Reflections on the development and legal status of victims' rights instruments

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Reflections on the Development and Legal Status of Victims' Rights Instruments

This publication brings together some of the most important conventions, treaties, declarations and recommendations in the field of victims' rights. It aims to show the commitments that Governments have made, and to encourage States to comply with these important standards if they have not done so already. It is also intended as a tool for Governments, non-governmental organizations, civil society groups, victim rights advocates, service providers, individual citizens and international organizations such as the United Nations, European Union and the Council of Europe. Governments are not the only entities having an important responsibility to uphold victims' rights; private citizens, civil society – including NGO's – also have a part to play in this endeavour. The international community has made significant progress in raising global awareness of victims' rights, setting out the (quasi-)legal framework, and establishing institutions and formal and informal mechanisms for providing protection, redress and justice. But our work is far from done. We must improve upon the record of the last century, and make respect for victims' rights a reality for every human being, all around the world.

The results achieved in the past decades should neither be neglected nor underestimated. During the relatively short life-span of victimology – let's say some odd 50 years since Hans von Hentig's book on The Criminal and His Victim – one of the most repeated complaints has been that the victim is the forgotten party in the criminal justice system. It would be factually wrong when this type of criticism would still be maintained today. It is generally known that criminal justice systems around the world feature vast differences. They vary from strictly adversarial systems (e.g. in Anglo-Saxon countries) to more inquisitorial systems in many jurisdictions on mainland Europe. No matter the incompatibilities between the various systems, nowadays they have one thing in common; they all share the ambition of reform on behalf of victims of crime.

The roots of these reformist efforts can be traced to the final quarter of the 20th century. In 1985, virtually simultaneously two powerful documents were issued urging the international community to enhance the status of victims. The first one is the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[1] The second one is the Council of

1 A/res/40/34, adopted by the General Assembly in 1985.

Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure.[2] Although differences in language and in details cannot be overlooked,[3] the content of the Declaration and the Recommendation are to a large extent overlapping and have subsequently been echoed and expanded on in other international documents of a similar nature, such as the Statement of Victims' Rights in the Process of Criminal Justice, issued by the European Forum for Victim Services[4] in 1996, and the European Union Framework Decision on the Standing of Victims in Criminal Proceedings.[5] The most recent – and most comprehensive – example is the Council of Europe Recommendation (2006)8 on Assistance to Crime Victims, adopted on June 14, 2006.

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2 R(85)11, also adopted in 1985.

3 The only really substantive difference between these two instruments is that the United Nations Declaration is not confined to victims of crime, but also includes victims of abuse of power. Given the crucial importance of abuse of government power in many regions of the world, this additional element is of major significance.

4 The European Forum for Victim Services (EFVS) is an umbrella organisation comprising as members the existing national (voluntary) victim support organisations throughout Europe. It follows that statutory organisations with similar objectives are not eligible for full membership.

5 Council Framework Decision of 15 March 2001 (2001/220/JHA).

To guide the user through this compilation, it is useful to give a brief introduction on the legal status of the different instruments on victims' rights. The legal status of the documents contained in this compilation varies. In this booklet, two different sets of instruments are included:

- The first category consists of legally binding treaties, conventions, covenants and protocols;
- The second set is a number of non-binding international declarations, standards, principles, guidelines, resolutions and recommendations, adopted by the UN, regional intergovernmental organizations or non-governmental organizations.

International treaties, referred to as covenants, statutes, protocols or conventions, are legally binding for those States that ratify or accede to them, and are, under public international law, referred to as *hard law*. In the context of public international law, a treaty is a written agreement between States and/or intergovernmental organizations that is enforced by international law.[6] The name or the form of a treaty is of little concern (Convention,

6 See the Vienna Convention on the Law of Treaties (Article 1), 1969.

Covenant, etc.): what matters is the content and the language of the treaty. Treaties adopted within the United Nations are open for signature and ratification by all States, while those adopted by regional organizations are normally open only to members of the organization concerned.

