

## Victim's rights in the criminal justice system

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Victims' Rights in the Criminal Justice System: a Call for more Comprehensive Implementation Theory

Keynote lecture delivered to the 9th International Symposium on Victimology, August 27 1997, Amsterdam, The Netherlands

1. Introduction

On Sunday, October 20 1996, some 300.000 people marched the streets of Brussels. Most of them were dressed in white. The extraordinary parade was led by parents who had lost a child in the so-called Dutroux case. The march was an expression of anger, directed at the government. The crowd, in their impressive white outfits, protested against the way the government handled cases of missing children. Objections were raised about the inadequacy of the criminal justice system. The main complaints concerned a lack of efficient law enforcement as well as gross neglect of the interests of the victims and bereaved families. This public outcry was taken seriously. The prime minister himself talked to some prominent marchers and promised on the spot to act swiftly and decisively. His government intended to reform the legal system on behalf of crime victims and their next of kin. He basically conceded that the obtaining methods of investigation and the care provided to victims had failed.

This dramatic episode in the history of Belgium is remarkable for many reasons. A particularly sad one is that nothing really new was revealed. The Dutroux case is an unprecedented horror story. But on the other hand it only confirms our common knowledge of the plight of victims in the aftermath of a crime. The Dutroux case merely highlights the kind of secondary victimization which occurs on a daily basis in a multitude of cases. The distress and indignation suffered by other Belgian parents who lost a child by criminal acts had even been recorded and documented previously in a book, entitled 'Living with a shadow'.<sup>1</sup> The book contains a preface by the then Minister for Justice Melchior Wathelet. It is a very sympathetic piece of writing, in which he summarizes the accounts by the parents as a 'wonderfully beautiful message of love, courage and wisdom'. He explains that reading the book hurts beyond saying. But he leaves it at that. One would expect the incumbent Minister of Justice to draw the inference that the criminal justice system is in urgent need of reform. Nothing of the kind occurred. It took the highly publicized Dutroux case to function as a catalyst and to get the government moving. What happened then is that on the spur of the moment some drastic changes were announced. Reflecting on this

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<sup>1</sup>In Dutch: Ivo Aertsen (ed.), Leven met een schaduw - Ervaringen van ouders van een vermoord kind, Antwerpen 1992; in French: Vivre avec un ombre

episode a year later, many people feel that some of the new provisions were ill considered and that on the whole nothing much has actually improved in the way the system is being operated.<sup>2</sup>

This Belgian example is typical of developments which can be observed in many countries. I will outline the background briefly. In the old days - that is to say: until quite recently - victims were virtually neglected by the authorities operating the criminal justice system. Their role was limited to (a) reporting the crime and (b) testifying as witness. They were used as instruments to procure convictions. They were treated as outsiders, deliberately not to be involved in the legal battle between the state on the one hand and the defendant on the other. This state of affairs could only change when a new conception of the phenomenon of crime prevailed. Traditionally and dogmatically, a crime used to be defined as a violation of the public order. It was an act against society, against the collective body of citizens, defying the standards set by the democratic institutions of the community.<sup>3</sup> Slowly but clearly, this perception of the intrinsic meaning of crime has shifted. Nowadays, it is widely accepted that a crime is first and foremost to be regarded as a violation of the individual rights of the victim. This conceptual change has farreaching consequences. As long as a crime is seen as an intrusion on the public order, it is only natural that the state - representing the community at large - as the injured party is the sole agent seeking redress for the act committed. But when crime is conceived of as an hostile act by one citizen against another, the latter individual will also have to play a part in the aftermath of the event. Criminal procedure can then no longer be exclusively considered as an affair between the government on the one hand and an accused on the other. Hence this conceptual reorientation offers a theoretical justification for some kind of participation of the victim in the criminal justice system.

## 2. Rights and services

The next question, of course, is what shape this participation

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<sup>2</sup>Stefaan de Clerck, L'affaire Dutroux et consorts - Actions du Gouvernement - Rapport intérimaire pour la Commission d'Enquête parlementaire, Ministre de la Justice, Brussels, 1997.

