

Although we agree with much of the criticism, we take issue with it on two grounds. This is the focus of the second section. First IPV is a more diverse phenomenon than is implied by the critics. A short review of the research into IPV will provide evidence of this diversity. This has implications for the possibilities for applying restorative justice procedures in situations of IPV. In addition it is possible to connect the criticism of restorative justice in IPV-cases of intimate partner violence to more general victim-related concerns. Victims of IPV can then serve to illuminate these issues.

These concerns and their implications for the development of restorative justice are discussed in the final section. Here we will reflect on the structure, methods and goals of restorative justice in IPV-cases, simultaneously expanding the general victimological framework of Pemberton et al (2007) and Winkel (2007) for victims in restorative justice to include IPV.

2. Feminist criticism of restorative justice in intimate partner violence cases

The use of restorative justice in cases of intimate partner violence is a particularly poignant example of the need to develop a more diversified view of victims in restorative justice. As Cheon and Regehr (2006) state "…the most worrisome finding was the lack of fit between the claims made about restorative justice for victims of intimate partner violence and what can reasonably and confidently be offered.". Stubbs (2002) notes that while the restorative justice literature emphasizes participation, apology and reparation, victims of domestic violence have emphasized safety and external validation of their attempts to stop the abuse, together with deterrence and rehabilitation.

We will be returning to a number of these differences over the course of this section. In recent years both an edited volume (*'Restorative Justice and Family Violence'* Strang and Braithwaite (ed.), 2002) and thematic issues of both the *Violence against Women* and *Theoretical Criminology* journals have been devoted to this topic. This literature provides a good description of feminist concerns about the use of restorative justice for intimate partner violence.

2.1 Reducing fear and anxiety

One of the primary harms caused by crime is the victims' anxiety and fear of reoccurrence. Various authors have suggested that one of the ways restorative justice procedures repair harm (see Hudson, 2003; Strang, 2002; Sherman and Strang, 2005; Pemberton et al 2007) is that the process in itself can dispel victims' fear, predominantly through the reasons and motives offenders give for committing the crime. Sherman and Strang et al (2005) for example state "Victims almost always seem reassured when the offenders say

they did not target the victim for any particular reason, when the crime occurred as an almost random intersection of offender and victim in time and space." Furthermore Hudson (2003) suggests that it is beneficial for the victim to hear from the offender that the negative consequences of the offence were neither intended nor fully appreciated.

This line of reasoning is not applicable to IPV. Stubbs (2002) notes that the offender's account will not lead the victim to believe she was not specifically targeted, as the specific characteristics of the victim-offender relationship are the main reason for victimization. Similarly it is not reasonable to assume that the offender did not have ample opportunity to ascertain the consequences of the offence. Many offenders of IPV live together with their victims.

In general Stubbs (2002) finds restorative justice theory and practice to be geared towards the situation where a crime took place in the past, with victim and offender being relative strangers. Cases of IPV clearly do not meet the latter criterium, as victim and offender know each other (very) well, but she also takes issue with the former. According to Stubbs a defining feature of intimate partner violence is its repetitive and ongoing nature. This implies that violence is likely to return in the future. Again this will negatively impact the possibility that a restorative justice encounter will reduce victims' anxiety. The idea that an encounter will reduce anxiety rests on the assumption that the victim errs in believing that future violence is a likely scenario. In IPV cases, however, victims have good reason to believe it will.

2.2. Cause of violence

The notion of crime as a discrete incident between strangers, or even as 'conflict' (see below) is another point of criticism. According to Stubbs (2002; see also f.e. Dobash and Dobash, 1979) this

representation of crime is a misnomer for IPV as it does not recognize the context in which IPV takes place and/ or the causes of IPV. The feminist perspective on IPV finds the root cause of IPV to be the perpetrator's wish to control the victim in an attempt to implement gender ideologies.

Restorative justice procedures do not recognize these context features (Stubbs, 2002). In a situation of ongoing violence, which is part of a pattern of controlling behaviour, discussing a 'specific offence' and its 'aftermath' does not sufficiently address the harm experienced by the victim (see also Koss et al, 2003). Here the criticism mimics that of the criminal justice system in general. Victims who have suffered chronic victimization over an extended period, find it hard to understand that the offender receive his sentence for only one or at most a few instances of his criminal behaviour (Hartley, 2003).

In addition features of the mediation setting may be exploited by the offender to continue his pattern of behaviour toward the victim. The offender may use the procedure as a method to try to control the victim, as the victim may be traumatized and in a weak position to withstand the offenders manipulation within the mediation setting (Cheon and Regehr, 2006; Johnson, Sacuzzo & Koen, 2005). Moreover there is the possibility that the community, often included in restorative justice procedures will support the sexist ideas of the offender (Coker, 2002).

2.3. The central role of apologies

According to Bennett (2007) a central role in a restorative justice process is accorded to the expression of an apology by the offender. The expression of an apology plays an integral part in repairing the moral relationship between the offender and the victim. Strang suggests that obtaining an apology is one of the victim's central

emotional needs (see Strang, 2002). She maintains that the expression of remorse will prove beneficial to the victim's healing process. Like the offender's stated motives it may reassure victims that the offender will not repeat the crime against the victim. Furthermore it may release the victim from feelings of revenge and anger that she may be experiencing after the crime.

Again the situation of many victims of IPV differs from this scenario in important respects. As Acorn (2004) and Daly and Stubbs (2007) observe many situations of IPV are characterized by a cycle of violence in which violent episodes alternate with expressions of remorse and apologies on the part of the offender (see Walker, 1984). A restorative justice procedure that stresses the importance of apologizing would be an unfortunate extension of this cycle. Offering an apology then is not likely resolve the 'conflict'. Victims have good grounds to distrust it. They have already heard many apologies that did not signify a change in the offender's behaviour. In addition the context of a restorative justice procedure provides the offender with added incentives to apologize. Offering an apology may lead to a more favourable outcome of the procedure for the offender.

2.4. Role of the community

Restorative justice emphasizes the importance of community involvement. Usually three 'stakeholders' of restorative justice processes are defined: the victim, the offender and the community (Johnstone, 2002; Schiff, 2007). Community is normally seen as a positive force in restorative justice. Schiff for example states that,'....community serves an important normative function by developing, communicating and upholding the standards to which its members are expected to adhere as well as the values that undergrid those norms.' These norms are important in restorative justice procedures. Braithwaite (1989) for example argues that for

reintegrative shaming to be successful the underlying law should be supported by a clear majoritarian morality.

The rather unproblematic and wholesome view of community involvement in justice is challenged in various ways when applied to intimate partner violence. First and foremost community norms may reinforce rather than undermine male dominance and victim blaming (Coker, 2002). Coker questions whether the type of morality assumed by Braithwaite exists for intimate partner violence. People may not agree that intimate partner violence is unacceptable behaviour and/ or they may excuse the offender's behaviour, by assuming victim precipitation.

Secondly Stubbs questions whether the community has sufficient resources to adequately deal with the problems posed by IPV-cases (Stubbs, 2002). Both the resources and knowledge necessary for successful implementation of measures to ensure protection and safety of victims and treatment of offenders call for an active state involvement (see below).

Finally in conferencing situations the community is represented by friends and family of both victim and offender (the 'communities of care'). In cases of IPV there is likely to be a lot of overlap between the communities of care of victims and offender. This may lead them to have mixed loyalties and be adverse to classify what happened to be a crime (see Daly and Stubbs, 2007).

2.5. Conflicts as property?

In one of the most famous articles in the restorative justice literature Nils Christie defined conflicts as property of the parties involved in them (Christie, 1977). In particular Christie criticized states and professionals (like lawyers or social workers) from stealing conflicts from their rightful owners. The use of inclusive methods in

restorative justice is then an avenue for retrieving conflicts from state actors and returning them to their rightful owners.
Stubbs (2002) however points out that the state has long refrained from interfering in IPV cases. The problem is not theft, but rather neglect, on the part of the state. Active state involvement in IPV has therefore been a central issue for the women's movement. Using restorative justice, in particular from Christie's communitarian perspective, may entail 'reprivatizing' these crimes. It could send a signal that what goes in relationships is not a public matter; it's up to those involved in the relationship to deal with it themselves.