Conversely, declarations, general principles, guidelines, recommendations and statements have no binding legal effect and are referred to as *soft law*. Nevertheless, such instruments quite often have a high moral force and provide practical guidance to States in their conduct. The value of such instruments rests on their recognition and acceptance by a large number of States and, even without binding effect, they may be seen as declaratory of broadly accepted goals and principles within the international community. As such, they are often used as benchmarks to assess progress in this area.

The fact that soft law norms lack formal legal consequences does not necessarily mean that States will not aspire to comply with them. If soft law can be more rigorous than one could assume at first sight, the opposite also holds: hard law is not always the most adequate instrument to affect policy and practice. Adopting legally binding documents does not automatically lead to 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 legally binding European Framework Decision on Victims' Rights has proven to be difficult. It has been established beyond doubt that many Member States did not create a well-considered and comprehensive legal framework for the transposal of all the relevant rights and duties into domestic law.[7]

So it is clear from the outset that the difference between hard law and soft law cannot be equated with a distinction between effective law on the one hand and symbolic standards on the other. This observation justifies the fact that we have included both kinds of documents in this collection of international victims' rights. In order to further amplify this point, we make some additional notes on the nature and the practical meaning of using hard law and soft law to promote victim-related legal reform.

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7 See Report from the Commission of the European Communities 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, in which the conclusion was drawn that 'No Member State can claim to have transposed all the obligations arising from the Framework Decision and no Member State has correctly transposed the first paragraph of Article 2'.

The UN Victims' Rights Declaration was adopted by resolution of the UN General Assembly. Resolutions of the UN General Assembly are considered to be soft law.[8] It has been correctly asserted that 'resolutions of the General Assembly of the United Nations contribute to the development of international law when they declare rather than propose legal standards, and that declaration is supported by consensus or a vote without opposition (...).'[9] Although the UN Declaration is not legally binding, there are many indications that it has actually positively influenced the interpretation of existing texts, and even contributed on its own terms to the subsequent creation of legally binding rules in many

8 A memorandum of the UN Office of Legal Affairs from the early 1960s stated that 'in United Nations practice, a 'declaration' is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated. A recommendation is less formal. (...) [I]n view of the greater solemnity and significance of a 'declaration' it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it' (UN Doc. E/CN.4/832/Rev. 1, para. 105).

9 Patrick Thornberry, The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update, in: A. Phillips and A. Rosas (eds.), *Universal Minority Rights*, Abo Akademi University, Institute for Human Rights, 1997, p. 28.

countries. This is evidenced, *inter alia*, by the various monitoring projects undertaken by the UN in the years following the adoption of the Declaration. In that sense, the Declaration could easily be regarded as a catalyst of change and as a presage or a precursor of even more potent norms on a global level. The Declaration could well establish new parts of customary international law. On top of that it could even be a preliminary step towards considering the adoption of a possible UN victims' rights convention. As to the possibility of adopting a convention, it should be noted that it is common practice in the UN to see legally binding instruments follow non-legally binding texts. Examples are the declarations preceding the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, and the Convention on the Rights of the Child.[10]

10 Note that the World Society of Victimology, the world's premier organization lobbying for victims rights internationally, and the International Victimology Institute Tilburg (INTERVICT) convened in December 2005 at Tilburg University, The Netherlands, an informal meeting with representatives from different regions to discuss the content of a draft convention on victims' rights. The background to the

The EU Framework Decision, not a treaty in the formal sense of the word, is a legally binding document. It imposes a formal obligation on the EU Member States to make sure their jurisdictions meet the new standards. In case of gaps or discrepancies, either legislation should be introduced or adapted, or policy measures must be taken in order to ensure compliance. In other words, the goals of the Framework Decision are binding, though the Member States are left with some discretion as to the means they prefer to warrant compliance.[11]

Another important document adopted by the EU relating to victims' rights is the EU Directive 2004/80 relating to Compensation to Crime Vic-

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meeting, the text of the convention, and further steps to be taken, can be found at http://www.tilburguniversity.nl/intervict/UNdeclaration/.