<sup>3</sup>This perspective dates back to the middle ages. Extensive references are provided by H. Rüping, Geldstrafe und Busze. Zur Entwicklung der öffentlichen Strafe, Zeitschrift für die gesamte Strafrechtswissenschaft 85 (1973), p. 672-695; and J. Schmidt, Schadenersatz und Strafe. Zur Rechtfertigung des Inhaltes von Schadenersatz aus Verschuldenshaftung, Bern/Frankfurt a.M. 1973.

is to take. This question has been answered differently in various jurisdictions. There are, however, some general developments which can be observed across the board. Most modern jurisdictions have recognised the need to provide victims with legal rights in criminal procedure as well as with services enabling them to exercise these rights.<sup>4</sup> This applies in equal measure to adversarial systems as well as to more inquisitorial ones.<sup>5</sup>

When it comes to legal rights in the criminal justice system, guidance has been provided by authoritative documents like the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>6</sup> and the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure.<sup>7</sup> Without ignoring the differences between the various international documents of this kind, I feel that there is by now widespread agreement on the hard core of victims rights in the criminal justice system. This consensus is also reflected by the more recent Statement of Victims' Rights in the Process of Criminal Justice, issued in 1995 by the European Forum for Victim Services.<sup>8</sup> I shall rely on

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<sup>4</sup>In my opinion we have moved beyond the stage of competition between a 'rights model' and a 'services model', as described by Jan van Dijk, Victim Rights: a Right to better Services or a Right to Active Participation?, in: Jan van Dijk a.o. (eds.), Criminal Law in Action. An Overview of Current Issues in Western Societies, Arnhem 1986, p. 351-375; and in the same volume Joanna Shapland, Victims and Justice: Needs, Rights and Services, p. 393-404. This point has been argued previously in my paper The Development of Victimology and its Impact on Criminal Justice Policy in the Netherlands, paper submitted to the 11th International Congress on Criminology, Budapest 1993 (still in press)

<sup>5</sup>Matti Joutsen, The Role of the Victim of Crime in European Criminal Justice Systems. A Crossnational Study of the Role of the Victim, Helsinki 1987; Albin Eser, Günther Kaiser, Kurt Madlener (Hrsg), Neue Wege der Wiedergutmachung im Strafrecht, Freiburg i.Br. 1990; Albin Eser, Susanne Walther (Hrsg.), Wiedergutmachung im Kriminalrecht: Internationale Perspektiven, Freiburg im Breisgau 1996

<sup>6</sup>A/res/40/34, adopted by the General Assembly in 1985.

<sup>7</sup>R (85)11, also adopted in 1985.

<sup>8</sup>The history and background of the Forum Statement is described in my paper Conflicts of Victims' Interests and Offenders' Rights in the Criminal Justice System, in: Chris Sumner a.o. (eds.), International Victimology: Selected Papers from the 8th Internati-

this last mentioned paper to describe the apparently emerging consensus on this topic. The international community seems to deem the following rights essential for safeguarding the interests of victims in the environment of criminal proceedings:

(1) The right to respect and recognition at all stages of the criminal proceedings.<sup>9</sup> Respect for the dignity of the victim means that he must be involved in the proceedings if he wants to. Acknowledgement of victimization by the authorities implies that the victim will not be treated as an outsider. This right applies in the most diverse of circumstances. For instance, it sets standards to be observed when a police officer takes down the report of the crime (take the victim seriously; reasonable waiting time; do not leave the victim on his own in typing complicated questionnaires). And it provides a general rule for conducting interviews with victims in various stages of the proceedings.

(2) The right to receive information and explanation about the progress of the case.<sup>10</sup> One of the most crucial elements of taking a victim seriously, is sharing information with him about developments in 'his' case. The victim has to be notified when the offender is apprehended. He will have to be told about the decision whether or not the suspect will be prosecuted. If not, the reasons for not pressing charges will have to be explained. The victim needs to know - well in advance - the date of the trial. After that, he will have to be informed of the outcome of the case. It is clearly unacceptable that he should read in the newspaper that 'his' offender was found guilty and sentenced to a prison term. During the execution stage, he will have to be told when there is any interruption or termination of imprisonment.