2.6. Complicated victim-offender relationship

In comparison with the situation of crimes between strangers the relationship between victims and offenders in IPV is rather more complicated. In the first place, victims run the risk of being mislabelled as offenders, when they commit a crime out of self-defence (Dobash and Dobash, 1979; Stubbs, 2002). Concentrating on the isolated incident may fail to reveal the ongoing violence and controlling behaviour that preceded it, with the victim having to face the humiliation of having to apologize to the offender. Second victim and offender are not only connected by the crime committed, but in many ways. They may have a house together, a shared history and friends and children. Apart from the criminal proceedings they may also find themselves in various other legal battles concerning domicile and custody of the children.

2.7. The principle of free and voluntary participation

A central principle of restorative justice is that participants engage in the process out of their own free will (e.g. Johnstone 2002). All

existing international legal instruments state this as a matter of the utmost importance (see Van Ness, 2003 and Aertsen et al, 2004).
Nevertheless it is questionable whether many IPV-victims are in the position to participate of their own volition. The offender may force them into participating (Stubbs, 2002), in particular when victim and offender live together and/ or have children. Similarly the victim may be under pressure to accept outcomes that suit the offender, pressure which the victim may not be able to withstand (see Goel, 2000).

2.8. Trauma and participation

Experiencing violence often leads to post-traumatic stress symptoms or full-blown post-traumatic stress disorder (Kessler et al, 1995). Repeated violence increases the chance of this occurring (Winkel, 2002).. The repetitive nature of IPV implies that its victims will often suffer from PTSD or co-morbid disorders like depression (Campbell, 2002).
PTSD can adversely affect victims' capacity to negotiate with the source of their anxiety, namely the offender. Symptoms experienced by victims of trauma include intense psychological distress upon exposure to internal or external cues related to the traumatic event, increased arousal leading to hyper-vigilance and difficulties concentrating (e.g. Cheon and Regehr, 2006). PTSD therefore affects victims' ability to engage in the mediation procedure in a meaningful way. The tension and distress makes it difficult for victims to express their wishes and reach a negotiated outcome that sufficiently reflects their needs (Cheon and Regehr, 2006; Johnson et al, 2005).

2.9. Impact on offenders

Restorative justice is often conceptualized as a more humane and in many ways more effective way of dealing with offenders (Braithwaite, 1989). Where criminal justice procedures are often seen as part of the punishment for offenders (Feeley, 1979), restorative justice procedures hopefully could be part of the 'cure'. The procedure would give offenders the opportunity to gain a fuller understanding of the consequences of their actions. The focus on making amends allows them to restore the damage they have caused. Together, these features should help to prevent further offending and lead to lower recidivism rates (Latimer et al, 2005).
However it is questionable whether the impact of restorative justice procedures is sufficient to change offenders' ways in situations of IPV. IPV-offenders have the tendency to view themselves as victims and to justify their actions. It is not likely that the procedure will help them to understand what they have done. Instead they are more likely to view the procedure as evidence that IPV is not such a serious matter. Moreover, if they find the audience to be sympathetic to their point of view, this will reinforce their initial justification. (e.g. Daly and Stubbs, 2007).

2.10. Restoring or transforming relationships?

Restorative justice, by its name alone, suggests that justice is done if the situation is brought back to its pre-offence level. A common argument with this notion is that this is impossible in many cases. The harm caused by the offence may be irreversible (f.e. in cases of murder, but also of rape etc.).
For IPV an additional argument applies. Coker (2002) finds it to be of little use to the victim if the relationship is only repaired to its pre-offence levels, if the underlying problems still exist and lead to

violence in the future. In particular Coker sees the violence within the relationship being caused by gendered conceptions of appropriate roles for men and women. If these conceptions are not challenged within the procedure, with only the eventual violent outcome receiving censure, the root-problem is still intact. Coker therefore concludes that victims need a complete overhaul of the relationship rather than merely restoration.

3. Questioning the homogeneity of intimate partner violence

Due to the criticism, described in the previous section, there are hardly no restorative justice programmes that include IPV-cases (see Daly and Stubbs, 2007), with the notable exception of a number of projects in New Zealand, Australia and Northern America (see also Pennell and Burford, 2002) and the practice in Austria (see Pelikan, 2002). Evidence of the effects of its use is therefore scant.
Nevertheless it is possible to take issue with the criticism offered in the previous section on two grounds. IPV, as we will show, is more diverse than is implied by the critics of restorative justice in intimate partner violence cases. In addition a number of the points made by the critics, are not unique for intimate partner violence. This implies that restorative justice theory and practice should take these issues into account, whether or not intimate partner violence is included.

3.1. Intimate Partner Violence: a more diverse experience

In expressing their critique of the application of restorative justice in cases of intimate partner violence, researchers with a feminist perspective tend to overlook the heterogeneity within this type of violence. The stereotype applied is escalating, repeated, one-sided violence, utilized by men to control their partners due to their perception of appropriate sex roles. Although it is certainly true that this type of IPV occurs on a (far too) regular basis, and that these situations are more heavily represented in the severe end of the spectrum of violence, it is neither the only nor even the most frequent form of intimate partner violence. On all counts: the explanation of violence through the lense of patriarchy; the character of violence as repeated, escalating and one-sided; the question

whether the perpetrator is necessarily male; there is abundant evidence of a more complex picture. We can not discuss these matters here extensively.[2] Our purpose is to provide the main points of contention where they are relevant to the issue of applicability of restorative justice. The two main issues are related to the variety in types of IPV and the causal explanations for the development of IPV.

3.2. Different types of intimate partner violence

Intimate partner violence is often assumed to be repeated by nature. Laycock (2001) for example describes it as the ultimate repeat crime. Once violence commences, it will escalate, mostly through a series of cycles (Walker, 1984). Although there is evidence that confirms these hypotheses, in many cases of IPV the pattern fails to emerge. For example, Johnson (1995) shows that of husbands who perpetrated severe violence against their partner, 'only' 30,4% recommitted such an act. Although this is still not a reassuring percentage, it does imply that the large majority of IPV-cases do not reveal a pattern of escalating violence.

The typecasting of IPV as being one-sided male violence has been criticized for at least thirty years, due to research showing the prevalence of female violence to be on equal footing with men (see Archer, 2000 for a review). Stets and Straus (1989) conclude that in both dating, cohabiting and married couples mutual violence occurs most often, followed by one-sided female violence. The stereotypical male-only violence was the least frequent. In line with these results, Archer (2000) found that 'women were slightly more likely than men to use one or more acts of physical aggression and to use such acts more frequently'.

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[2] That is also true for the ongoing controversy between feminist and family violence researchers.

However the results of these 'family violence' studies are at odds with both crime victim surveys and the perception of those working in criminal justice agencies and women's shelters (e.g. Tjaden & Thoenes, 2000, Kimmel, 2002; Dobash & Dobash, 2004). According to these sources males perpetrate the majority of IPV. The inhabitants of the shelters are nearly exclusively, chronically victimized women. This apparent discrepancy has led to a severe and sometimes rather bitter debate between so-called family violence and feminist researchers (see Kurz, 1989), in which everything from the respective methodologies to the political agenda of the researchers has been criticized.

A possible solution to the divergence is suggested in a series of articles by Michael Johnson (see amongst others Johnson, 1995, 2001, 2006). His two main insights are that there are a variety of forms of intimate partner violence and that not all forms of violence have an equal chance of being reported to the police (see also Mihalic and Elliot, 1997) or necessitate the far-reaching consequence of accessing the shelter system. He initially identified two forms of intimate partner violence (Johnson, 1995). [3] With his distinction between situational couple violence and intimate terrorism (which he initially labelled common couple violence and patriarchal terrorism respectively) he criticised the view of feminist researchers of violence being exclusively one-sided, control-driven and male-perpetrated (Johnson, 1995). According to Johnson this solely applies to the intimate terrorism category. Situational couple violence, on the other hand, is two-sided, not (necessarily) escalating and not driven by the desire to control the other. In this sense it is similar to forms of violence that occur between strangers.

[3] In later studies Johnson (2006) also included the categories mutual violent control and violent resistance

Situational couple violence is the most prevalent form of intimate partner violence, which is in line with the family violence surveys (Johnson, 2006). However in those cases that are reported to the police and/ or necessitate accessing the shelter system, intimate terrorism is increasingly prevalent. This is due to the fact that intimate terrorism is on average the more severe form of violence, but also due to the likelihood with witch the violence will be categorized as a crime. Johnson showed that intimate terrorist cases, although they were only 11% of the total number of cases of intimate partner violence, were 68% of the cases in a court sample and 79% of the cases in a shelter sample. Furthermore a large majority of intimate terrorism cases is perpetrated by men against women, while situational couple violence has roughly the same perpetration and victimization rates for men and women (Graham-Kevan and Archer, 2003).