11 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. More binding and more authoritative, they should serve to make action under the reorganized 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 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 expired.

tims. A directive is a legislative act of the European Union, which requires Member States to achieve a particular result without dictating the means to actually accomplish that goal. 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.[12]

The point to be made here is that Framework Decisions and Directives are very strong instruments indeed. Yet, even in this environment the mere adoption of rules can only be regarded as a first step in a long march. The second step might then be creating 'paper compliance', i.e. adapting domestic legislation. But even that still falls far short of effectively turning the rights included in the international documents into a reality for all victims involved, if it would not be supplemented by purposefully devised proper budgets, plans, aims, objectives, targets and timetables for implementation.

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12 See Article 249 of the Treaty establishing the European Union. A consolidated version of the treaty can be found at http://europa.eu.int/eurlex/lex/en/treaties/dat/12002E/htm / C_2002325EN. 003301.html.

The conclusion is that the distinction between hard law and soft law is not as rigid as is commonly assumed. Taking this line of reasoning one step further, we move on to some observations on the difference between 'recommendations' by the Council of Europe on the one hand and the 'statements' by the European Forum for Victim Services (EFVS) on the other. The recommendations are clearly soft law, just like the basic principles and the guidelines issued by the United Nations. The 'statements' by the EFVS have to be qualified as 'non law'. They concern victims' rights in various environments – not unlike the Council of Europe recommendations – but they have been issued by a NGO which is solely engaged in victim advocacy.[13] The 'statements' are not supported by any public authority whatsoever. Yet, in reality these documents appear to have functioned in a similar way as the internationally recognized soft law instruments. The member organizations of the EFVS – all of

13 According to its Constitution, the EFVS was set up to: (a) promote the development of effective services for victims of crime throughout Europe; (b) promote fair and equal compensation for all victims of crime throughout Europe, regardless of the nationality of the victim concerned; and (c) promote the rights of victims of crime in Europe in their involvement with the criminal justice process and with other agencies. For more information, see www.euvictimservices.org.

them being national victim support organizations – have used the published statements as a means to lobby for additional victims' rights and services in their respective countries. Quite successfully, it may be added. The governments in these countries could not escape comparisons of the actual state of affairs with the standards set out in the 'statements' by the EFVS. In Europe, the statements are widely regarded as documents with a substantial symbolic value. According to some, they represent the ultimate model for victim-oriented reform in legislation and in policy. Like the other soft law instruments, the statements are increasingly regarded as benchmarks and as aspirational standards. However, the fact that they were drawn up by a NGO is reflected in the content of the statements. The EFVS can afford to be less preoccupied with domestic sensitivities or competing interests than is the case with international associations of national governments. Unlike the established bodies in international public law, this NGO has the opportunity to uniquely focus on the best interests of the victim. An example of this is the 'statement on the social rights of victims of crime', which has a scope and a substantive ambition unparalleled by any of the other international instruments. Similarly, this compilation contains several instruments on minimum standards to be observed in mediation. The

one issued by the EFVS stands out among these because of its compelling demands to protect the interests throughout any process of alternative dispute resolution. From the above it follows that there are at least two solid reasons for including the EFVS statements in this booklet. One is that their practical effect and application approximates that of generally recognized instruments of soft law. The second is that their content is at times more aspirational than documents with accepted legal standing, which could be an indication of the direction in which the next generation of legally valid instruments might develop.

It is even easier to explain why the provisions on victims' rights in the Statute of Rome have been included in this compilation of international instruments. The Rome Statute, adopted in 1998, is a treaty that sets up an International Criminal Court. It entered into force in July 2002. The Court is the first permanent international tribunal which is empowered to prosecute individuals, not States, accused of genocide, war crimes or crimes against humanity. Its jurisdiction also includes the crime of aggression.[14] The court is to be complementary to

14 It should be noted, however, that the States Parties must adopt an agreement setting up a definition of aggression and the conditions under which the Court could exercise its

national judicial systems and will be able to assume jurisdiction only after it determines that a national system is unwilling or unable to prosecute the crimes relevant to the Statute.