(3) The right to provide information to officials responsible for decisions relating to the offender.<sup>11</sup> The victim must be offered an opportunity to tell his own story to the authorities dealing with the case. He will have to get a chance to relate the emotional impact of the crime as well as the damages he has incurred. Preferably, this should take place during the early stages of the proceedings, thus allowing the police and the prosecutor to take this information into account when making decisions on how to process the case. Opinions differ as to the

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onal Symposium, Canberra 1996, p. 163-176.

<sup>9</sup>The corresponding items in the other main documents are: Council of Europe Recommendation numbers A.1. and C.8.; UN Declaration number 4.

<sup>10</sup>Council of Europe Recommendation, items A.2., A.3., B.6.; and D.9.; UN Declaration, items 5 and 6a.

<sup>11</sup>Council of Europe Recommendation, items A.4. and D.12.; UN Declaration, item 6b.

question whether the victim should also be offered an opportunity to make a 'victim impact statement' in open court.<sup>12</sup>

(4) The right to have legal advice available, regardless of their means.<sup>13</sup> Legal rights are useless as long as you are not aware of having them. Quite often one is not able to exercise rights because certain preconditions have not been met. For reasons like these it is essential that the victim be provided with legal assistance. If he cannot afford the expense, the state will have to provide council free of charge.

(5) The right to protection, both for their privacy and for their physical safety.<sup>14</sup> The privacy of victims can be invaded easily. This can be countered by various means: disseminating limited information to the press, self imposed rules of conduct, and, in extreme cases, trials in camera. The physical safety of victims has to be safeguarded by protecting them against threats and violence.

(6) The right to compensation, both from the offender and from the State.<sup>15</sup> The offender should be made to pay restitution. Two models obtain. One is the model of the partie civile, where the victim files a civil claim for damages. The other model is the compensation order, where the forced payment of reparation to the victim is considered as a penal sanction in its own right. When the offender is not tracked down, or when he is unwilling or unable to pay, compensation should be provided by the State.

This is the victims' bill of rights as it emerges from the international political and scholarly debate. Quite a few of these rights have already been incorporated in domestic Codes of Criminal Procedure. The main topics to be discussed in this paper are: (a) how do these rights affect the daily routines of the criminal justice system, and why?; and (b) what limits should be imposed on expanding victims' rights? These - in my view: closely connected - questions will be dealt with on three levels of analysis. On a global level I will describe some of the UN activities relating to the implementation of the 1985

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<sup>12</sup>Edna Erez, Victim participation in sentencing: and the debate goes on . . ., International Review of Victimology, 1994 Vol. 3 p. 17-32.

<sup>13</sup>Interestingly, there are no explicit corresponding standards in the Council of Europe Recommendation; the UN Declaration, item 6c refers to "Providing proper assistance to victims throughout the legal process", and item 14: "Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means".

<sup>14</sup>Council of Europe Recommendation, items F.15. and G.16.; no explicit provision in the UN Declaration.

<sup>15</sup>Council of Europe Recommendation, items D.10., D.11., D.13., and E.14.; UN Declaration items 8-13.

Declaration of basic principles of justice. This will lead to some remarks on the regional level, where the impact of the 1985 Recommendation by the Council of Europe will be discussed. And on the national level I will draw some examples from efforts by the Dutch government in giving effect to new victims' rights legislation in recent years. I will argue that at present there is a conspicuous lack of empirically tested knowledge on effective implementation strategies in this area. And on the other hand, where such knowledge is available, it is quite frequently neglected or disregarded by governments professing to be engaged in a campaign of reform. My conclusion will be that it is a major challenge for victimology to design a comprehensive developmental model for implementation of victims' rights in the criminal justice system.

### 3. Implementation

As has been said many times before, it is relatively easy to draft and promulgate legislation containing new rights for victims of crime. As is also very well known as an established fact, it is much harder, though, to implement such rights effectively. Some progress has already been made, but a lot remains to be accomplished. In my country this state of affairs has led to the question whether the cup is as yet half filled or still half empty. Others have stated that the progress achieved so far is no more than a millimetre in what has to be a marathon.<sup>16</sup> Against this background, one would expect an overabundance of attention being paid so systematic monitoring of new developments. In actual reality, however, the efforts to that effect have been relatively limited. Governments appear not always to be overly anxious to have their record reviewed carefully in this way; and the volume of academic research on implementation issues is less than encouraging.<sup>17</sup> In the next sections, some of the most significant results of projects of this kind will be examined and inferences drawn.