3.3. Causes of intimate partner violence

The different types of intimate partner violence may be explained by different causal mechanisms. Johnson's typology places the control-motivation at the heart of the division. Where the will to control the partner is central to in cases of intimate terrorism, it is absent in cases of situational couple violence.

The explanation of violence in the latter cases is similar to aggression and violence in other interactions, e.g. the General Aggression Model (Anderson & Bushman, 2001). According to Johnson (2001) it arises in the context of specific conflicts, which become arguments and then escalate to violence. Pan, Neidig and O'Leary (1994) show that marital problems greatly increase the chance of IPV, and that the single most common event preceding aggression is an argument. As is confirmed by recent research (Whitaker et al, 2007) the fact that this type of violence is not embedded in a general pattern of control,

does not imply that it can not be severe or repeated, although on average a case of intimate terrorism will be the more serious violent relationship.

Research shows that both individual and relationship level characteristics impact situational violence in relationships. Robins et al. (2002) for example state 'It's not just who you're with, it's who you are'. In their study, in which they examined longitudinal data of a representative sample of young adults, they found personality traits in adolescence to predict the quality of relationships in young adulthood. Those with high scores on measures of negative affect or antisocial behaviour more often had bad relationship experiences (Robins et al, 2002). In line with this, abuse is particularly likely when both partners share these characteristics. Moffit et al. (2001) conclude that abuse is a dyadic process in which characteristics of both individuals contribute. It is noteworthy that the own level of antisocial behaviour is predictive for relationship aggression for both men and women but that, in addition, women's antisocial behaviour is a strong predictor of their own victimisation as well (Kim & Capaldi, 2007).

In intimate terrorism the violence is entrenched in a general attempt to control the partner. However the attempts to control the partner are not necessarily rooted in patriarchal values or misogyny, as feminist researchers have presumed. In the research into perpetrators of intimate terrorism both sociopathic perpetrators and borderline/ dysphoric perpetrators figure. The first group commits IPV in a general pattern of violent and criminal behaviour, in the second the violence is restricted to their partners but is the result of an extremely fearful attachment style (Bowlby, 1969). In these cases the perpetrator is so desperately attached to his partner that he feels he must control her in order not to lose her (Dutton (2006) refers to this type as having a borderline personality organisation).

However patriarchy as a motivation should not be dismissed either. Holtzworth-Munroe et al (2000) found that intimate terrorists are characterized by higher scores on misogynistic attitudes than either non-violent husbands or those involved in situational couple violence (see also Sugarman & Frankel, 1996). A recent review by Archer (2006) of victimization in relationships in a variety of countries shows that sexist attitudes and relative approval of wife beating are associated with women's victimization rates. Moreover as gender equality and individualism increase, women's victimisation rates decrease and their perpetration rates increase.

Nevertheless there is not much support for the idea that patriarchy still figures as a central norm in most of our Western societies. Quite the contrary is true. Felson (2002) emphasizes the existence of a special 'chivalry' norm, according to which women have to be protected from harm. Consistent with this 'chivalry' norm, it appears that societal acceptance of men committing violence against women is low in Western societies (e.g. Felson, 2002). For example Simon, Anderson et al. (2001) found that only 9.8% of men and 7.2% of women approved of a man hitting a women, 'even if she hits him first'. Furthermore, 2.1% of men and 1.4% of women believe it is acceptable for men to hit women to keep them in line (Simon et al., 2001). Particularly striking is that the reverse situation (a woman hitting a man) receives much more support. No less than 33.8% of men and 27.0% of women find it is acceptable that a woman hits a man if he hits her first, and respectively 5.0% and 4.4% 'to keep him in line'. Violence against women is thus perceived as more negative than violence against men.[4]

[4] Referring to Felson (2002), it is important to keep in mind that the fact that some respondents may have given a socially desirable response only adds support to the notion that respondents consider violence against wives deviant behaviour' (p.75).

It is however open to question whether what is true in general in Western society will also apply to all its factions. Archer's (2006) results suggest the possibility that it is likely that minority populations from different backgrounds may well have different levels of acceptance of violence against women.

Finally researchers have increasingly turned their attention to the role victim characteristics play in their own victimisation (see Capaldi & Kim, 2007 for an overview). Winkel (2007) shows that psychological characteristics like anxiety and anger are predictors of future victimization. The role that these factors play depends on the type of IPV-situation. For victims of intimate terrorism, anxiety increases the chances of revictimization, while for those involved in situational couple violence a high level of trait anger is a risk factor.

We will return to the implications of this anxiety-anger division amongst victims of intimate partner violence in the final section, but will stress here that the relationship between psychological characteristics of victims and the risk of future victimization offers additional victim-focused possibilities for reducing risks of this occurring. Reducing anger and anxiety within victims of intimate partner violence, then not only serves to alleviate the consequences of the current victimization, but also reduces the chances of it happening In the future.[5]

3.4. *A larger variety of IPV and its consequences for applicability of restorative justice*

In this section we have shown that the homogeneous and monocausal explanation of IPV implied by much of the feminist criticism on restorative justice needs qualifying. First and foremost

[5] Winkel (2007) dubbed this notion the 'Janus face' of post-traumatic sequelae.

the criticism ignores the existence of situational couple violence which is the most prevalent form of IPV. Situational couple violence is not embedded in a perpetrator's attempt to control the victim, is most-often two-sided and has equal male and female levels of perpetration. Situational couple violence does not normally reveal a pattern of repetitive and escalating violence, although there are many instances of severe injury as a consequence. Finally individual (perpetrator and victim) and relationship characteristics impact the levels of violence in these cases.

Even when the violence more closely resembles the stereotypical domestic violence situation, current research shows more variation. Misogyny and patriarchy may play a role in the violence, but are neither the dominant nor a necessary cause for the occurrence of intimate terrorism. Both fearful attachment or sociopathic tendencies can contribute to the commission of intimate partner violence. Moreover, contrary to the suggestion that communities will have a tendency to accept intimate partner violence, the evidence shows that male against female violence is not condoned in Western societies. Finally even for victims of intimate terrorism personal characteristics are a relevant predictor of future victimization and therefore offer avenues for reducing the risk of this happening.

These qualifications impact the possibilities for the application of restorative justice. The distinction between intimate terrorism and situational couple violence will impact the preferred outcome of any measure striving to resolve the violence in the relationship and this is also true for restorative justice. Much of the criticism concerning restorative justice in cases of IPV targets intimate terrorism and primarily the forms of intimate terrorism caused by patriarchy. The use of restorative justice procedures for other situation needs further examination, which we will proceed to do in the final section. Inclusion of the community may be less problematic as assumed, as a very large majority of people in the community do not accept

intimate partner violence. This does not solve all community problems though, as members of the community may well still have loyalty issues. In situations of situational couple violence moreover there may be considerable disagreement about the labelling of the partners as either perpetrator or victim.

4. Questioning the unicity of intimate partner violence

We have shown that the critique on the use of restorative justice in cases of intimate partner violence will not apply evenly to all situations of violence between partners. In addition several of the issues raised by the critics are not unique to intimate partner violence, but apply, although maybe not equally, to other crimes as well. This implies that these issues pose challenges to restorative justice in general (see for a more extensive discussion of these issues Pemberton et al, 2007, 2008; Pemberton, 2007a, 2007b, Winkel, 2007).

4.1. Victim needs

The restorative justice literature stresses differ needs from victims of IPV. Where restorative justice emphasizes participation, apology and reparation, victims of IPV are more concerned with safety, and external validation. This discrepancy is related to a more general tendency within the restorative justice literature to bias some needs over others; in particular those relating to revenge, retribution and anger are neglected (see f.e. Strang, 2002). Van Dijk (2006) criticized restorative justice for employing the stereotype of 'the ideal victim of restorative justice'. In this stereotype victims are represented as being forgiving, not punitive, preferring apology and/ or reparation and symbolic reparation at that over punishment, part of the same community as the offender, not afraid of the offender, wanting and capable of full participation in the case. The contrast that is often made between a focus on repair and a focus on retribution does not reflect the results of social-psychological research in which both retribution and forgiveness serve various coping functions for victims (Worthington & Scherer, 2004; Hill et al, 2005; Tripp et al, 2007).