The Statute has been hailed as 'a milestone in Victimology'.[15] Compared to the procedural rules governing previous International Tribunals (like the former Yugoslavia and Rwanda), the main improvements are in extending the protection of victims, expanding their participation, and in better provisions on reparation.[16] The main attraction of the Rome Statute, though, is that it offers a more universal model of how the legal system can respect legitimate victims' rights without prejudice to a fair trial for the accused. It transcends the well-known differences between the existing legal traditions, by introducing a procedure which could be agreed upon by representatives from the common law systems as well as from the civil law heritage. On

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jurisdiction. A review conference will be held in 2009, during which the matter will be discussed.

15 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, pp. 333-351.

16 Sam Garkawe, Victims and the International Criminal Court: Three Major Issues, *International Criminal Law Review*, 3, pp. 345-365, 2003.

top of that, the Statute with its corollary Rules of Procedure and Evidence[17] have introduced unique requirements in selecting staff. Every official that could come into personal contact with victims must be trained in victims' issues; for instance, in selecting staff, including judges, attention has to be paid to their expertise in the field of sexual violence. These are major steps forward and it might turn out to be the best model so far to reduce risks of secondary victimization.

Some comments on the topic of compensation. It is well-known that victims are primarily in need of respect and recognition. Having noted that, it is obvious that many victims also have to face dire financial consequences of the crime they suffer from. This ordeal can be alleviated by restitution (or reparation) being paid by the offender. In a vast majority of cases, though, the offender is not found or apprehended, or is unwilling or unable to take care of the damages incurred by the victim. It is widely recognized that when this happens in instances of violent intentional crime, the State should step in and provide financial compensation

17 The Rules of Procedure and Evidence set out general principles and clear descriptions of specific procedures underpinning and supplementing the provisions of the Statute. They are subordinate to the provisions of the Statute.

to the victim. This principle has already been recognized in the UN Declaration of 1985, and was subsequently reaffirmed and elaborated in a number of instruments specifically dedicated to this topic. Most noteworthy in this respect are the early Council of Europe Convention on the Compensation of Victims of Violent Crimes (1983) and the more recent European Union Directive relating to Compensation to Crime Victims (2004). Unsurprisingly, the latter documents – hard law instruments – could only have been adopted in a more affluent region of the world. And even in Europe, it is still only a minority of those who meet the eligibility criteria who actually do receive State compensation. In most countries of the world a national compensation scheme is completely absent. Improving this situation may be regarded as one of the big challenges facing the world community.

The present compilation of international instruments protecting victims' rights is far from complete. We had to be selective. On a global level, all instruments included in this booklet have been issued by the United Nations. The regional instruments all stem from Europe. This is not because of a 'first world-bias'. It is caused by the fact that we have not been able to identify any *regional* victims' rights instruments (soft law or hard law) applicable

in Africa, Asia or the America's. If we have overlooked existing instruments of any significance, we will be happy to include them in the next edition of this publication.

It has frequently been observed that making law is the easiest part of the effort to emancipate victims of crime and abuse of power. Indisputable as this may be, it is equally true that it is also an indispensable first step. It has to be added that adopting international standards on victims' rights is virtually useless if professionals and the public at large do not have easy access to them. The purpose of the present compilation of international instruments on victims' rights is to ensure such easy access. Looking at it this way, the publication of this booklet is just another tiny step in the long march leading to reformist action. Much debate lies ahead of us on the pros and cons of using hard law in stead of – or in addition to – soft(er) law when it comes to the effectiveness of victim's protection and the responsiveness to their needs. Experience, both on the national and the international level, learns that in reality a successful codification of victims' rights requires a complicated process of 'multi-level implementation' in which States, NGOs, the judiciary, prosecutors, probation officers, service providers, police and law enforcement officials and many

others all play an important role. Only their combined and concerted efforts can safeguard that the 'chain of protection' be strengthened. Step by step, piece by piece. With a clear goal in mind: making respect for victims' rights a reality for every human being suffering from the effects of crime and abuse of power.

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