#### 3.1. The 1985 UN Declaration

To its credit, the United Nations stands out as an organization which is keenly aware of the limitations inherent in 'merely' adopting declarations. In connection with our subject, this was underscored by the adoption, by the Economic and Social Coun-

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<sup>16</sup>Irvin Waller, Rights of Victims of Crime and Abuse of Power: From Rhetoric to Realization, in: M. Cherif Bassiouni (ed.), International Protection of Victims, 7 Nouvelles Etudes Pénales, Erès 1988, p. 127-146.

<sup>17</sup>Systematic studies like the one conducted by Michael Kilchling, Die Stellung des Verletzten im Strafverfahren. Implementation und Evaluation des "Opferschutzgesetzes", Freiburg i. Br. 1992, are still relatively rare and isolated. This point was already made in the classic volume by Peter Noll, Gesetzgebungslehre, Hamburg 1973, p. 146.

cil, of Resolution 1986/10 on 21 May 1986 on the implementation of decisions like the one on the declaration of basic principles of justice for victims of crime. Subsequently, a detailed list of measures for implementation was designed and presented to the General Assembly as a separate resolution in 1989. The document, prepared by a Committee of experts at the International Institute of Higher Studies in Criminal Sciences, Siracuse, Italy, contains some general recommendations and then moves on to specific proposals to give effect to the various elements of UN declaration 40/34 and the resolution to which it was attached.<sup>18</sup> It is an impressive piece of work. It reiterates the need for widespread dissemination of the text of the Declaration, for training, research, information sharing, and to incorporate the relevant provisions into national legislation, and it reemphasizes the need for procedures to prevent victimization. The specific proposals are contained in so-called 'implementation principles' which are followed by a brief 'commentary', describing, inter alia, examples of best practice collected from different regions. In order to get a good grasp of the nature of this approach, I will examine in more detail the remarks dealing with § 6(a) of the Declaration, which is about informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases. The document then specifies the following implementation principles:

6(a).1. States and voluntary organizations should disseminate information on judicial and administrative processes, through, for example, the publication of brochures outlining the procedures as well as the rights and obligations of victims, and encourage the lodging of complaints of victimization when it occurs, indicating the appropriate recipient of complaints, and the protections afforded persons presenting complaints.

6(a).2. States should ensure that judicial and administrative officials provide victims with timely information on procedural and practical issues relevant to their cases, as well as on the scope and relevance of any decisions. Consideration should be given to the designation of a specific agency or official to be responsible for keeping the victim informed, as appropriate, of the progress of the case.

In the adjoining commentary the designation of a specific agency or official responsible is identified as "one method" of keeping the victim informed. In some countries, it is further mentioned, the prosecutor must invite the victim of a serious crime for a personal discussion of such matters. A statutory obligation requiring the victim to be informed is also suggested as a possible means to this end. Finally, some countries are presented which have developed a book or a

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<sup>18</sup>M. Cherif Bassiouni (ed.), International Protection of Victims, 7 Nouvelles Etudes Penales, Erès 1988, p. 27-81.



brochure explaining victims' rights in clear and simple language.

This is the format of the Siracuse document. As said before, it is highly useful, but it also has definite limitations. The proposals on information, for instance, in no way answer the question what works and what doesn't. It only addresses few of the many practical obstacles to effective communication between the authorities and the victim. It does not reflect on the problems of victims without a known address or who move about frequently. Not a word about illiteracy or a level of education which is prohibitive of understanding official correspondence. It hardly contributes to our understanding of the logistical problems even well meaning governments are faced with when trying to keep all parties informed of major developments in every case. Similar observations could be made in connection with the implementation principles suggested for the other provisions of the Declaration.

I shall only briefly mention the so-called Onati Report, issued in 1993. The basic problem is reflected in this quotation:

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. This was seen to have resulted from two sets of factors. One has been the marginalization or compartmentalization of victim and human rights concerns within the United Nations system, which hinders effective follow up work. The other has been the inability or unwillingness of the Member States themselves to take action, or even to reply to requests from the Secretary-General for reports on the progress of implementation" (p. 30).

The chief recommendations in the Onati report are (1) to intensify monitoring of implementation efforts, (2) to pre-test a survey, and (3) to assist member states in responding to a survey (p. 39).