Sufficient retribution is a prerequisite for victims to be able to let go of their feelings of justified anger (see also Pemberton et al, 2007).
This does not imply that for many victims the needs stressed by restorative justice proponents are not important. To the contrary, even for victims of intimate partner violence they will feature. However they neither necessarily figure as the most important needs nor fit smoothly and unproblematically with other needs. It may be possible to meet the various needs within one procedure, but the case of restorative justice encounters for victims of intimate partner violence reveals that reaching one goal may hamper reaching another. There are various instances of this, but the one that has the most far-reaching consequences for the structuring of restorative justice encounters is the tension between participation in a justice procedure, focused on reaching a mediated agreement and the possibilities for alleviating feelings of anxiety, anger and stress that victims may have.

4.2. Reducing fear, anxiety and trauma

Cheon and Regehr (2006) rightly note that suffering from PTSD may hamper victims' possibilities to negotiate with the offender. This problem is not unique to IPV situations. PTSD can be caused by variety of other criminal acts (and non-criminal acts) as well (see Kessler et al, 1995).
On the other hand, one of the recent developments in restorative justice theory relating to victims of crime is the suggested link with forms of therapy for post-traumatic stress disorder (see Sherman and Strang, 2005, Angel, 2005), which is supposed to explain the mechanism by which a meeting with the offender may relieve victims' fear of the offender. In short the central idea is that that the meeting the offender shares some of the same basic features of techniques like imaginal exposure therapy (e.g. Foa, 1995). The meeting with the

offender may dispel the ideas that the victim may have about being uniquely vulnerable, which are related to the development of post-traumatic stress disorder (e.g. Ehlers and Clark, 2000).

This reasoning is not applicable to most IPV cases. Here the victim has good cause to feel uniquely targeted by the offender. This is also the case in many other situations as well. Pemberton et al (2007) note that when offenders' motivations for committing the crime are related to intrinsic characteristics of the victim, as is the case in hate crimes, this will confirm rather than counter the victims' feelings of vulnerability.

Nevertheless a meeting with the offender may be beneficial to victims suffering from PTSD (Pemberton et al, 2007). Winkel (2007) stresses the necessity of including other elements of the therapeutic interventions for victims. In particular he criticizes the idea that a one-time intervention is effective as out-of-sync with current evidence (see van Emmerik et al, 2002; McNally, Ehlers and Clark, 2003). In Foa's imaginal exposure therapy, the victim is gradually and increasingly exposed to elements of the fear provoking stimulus over the course of a number of sessions. This systematic and gradual exposure could also be included in the preparation for a restorative justice meeting.

This therapeutic approach to victim-offender encounters implies a loosening of the association between the encounter and the criminal justice process. Pemberton (2007b) has argued that in these cases the encounter preferably should take place outside of the criminal justice system, rather than as a part of or an alternative to it. We have already noted that it will be difficult for victims suffering from PTSD to succesfully negotiate with the source of their anxiety. In addition encounters that affect the course of the criminal justice procedure raise the stakes for both parties, which will increase the stress experienced by the victim.

Positioning victim-offender encounters as a complement to the criminal justice system may increase the chances that victims suffering from PTSD participate. The available evidence suggests that this is currently seldom the case. Reviewing the often cited study by Angel (2005,) Winkel (2007) shows that only one of the participating victims showed a level of symptomatology that was sufficient for a diagnosis of suspected post-traumatic stress disorder.[6]

4.3. Apologies may backfire

Apologies in the situation of intimate partner violence bear a dubious similarity to the expressions of remorse that are often found in cycles of violence. But also in other situations the delivery of apologies is not necessarily beneficial for victims. Where Strang (2002) stated that victims want an apology, this is only correct in part. Victims' preference concerning this type of statement is a sincere, believable and full apology, and it is this type of apology that is associated with benefits for victims (Allen et al, 2006; Smith, 2005; Exline and Baumeister, 2000, Hill, Exline et al 2005). When the victim does not believe the apology, does not think it is sincere or interprets it to be an excuse rather it will prove counterproductive (Allen et al, 2006; Darby and Schlenker, 1986; Winkel et al, 2007). In a substantial minority of restorative justice encounters the victim did not believe the apology offered was sincere (Strang, 2002; Daly, 2003).
According to Tavuchis the extent to which the victim believes the offender's apology is related to the victim's perception of the offender's reason for offering the apology (Tavuchis, 1991). Where

[6] In the Impact of Event Scale-Revised which was used to measure symptoms of post-traumatic stress, the cut-off score for supposed PTSD is a value of 33 (Creamer, Bell & Failla, 2003), while the results reveal average values of 14,8 (criminal justice group) and 10,1 (restorative justice group).

offering the apology serves an instrumental purpose the victim will be less likely to believe it. In line with this Pemberton (2007) has therefore noted that positioning the meeting between the offender and the victim within the criminal justice system may have the additional drawback of instrumentalizing apologies. The offender may apologize to receive a more lenient sentence. Research (Kleinke et al, 1992, Robbenolt, 2003) shows that offenders do receive more lenient sentences when they apologize.

4.4. Community and state resources

The unproblematic notion of community may also be criticized in a more general fashion. First of all in areas that are rife with crime, there may be no community worth speaking of (see Sullivan and Tifft, 2005). Criminal victimization in these areas is a direct result of the breakdown of community, the repair of which will need state interventionon on a large scale. Second where Christie (1977) assumed conflict resolution to succeed through the spontaneous exercise of community morality and its reconciliatory nature, Cragg (1992) and Van Stokkom (2007) assert it is a mistake to see informality as inevitably benign or by its nature less punitive or more humanitarian.

Finally implementing restorative justice procedures may have the, admittedly unintended or unwanted, consequence of cutbacks on auxiliary services or victim assistances schemes. Weijers (2003) shows evidence of this phenomenon in New Zealand, which has the most full-fledged programme of restorative justice for juveniles, where the much heralded implementation of family group conferencing was part of a large scale budget reduction. Weijers primarily criticized the lack of available follow-up for the young offenders, but similar concerns have been voiced concerning victims as well (Reeves & Mulley, 2000; Green, 2007). This is also related to

the tendency of restorative justice proponents to suggest that restorative justice-meetings may replace other victim supportive interventions (e.g. Aertsen et al, 2004) or misinterpret and/ or overestimate the possibility of restorative justice to assist victims in overcoming their post-traumatic complaints (see below).

4.5. Conflicts as property?

The fact that many victims feel ignored by the criminal justice system and therefore would like more participatory options than previously available, does not mean that all or even most would welcome full decision control or responsibility for the resolution of the case (Edwards, 2004; Wemmers and Cyr, 2004). To the contrary: the umbrella organisation of victim service providers in Europe, Victim Support Europe, (formerly known as the European Forum for Victim Services) has emphasized that 'Throughout Europe, the state has assumed responsibility for prosecuting offenders and has removed from the victim the burden of responsibility for determining any action to be taken in respect of the offender. The acceptance of responsibility by the State should be recognised as a fundamental right of victims of crime, and no attempts should be made to erode this by returning the responsibility for decision making to victims.' (EFVS, 2005). Conflicts may well be property, however for many victims this property is akin to a hot potato.

4.6. Voluntary participation

The invitation to participate in a restorative justice procedure has to reckon with the fact that there is a fine line between information and coercion (see Hoyle, 2002). In many cases it will be the organisation providing the procedure that will approach the victim, and this

organisation will have a natural incentive to stress the advantages of participation rather than the possible risks.

The pressure to participate may increase. For instance, the work of researchers showing positive results for victims who *are willing to participate*, may well be misinterpreted as applying to all victims. Sherman and Strang (2007), while discussing the benefits of restorative justice, state the following :"And even when offenders are willing to engage in restorative justice, some victims (or their families) will prefer not to. *restorative justice cannot help those who will not help themselves*." Except for the questionable generalization of the results of victims who are willing to participate to all victims, the quote also adds the suggestion that declining to participate in restorative justice is equivalent to not willing to help oneself. This neglects the fact that there are, luckily, many things a victim can do to help him or herself without restorative justice. Moreover, as Pemberton (2008) shows, the effect-sizes of restorative justice encounters are small, particularly compared to other therapeutic interventions.

4.7. Impact on offenders

Offenders' regularly employ a variety of minimizing and neutralizing techniques (see already Sykes and Matza, 1957, but also Topalli, 2005, and specifically relating to restorative justice, Fellegi, 2008), which may in general interfere with their empathy for the victim. In addition some offenders will be diagnosed with a psychopathic personality disorder (see Hare, 1992) in which one of the defining features is a lack of empathy for others. This means that the question of offender empathy is relevant to many restorative justice procedures.

Furthermore the offender may have cause not to take the victims' perspective. There are a variety of situations in which the result of

the interaction determines who is the offender and who is the victim, rather than their prior intentions. Alternatively the offender find the victim inflate the extent of the harm and wrongdoing. Research by Baumeister and his colleagues confirms that where offender accounts tend to downplay the severity of the offense or the culpability of the offender, the victims' account tends to exaggerate these features (see Baumeister et al, 1990, Stillwell and Baumeister, 1998).

Finally the general impact of restorative justice on offenders is a much debated issue. The meta-analysis by Latimer et al (2005) shows participation in restorative justice-procedures in general to be associated with less recidivism. But due to the black-box nature of the underlying process, many questions are still open. Levrant et al (1999) criticize the idea that a one-time intervention can be effective in changing offenders' behaviour and suggest that effects are due to the voluntary nature of participation and completion of restorative justice-procedures. In addition the working element, which initially was suggested to be 'reintegrating shaming' has been criticized. Van Stokkom (2002) theorizes that it is not shaming that is beneficial but the extent to which the procedure succeeds in designing empathy for the victim. Furthermore the empirical work in psychology connects shame with rather unhelpful emotions like anger, and sharply distinguishes it from the experience of guilt, which is associated with attempts on the part of the offender to make true amends (see Tangney and Dearing, 2002; Tangney et al, 2007).

4.8. Connecting IPV criticism of restorative justice with more general concerns

In this section we have connected the criticism of restorative justice in situation of intimate partner violence to more general victim-related concerns with restorative justice.

First of all the discussion has shown that victims have different needs which may or may not be met in restorative justice encounters. Matching victims' needs with a victim-offender encounters requires a more thorough and less biased review of these needs than is mostly on offer in the restorative justice literature. Even when victims needs could be met by restorative justice encounters they may conflict with each other. The need for participation in the justice procedure may conflict with their need to reduce anxiety. Apologies may be less believable when the victim has cause to assume that they have served an instrumental purpose. The differing and sometimes conflicting nature of victims' needs in restorative justice may well necessitate diversification in restorative justice methods and procedures. Throughout this section there have been instances where the smooth linking of a facilitated encounter between victim and offender and the (partial) replacement of criminal justice procedures has been questioned. It may well be in the interest of many victims to have the option to explore a facilitated encounter alongside the criminal justice procedure.

A particularly important point is the effect of restorative justice encounters on the victims' feelings of anxiety and posttraumatic stress. According to some scholars hearing the offender's account may be sufficient to reduce victims' anxiety. However the analysis in this section suggests that it is insufficient to rely on the offender's account alone, as this may well, contribute to, rather than allay victim' s fears. If change in the offender's behaviour is to be part of this reassurance, the victim will often need additional reasons to be convinced that the change is real.

The analogy to the therapeutic approaches suggests that it is highly unlikely that a one-shot meeting can have far-reaching consequences, as this is rarely the case for therapeutic approaches themselves. Instead a graduated exposure model could prove beneficial (Winkel, 2007), in which the meeting with the offender is

preceded by imaginal exposure techniques. Instead of implementing restorative justice procedures as an alternative to victim supportive interventions, much may be won by connecting the encounter with other measures intended to reach the same goal.

5. Conclusion: the lessons from restorative justice for intimate partner violence

The final section will discuss two main issues. First the section will offer insight into the possibilities for the use of restorative justice procedures in the case of intimate partner violence. The literature described in the previous sections will be used to suggest the purpose and structuring of restorative justice procedures in these cases.
Second the more general implications for restorative justice will be discussed. As we have shown in the previous section it is possible to connect the complexities of using restorative justice in IPV-cases to more general concerns surrounding victims in restorative justice. The case of intimate partner violence can serve to illuminate more general challenges for the development of restorative justice.

5.1 Transforming relationships through restorative justice procedures

Both in the situation of victims of situational couple violence and intimate terrorism a central goal of victims of IPV is to transform their currently violent relationships into non-violent ones, as Coker asserted. Where the repair of relationships within restorative justice is often used in figurative manner or in a moral sense (Bennett, 2007), in the context of IPV repairing relationships should be taken far more literally.
The focus on relationship repair is particularly relevant in cases of situational couple violence where both victim and offender want the relationship to continue, but without the violence. In other situations it is also important. Where victims want the relationship to end, reassurance that the violence will not continue, will alleviate their anxiety. This is particularly relevant in the situation where the

victims will still remain in contact with the offender, which is often the case when victim and offender have children together.

The have implications for the structuring of restorative procedures. The literature reviewed in this article reveals that the methods suggested for the repair of relationships that are only symbolic or moral in nature, may well not be appropriate in cases where there is a real, empirical, intimate relationship. Duff (2003) and Bennett (2006, 2007)'s suggestion for an apologetic ritual, has its merits in cases of violence between strangers. However it is unlikely that victims of intimate partner violence will interpret the symbolic gestures in a similar way to victims who solely had a relationship with the offender due to their membership of the same moral community.

Furthermore we have shown that the nature of the encounters as mediation in the criminal justice system may conflict with the reduction of anxiety in victims. This does not necessarily imply that restorative justice procedures in cases of intimate partner violence can not be integrated into the criminal justice procedure. This can be a viable option, in particular seeing the poor performance of the criminal justice procedure for victims of these crimes (Daly and Stubbs, 2007; Koss, 2003). When the overriding concern, however, is the reduction of fear and anger in victims, the option of facilitated encounters between victims and offenders complementing the criminal justice procedure should be on offer as well. In the remainder of this section we will suggest two ways of structuring these procedures, based upon the literature surrounding intimate terrorism and situational couple violence respectively.

Briefly recapitulating: the main divide within intimate partner violence is that between intimate terrorism and common couple violence. In the first the violence is relatively one-sided, with the victimization repeatedly happening within a context in which the offender attempts to control the victim. While many offenders of this

form of violence suffer from either deep-seated misogyny or psychological problems, like borderline personality organisation (Dutton, 2006), victims often suffer from anxiety related problems, with their traumatic sequelae being rooted in their anxiety and fear towards the offender (Winkel, 2007). In the second violence is more often two-sided, with both partners aggressing against each other, while the context is normally not related to control, but to exaggerated conflict. Moreover the violence here is less likely to be repeated, and is often but definitely not always of a less serious nature. In addition Winkel (2007) shows that both victims and offenders (even in the cases where it is appropriate to use these terms) suffer not only from anxiety-related distress, but that anger plays a far more important role here.

5.1.1. A victim-offender encounter after therapy: dispelling fear in victims

Pemberton, Winkel and Groenhuijsen (2007) and Winkel (2007) show that the common notion in restorative justice literature that victims' anxiety will be relieved after a mere meeting with the offender is problematic. First of all it is highly dependent on the reasons for the commission of the offence and the manner in which the victim interprets the offenders behaviour during the meeting. Second the notion that a one-shot intervention can be effective in curing or preventing PTSD is not supported by the research into this phenomenon. Third the added stress of the mediation setting is not helpful in reducing anxiety. These features are particularly pronounced for victims of intimate terrorism. A mere meeting with the offender of this form of crime is very unlikely to provide the cognitive shift necessary to reduce the anxiety of victims, in particular as many of them suffer from PTSD and similar conditions.

The fact that for reduction of anxiety the victim has to come to believe that the offender will not harm her in the future is central to our first suggestion. In other crimes apologies, expressions of remorse, explanations of the motivation and unawarenes of the consequences of the crime committed may be helpful but this is not the case for victims of intimate terrorism. They needed an additional reason to believe the offender has changed. An example is that the offender has received treatment for his underlying personality problems. Positioning the encounter after successful treatment therefore makes sense.

The chances of reduction of anxiey will be increased if the meeting is preceded by therapeutic approaches to victimization that serve similar goals. An example are structured writing techniques (f. e. Van Emmerik et al, 2007, McCullough et al 2006; Winkel, Schweizer and Pemberton, 2008). In these treatment packages victims suffering from traumatic stress symptoms are invited to write about certain aspects of their experience. This could entail writing a letter to themselves, offering written advice to a hypothetical person in the same position or concerning the benefits they may have found from their own experience. These writing exercises are a natural preparation for the meeting, by helping victims to clarify their own thoughts about their experience. Moreover increasing evidence shows that these types of interventions are an effective method of reducing anxiety in victims and preventing or resolving post-traumatic disorder (Van Emmerik et al, 2007).

5.1.2. Integrating victim-offender encounters and therapy: lessons from conjoint therapy for restorative justice

Taking the analogy of CBT further, what if the central focus of what victims (and offenders) need or want is not a release from anxiety or post-traumatic stress, but for example better ways of reacting to

provoking situations or conflict? Or dealing with the problems caused by poor attachment styles? In situations of situational couple violence both parties may need help in adjusting their behaviour in the relationship.

Stith et al (2003) argue for the use of conjoint or couples therapy for various instances of intimate partner violence, in particular relatively low or middle-level violent cases. In many of these cases the couple will continue the relationship. If the violence is two-sided, it is not likely that the violence will be resolved by solely tackling the male violence. Both the violence committed by the female and problems in the interaction between the partners often are in important. The focus of conjoint therapy is then to enhance coping with disagreements in the relationship, in line with evidence that poor coping with these situations is mostly the precursor to violence.

In their review Snyder et al (2006) show that most conjoint therapeutic approaches include anger-management approaches (like recognition of anger, time-outs, and self-regulation techniques) and communication skills (like emotional expressiveness and problem solving). Inclusion of these features into victim-offender encounters may well serve to enhance their restorative value. Two possible avenues for doing this are solution-focused domestic violence treatment and emotionally focused therapy.

The requirements for solution-focused domestic violence treatment (Lipchik and Kubicki, 1996) are similar to those in victim-offender mediation (Aertsen et al, 2004). The perpetrator must take responsibility for the abuse and resolve to end it and take responsibility to contribute to the quality of the relationship. The victim shares in this responsibility. The focus of the therapy is then reaching the mutually satisfying goals that the couple set for themselves and ascertaining and amplifying the positive aspects of the relationship. On both counts this bears much similarity to the focus of restorative justice approaches.

The second example is emotionally focused therapy (see Johnson et al, 1999), which aims to reduce destructive interaction patterns caused by anger or other negative emotions. Amongst others this approach focuses on the underlying root causes of the violent behavior. It identifies the problematic interactional cycle that maintains attachment insecurity and relationship distress and accesses the unacknowledged emotions underlying this cycle. Moreover the therapeutic approach specifically stresses the importance of reframing the problem in terms of the cycle, the underlying emotions, and attachment needs. This is the kind of cognitive shit that is implicated as a working element of restorative justice encounters.

It appears that effectiveness or restorativeness of restorative justice practices for intimate partner violence will be increased by cross-fertilization with techniques derived from conjoint couples therapy. If restorative justice is serious about its intention to restore or transform relationships then much is to be learned from the experience and practice of those involved in the development of these approaches.

5.2. The relevance of the IPV-case for wider restorative justice issues

The case of intimate partner violence has highlighted several of the challenges for restorative justice. In these situations the reliance on the 'healing' power of apologies is suspect, due to the cycle of violence in which periods of battering alternate with expressions of remorse. The emphasis on the reduction of state participation in restorative justice ignores the fact that involvement of the state to adequately support victims of intimate partner violence. The extent to which participation is voluntary is called into question. Victims may be put under pressure by offenders to participate. The possible effects of a one-time intervention on both victim and offender may be

modest at most. Changing engrained patterns of behaviour or deep-seated personality problems mostly entails (much) more. Finally it is difficult for victims suffering from severe traumatic problems to successfully negotiate with the source of their trauma. These issues apply to other victims of crime as well. In the further development of restorative justice practice it needs to meet these challenges.

The case of intimate partner violence shows the importance of paying attention to the following four issues in the development of restorative justice.

First of all needs differ. We have seen that the perspective of most restorative justice literature on victims does not reflect that of many victims of intimate partner violence. For them the harm that needs repairing is often of a different kind than that of victims of violence between strangers. Nevertheless, even within victims of intimate partner violence diversity is the rule rather than the exception. The situation of victims of intimate terrorism is different from those of situational couple violence and the preferred solution of many victims can reflect this difference.

Secondly needs may conflict. This is obviously true of the needs of victims and offenders. Within victims themselves it is also true. The list of victims' needs devised by Strang (2002; see also Braithwaite, 2002) suggests that a restorative justice encounter may meet all these needs simultaneously. However the case of intimate partner violence shows that there may well be a tension between these needs. In particular the need for participation in a justice procedure and the need for emotional repair can be at odds with each other.

Thirdly the development of procedures and methods to meet victims' needs should reflect both the divergence in needs and the possibility that they may conflict. We have shown avenues for the further development of effective procedures in the cases of intimate partner violence, tailored to their particular situation. However many victims may well prefer a 'real' victim-offender mediation to the more

therapeutically-driven encounters we sketched. It seems that the most appropriate method of dealing with this divergence is by offering the choice of a variety of options to those most directly involved.

Fourthly and finally, the differences in victims needs influences the most important outcome of the procedure. In turn this should impact the manner in which we assess the effectiveness of restorative justice practices. For many victims of intimate partner violence the most important outcome is to be able to continue the relationship with the offender in a non-violent manner. The prevention of future violence is the most important aspect of justice for this group.

We have seen that reaching this goal may necessitate loosening the connection between victim-offender encounters and the criminal justice system. Paradoxically, justice may be served by foregoing the link to the formal justice system.

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13 Intimate partner violence risk assessment: The prediction of 'recidivism' in terms of short-term self-reported re-victimization [1]

Anna C. Baldry[2], Frans WillemWinkel, Antony Pemberton and Karlijn Kuijpers[3]

1. Introduction

Intimate partner violence or domestic violence, as is still more often referred to, is the combination of several forms of physically, psychologically or sexually violent acts committed towards the partner or former partner. Domestic violence affects millions of women worldwide with enormous individual and social costs. Domestic violence can even lead to death, either directly (femicide, *inter alia* Campbell et al. 2003) or indirectly as a consequence of the physical or psychological violence used.

Risk assessment is the process by which police officers, magistrates, judges, forensic psychologists or doctors try to predict the likelihood of recidivism of violence perpetrated towards the partner or former partner. This prediction should not be left to chance, but should be based on current and past risk factors that previous studies and research have found to be correlated with repeat victimization (Hart & Kropp, 2000). A formal risk assessment approach, based on a checklist or test, is useful for those professionals who work in the

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field and have to deal with victims of domestic violence (police officers, victims support personnel, social workers, forensic psychologists and magistrates).

Several risk assessment tools for domestic violence have been developed and are currently used. Some are actuarial (*Odara*, Hilton et al., 2004), meaning that there is a pre-fixed cutoff value suggested, together with an associated level of risk (see also Campbell & Wolf, 2001). Another validated and used approach is the Spousal Assault Risk Assessment procedure (Kropp & Hart, 2000), originally developed in Canada in a 20-item format, which was later reduced to a screening version, the BSafer, including 10 risk factors (Kropp, Belfrage & Hart, 2005; Belfrage, 2008).

Risk factors and protective factors might have an influence on the violent outcome, but they can not necessarily be referred to as *causing* the outcome. These correlates generally are considered either as static (i.e., they do not change in time) or dynamic (i.e., they change in time, place, or intensity). Identifying the presence or absence of both types of risk factors is seen as essential in assessing whether certain behaviors and victimisation outcome are likely to recur. The violence risk assessment approach is related to risk assessment of recidivism; once we know a person has been violent or has committed a certain act, the question to pose is to know whether that person is likely to be violent again in order to initiate measures that can protect the victim (Baldry & Winkel, 2008).

A general principle of risk assessment is that prediction of an outcome should exceed the 50% chance figure which would be no different than the odds of simply guessing correctly what might happen. However in real life, police officers, judges or forensic practitioners are not guessing when deciding which sentence to give to the offender, or whether or not to release or or arrest him. Their judgment is based on the legislation and experience but also on some factors that cannot be easily measured. To reduce random prediction

as much as possible, risk assessment methods can be of value (Baldry & Winkel, 2008; Hart & Kropp, 2000). In effect, the level of risk, is dynamic; it *can* change over time, because risk and protective factors also *can* change over time.

Similarly, it is accepted that violence risk assessment is not a static assessment, and, consequently, each time a decision is taken about the management of an offender and or the assistance and protection of the victim (e.g., release from prison, renewal of protective or restraining order, leaving a shelter for battered women) or each time there is a significant change in the life of the offender or of the perpetrators that might affect behavior and reasoning (e.g., the partner goes to live somewhere else, he looses his job, the victim has a new relationship), another risk assessment would be needed (Kropp, 2004).

Several approaches exist to assess risk of recidivism: among the least common is the *actuarial approach* which is based on the presence or absence of multiple risk factors. Typically, risk is assessed by establishing a minimum score. The most well known and validated actuarial method is the ODARA (Ontario Domestic Assault Risk Assessment), which has the advantage of providing normative data and cut-off scores.

Another, widely used approach is the so called *structural professional judgment* approach: the most widely used and validated is the SARA (Spousal Assault Risk Assessment, Hart & Kropp, 2000) and its short version the B-Safer (Kropp, Belfrage & Hart, 2004) which according to its authors has the advantage of being a method based on a narrative meta-analysis, which allows the assessor to make sense of the presence or absence of the factors in a dynamic way, according to the possible scenarios that are considered as potential outcomes, according to the factors identified instead of adding them up in an arithmetic and static way.

Several studies have been conducted to establish the predictive capacity of these approaches relative to *official recidivism*. Both prospective and retrospective studies can be useful to determine the predictive power of these methods, and to establish which risk factors are prominently predictive of future outcome. A problem that has often been underestimated when doing risk assessment is to determine if there are individual risk factors that play a role in predicting future violence, and whether these relate to the more recent or distant past.

The aim of the present study was to describe the level of domestic violence in a sample of 500 victims of domestic violence and to determine the relationship between the risk factors as identified by the SARA screening version based on 10 risk factors and future violence, and the relationship between the level of risk assessed on three levels (low, medium and high) according to the SARA screening and future violence.

2. The present study

2.1 Participants

Five-hundred women took part in the study; their age ranged between 16 and 74 years and their mean age was 38,10 years (sd = 10,6). 10,6% of all cases were foreigners (mainly from Eastern Europe, 6,8%), the remaining 89,4% of cases, were Italian. More than half of the whole sample consisted of married women (52,2%), non married (19,8%), divorced (26,9%) or widowed in 1% of all cases.
With regard to their employment, 18,3% were white collars workers, 41,1% housewives, 17,5% were unemployed, 15,8% were blue collars, 5,3% had another type of job and 2,1% were professionals. With regard to the perpetrator, the mean age is 42,12 years (sd = 11,11), with a minimum of 19 years and a maximum of 76 years, Italians in 92,3% of all cases, from Eastern Europe in 4,1% of all cases. At the time of the interview 78,3% women had at least one or two children living with them.

2.2. Procedure

Women victims of violence were recruited either in shelters, transition houses or at social services. The criteria for selection of the sample was that they were or had been victims of intimate partner violence (Strauss *et al.* 1996). Once participants agreed to take part in the study, they had to sign a 'consent form' which authorized the researchers to contact the woman for the follow-up phases, after 2 months and if feasible after 6 and 12 months. The CTS Scale (Conflict Scale, Straus, 1979) was then delivered to measure episodes of violence preceding the risk assessment. Trained research assistants and psychologists conducted the interviews with victims to gather information and accounts about their (past) relationships

and the behaviour of the partner to be able, together with other information gathered form other sources (files, interview with friends and relatives) to complete the SARA-S assessment which is the 10-item screening version of the SARA used in Italy, derived from the English version of the B-SAFER (Kropp, Belfrage, Hart, 2005). Assessments were rated on a 3-point scale whether the risk factor was absent = 0, possibly or partially present = 1 or present = 2. Each item (risk factor) was scored for the present (what has happened in the previous 4 weeks) and for the past (what has happened in the past preceding the last month), therefore a total of 20 scores were obtained. When items were omitted due to missing information, they were coded as absent. Total scores were calculated from the item ratings and could range from 0 to 10 if only violence in the past or in the present was taken into consideration or if any of these was present. If both violence in the present and in the past was taken into account then a score from 0 to 20 could be obtained. Finally, evaluators coded final judgments concerning offenders' risk of recidivism for spousal assault in the short term (next 2 months), long term (over 2 months), risk of lethal violence and risk of escalation of violence on a 3-point scale (0=low risk, 1=medium risk, 2= high risk). Two months after the first risk assessment and assessment of risk of recidivism by using the SARA screening version, victims were contacted again and were asked to fill inn again the Conflict Tactics Scale referring to the previous two months; this was done to have a measure of recidivism and to understand what had happened from the first assessment and the next two months. In all those cases where women were still willing to be interviewed and could be reached data were collected also for 6 months and 12 months follow-up. For the purpose of this chapter, however, only short term follow-up (2 months) was considered. The advantage of this study design (prospective study) is that no contamination took place. In addition, this study design has the advantage of measuring the true rate of

recidivism, measured by asking the woman whether she had been victimised again or not, rather than relying on reported data that can be affected by a low rate due to the fact that not all revictimized women would report it to the police or contact the shelter or service again. Another important question we wanted to address in this chapter is which risk factors, if any, play a significant role in predicting short term revictimization.

2.3. Results

The first step in the analysis was to describe the types of violence women were involved in as victims. It is worth mentioning that due to the fact that all women taking part in the study were recruited because they were victims of violence, the measures are skewed and therefore not necessarily representative of the population of women of that age, or with similar socio-demographic characteristics.
Table 1 shows the type of relationship existing between the man and the woman at the time of conducting of the research. In 35,8% of all cases it was the ex partner who had been violent, almost always *stalking* the victim.

table 1 – Type of relationship victim/perpetrator

Type of relationship with partner	*Absolute numbers*	*Percentages*
Husband	246	49,5
Ex husband	140	28,1
Co-habitant	22	4,4
Ex-habitant	31	6,2
Partner	44	6,8
Ex partner	22	4,4
Lover	2	0,4
Total	***497***	***100,0***

Note. In three cases information were not available

When the risk assessment took place, 43,6% of all women were living with their partner, 28,5% were living at home but without the partner, 17,4% were living at friends' home or relatives, the 5,1% were staying at a antiviolence centre, and the 5,3% were living someone else.

The next step in the analysis was to describe the prevalence rate of violence victims reported with the *Conflict Tactics Scale* (Straus, 1979) referring to the two months preceding the risk assessment (time 1) and after two month (time 2, follow-up stage).

Prevalence rates overall show high levels of violence, especially when the first set of data was collected, at time 1. After 2 months, rates drop for all types of violence, although they remain relatively high, especially with regard to psychological violence.

Types of violence have been divided into: psychological and verbal violence (item 1, 2, 3, 4, 5, 7) and physical (item 6, 8, 9, 10, 11, 12, 13, 14, 15) and then were added together to get two separate score.

For the purpose of the present chapter, we will only present data related to physical violence due to the fact that psychological violence was not discriminating enough and was overrepresented.

Table 2 – Prevalence of different types of physical and psychological violence at time 1 and at time 2 after 2 months.

Type of violence	*Time 1*	*Time 2*
1) He shouted, downgraded?	82,7	66,3
2) He refused to talk, he ignored you?	69,4	61,0
3) He humiliated you telling you you did not understand anything and that were worthless?	72,2	59,5
4) He followed you, controlled with whom you were talking or phoning?	54,4	40,0
5) He has been very jealous and suspicious with you?	62,2	48,8
6) He through objects (even if not directly against you), has broken objects?	50,8	30,2
7) Has he threatened to hit you?	49,0	32,9
8) Has he thrown objects against you?	32,2	17,0
9) he pushed you, grabbed you or shoved you?	52,9	30,4
10) He hit you with his hands, fists?	43,1	20,0
11) He hit you with a sharp object?	11,1	4,2
12) He kicked you, bit you?	23,0	8,1
13) Has he been violent with you in a more severe way? (for example he tried to strangulate you, suffocate you or burn you or threatened you with a gun?	22,1	8,7
14) Has he tried to force you to have sex against your will?	36,3	25,6
15) Has he forced you to have sex against your will?	28,8	14,8
Total for psychological violence (item 1,2,3,4,5,7)	*90,3*	*55,6*
Total for physical violence (item 6,8,9,10,11,12,13,14,15)	*64,0*	*28,6*

Note. Percentages exceed 100 because each respondent could check more than one option.

Results on the prevalence of psychological violence showed, as expected and as already mentioned a high prevalence rate; almost all women when contacted the first time said they had been psychologically abused. More than half of all women were also physically abused in a variety of ways. Though these rates dropped after two months, over 1 out of 4 women were still affected. Sexual violence was also commonly present in this sample, both in terms of attempted and completed rape (see table 2).

Subsequently, analyses were conducted to gather descriptive information concerning the distribution of SARA-S ratings.

Table 3 – Distribution of Risk Factors and percentage, including Omitted Items

SARA Risk factors		Not present	Partially or probably present	Present	Omitted items
	Criminal history				
1	present physical/sexual assault	267 (53.4%)	137 (27.4%)	95 (19.01%)	
1	past physical/sexual assault	74 (14,8)	149 (29,8)	277 (55,4)	
2	Present threats	154 (30.8)	171 (34.2)	175 (35)	
2	Past threats	46 (9,2)	149 (29,8)	305 (61,0)	
3	present escalation	220 (44%)	107 (21.4%)	173 (34.6%)	
3	Past escalation	76 (15.2)	92 (18.4)	332 (66.4)	

SARA Risk factors		Not present	Partially or probably present	Present	Omitted items
4	Present measures transgressing	472 (94.2%)	16 (2.4%)	8 (2.8%)	
4	Past measures transgressing	470 (94.2%)	12 (2.4%)	14 (2.8%)	3 (6%)
5	Present negative attitudes	49 (9.8%)	110 (22.0)	340 (68%)	1
5	Past negative attitudes	29 (5.8%)	72 (14.4%)	398 (79.6%)	1 (.2%)
6	Present penal precedent	422 (84.7%)	24 (4.8%)	46 (9.2%)	6 (1.2%)
6	Past penal precedent	373 (74.9%)	32 (6.4%)	91 (18.3%)	2 (.4%)
7	Present relational problems	65 (13.1%)	103 (20.7%)	325 (65.4%)	4 (,8%)
7	Past relational problems	45 (9.1%)	77 (15.5%)	373 (75.1%)	2 (.4%)
8	Present job problems	240 (48.3%)	66 (13.3%)	190 (38.2%)	1 (.2%)
8	Past job problems	213 (49.2%)	64 (12.9%)	220 (44.3%)	
9	Present substance abuse	258 (51.7%)	77 (15.4%)	157 (31.5%)	7 (1.4%)
9	Past present substance abuse	235 (47.3%)	62 (12.5%)	199 (40.0%)	1 (,2%)
10	Present mental disorder	309 (62%)	129 26%	53 10.7%	6 (1,2%)
10	Past mental disorder	304 (61.2%)	128 (25.8%)	65 (13.1%)	

The table reveals that a very small percentage of risk factors (1% or less) have been omitted. This underlines the strength and importance

of using first-source data, meaning information gathered directly from the victim, instead of (only or primarily) gathering them from files with potentially defective information.

Prevalence rates of risk factors show that several of these are present either in the past, in the present or both. The overall profile that can be outlined foresees less than a third of overall abusers having alcohol or drug problems, less than half having problems related to their job, and just over 10% mental health problems. The profile of abusers therefore according to the presence or absence of risk factors, mainly identifies violent men who have been violent also in the past, who have and have had relational problems with their partner, meaning that they have already broken up the relationship, sometimes going back together or other times directly divorcing; the violence has escalated in time and not only is characterized by physical violence but also by threats and psychological violence.

Summary risk ratings. Using the SARA implies that a summary risk rating is done in terms of low, moderate, or high risk and this was done for the short term, long term (over 2 months) risk of lethal violence and of escalation. These ratings were distributed as shown in Table 4.

Table 4. Ratings for the different levels of risk assessed for the immediate, long term risk of recidivism, escalation and lethal violence.

Risk	Immediate		Long term		Severe		Escalation	
	N = 500	%	*n* = 500	%	*n* = 500	%	*n* = 500	%
Low	130	(26)	88	(17,7)	237	(47,9)	150	(30,3)
Moderate	219	(44)	237	(47,8)	152	(30,7)	196	(39,6)
High	148	(30)	171	(34,5)	106	(21,4)	149	(30,1)

In line with the findings reported by Hart & Kropp (2000) prevalence rates of high and medium risk of recidivism are rather high: they always were over the 50% range. This is not surprising given that the

sample studied comprised of victims of violence, and therefore more than half of the whole sample has been assessed as being at risk of repeat victimization.

Finally, in order to examine the relationship between risk assessment and actual recidivism, further analyses were conducted by comparing the risk ratings done by the assessor and recidivism measured with the Conflict Tactics Scale.

Table 5. Comparison of Recidivism/ non recidivism of spousal assaulters: summary risk rating (Immediate, within two months from the risk assessment)

	Recidivism	
Summary risk rating	No	Yes
High risk	91 (21.7)	36 (38.1)
Moderate risk	104 (41.8)	110 (46.6)
Low risk	54 (36.5)	90 (15.3)

Note. N= 485 (246 cases of non recidiviss and 236 recidivism). Percentages in parenthesis.

x^2=32.6 p<.0001

Table 6. Comparison of Recidivism/ non recidivism of spousal assaulters: summary risk rating (longterm, after two months from the risk assessment)

	Recidivism	
Summary risk rating	No	Yes
High risk	70 (51.2)	94 (39.8)
Moderate risk	113 (28.2)	120 (50.8)
Low risk	65 (26.2)	22 (9.3)

Note. N=484 (248 cases of non recidiviss and 236 recidivism. Percentages in parenthesis).

x^2=24.6 p<.0001

Table 7. Comparison of Recidivism/ non recidivism of spousal assaulters: summary risk rating (severe and lethal violence), after two months from the risk assessment

	Recidivism	
Summary risk rating	No	Yes
High risk	42 (17)	63 (26.7)
Moderate risk	66 (26.7)	81 (34.3)
Low risk	139 (56.3)	92 (39.0)

N=484 (247 cases of non recidiviss and 236 recidivism. Percentages in parenthesis).

x^2=15.05 p<.05

Table 8. Comparison of Recidivism/ non recidivism of spousal assaulters: summary risk rating (risk of escalation of violence), after two months from the risk assessment

	Recidivism	
Summary risk rating	No	Yes
High risk	53 (21.5)	91 (38.6)
Moderate risk	91 (36.8)	100 (42.4)
Low risk	103 (41.7)	45 (19.1)

Note. N=483 (247 cases of non recidiviss and 236 recidivism. Percentages in parenthesis).

x^2=32.9 p<.0001

Looking at these results, a consistent relationship between risk assessment and actual outcome did not emerge. Table 5 shows the relationship between recidivism and the assessment of the evaluator with regard to short term risk. Findings suggest, that in most cases the more conservative solution of moderate risk is chosen by assessors. This could be due to an actually higher prevalence of moderate risk cases, or be the result of a conservative choice. On the other hand though, a substantial proportion of cases that were

assessed high risk did in fact exhibit recidivism (38.1%) and a substantial portion of those that were assessed low risk did not recidivate (36.5%). However, many cases assessed high risk did not report any revictimization (21.7% - false positives). Other cases assessed not at risk were actually confronted with additional violence (15.3% - false negatives).

3. Conclusion

Previous studies have clearly documented the performance of the SARA – S for identifying male partners who are at risk of *official recidivism*, over a relatively long opportunity interval. However, the current findings, unfortunately suggest that this instrument does not provide an adequate basis for identifying female domestic violence victims who are in danger, that is, victims, who are at high risk of short term re-victimization. Risk assessments and actual outcome in terms of revictimization were *not found to be* related in the linear manner suggested by the (authors of the) checklist. Findings moreover revealed, that female victims who were involved in a cycle of violence, do not necessarily report an upward spiral: the general trend emerging in this study was that violence tends to go down with the passage of time. In other words: a cycle of violence is not necessarily a *perpetuating* cycle of violence that justifies a high risk assessment. Maladaptive emotional processing (MEP) has been identified as an important mediator of the link between initial and re-victimization (Winkel, 2007). Reinforced MEP due to re- victimization has been conceptualized more recently as a risk factor for the *onset and maintenance* of a perpetuating cycle. MEP-related risk factors are currently not explicitly included in the SARA-S[4]. The inclusion of MEP-related risk factors appears to be a promising road to enhance the predictive power of the currently used forensic instruments (Winkel, 2008), including the SARA-S and the ODARA, for identifying victims who are and remain to be in danger.

[4] These factors may be implicitly considered by the assessor, when the SARA-S is used within the context of a personal interview with a victim of domestic violence. Previous findings (Winkel, 2007) suggest that assessments made by victim support workers in the Netherlands were significantly associated with the victims' status in terms of post traumatic stress disorder (PTSD), and type D personality, a susceptibility factor for the developement and maintenanace ofd PTSD.

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