The next step was taken in response to section III of Economic and Social Council resolution 1993/34. The resolution called for a process of information gathering by means of surveys. Consequently, an extensive questionnaire was sent to the member states covering all items in the Declaration, to be completed by the end of March 1995. Replies were received from 44 states.<sup>19</sup> Although the Secretary-General's report optimisti-

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<sup>19</sup>Report of the Secretary-General to the Economic and Social Council, United Nations Standards and Norms in the Field of Crime Prevention and Criminal Justice. Addendum. Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, E/CN.15/1996/16/Add.3, 10 April 1996.

cally claims that the interest in the survey manifested by the respondents is a valuable indicator of the growing awareness regarding victims' issues all around the world, it is my understanding that this was the lowest reply rate in any UN questionnaire on implementation. According to the official report, things don't look too bad. A general conclusion reads that the Declaration appears to enjoy respect in most States. This is true regardless of differences in the judicial traditions, systems and practices.<sup>20</sup>

These conclusions rest on quantitative findings like the following. All responding States indicated that victims were able, in principle, to seek redress through formal or informal means. That practice was followed always or usually in 41 of these States. Most of the States indicated that the victims did not have to pay for the administrative or judicial procedures to obtain redress. These procedures also guaranteed that victims were treated fairly and that they were involved in the criminal process initiated against the suspect. It almost sounds too good to be true. The results on information are also illuminating. Most of the States indicated that procedures had been established to provide information to victims but that they were not implemented or used in practice to a great extent. The report mentions that two thirds of the respondents reported that victims were informed of their possible role during a judicial or administrative process. The practice was mandatory and generally applied in the majority of States. And equally in two thirds of the responding States, victims were informed about the timing of the process, the schedule and the result of each judicial or administrative action. According to the report, Romania indicated that victims were informed in all cases. And: victims were always informed about the disposition of their cases in around two thirds of the responding States. The results on victims' views and concerns also look promising. In 33 States, the judicial or administrative process always allowed the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests were affected. More than 80% of the States noted that the victims were able to present their concerns, either in person or through legal council and the public prosecutor. The situation on restitution shows a similar picture. All respondents indicated that offenders were bound by law to provide fair restitution to victims, their families or dependents. The practice was mandatory and generally followed in the majority of the States. Most readers with a background in victimology or victim assistance would simply find this hard to believe. Restitution, according to the report, was exceptional in only two States. In two thirds of the States involved, restitution is an available sentencing option in criminal cases; in half the number of States the practice was considered mandatory. As far as compensation from the State is

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<sup>20</sup>For the sake of accuracy, I will refer to the findings in the wording used in the official report.

concerned, about one half of responding States either did not reply to this part of the questionnaire or indicated that there was no information available on the subject (sic!). More than one third reported that the State provided financial compensation to victims who did not get compensation from the offender.<sup>21</sup> The report then mentions that in nearly all States proper assistance was provided to the victims always or usually in order to enable them to present their concerns throughout the legal process. Finally, 60% of the respondents reported that measures were taken in order to always or usually protect the privacy of victims from intimidation or retaliation.<sup>22</sup> In view of these findings, the report concludes by specifying required additional action: continue to promote research, technical assistance, exchange of experience and model examples of legislation.

The Crime Prevention and Criminal Justice Branch of the United Nations Office at Vienna has been kind enough to offer me an opportunity to study the answers to the questionnaire myself.<sup>23</sup> This has led to some additional observations and reflections on the overall outcome of the survey.

To start with, the answers seem to make clear that victims' issues are not a priority in many countries. Bearing in mind the low reply rate (with the most successful and enthusiastic members likely to be overrepresented among the respondents) it is significant that 11 States expressly admitted this to be the case.

It turns out that redress for the harm victims have suffered can only be achieved with the assistance of other agencies than the officials who are operating the criminal justice systems. Acquiring such assistance, however, depends to a large extent on the initiative of the individual victim, who, in turn, often lacks the knowledge required to make the right request to that end.

Another interesting finding emanating from the survey is that in most countries victims are still referred to civil court with their claim for restitution. One need not be a legal expert to know that decisions in civilibus have always been one of the root causes of, and an alibi for, the deplorable neglect of victims in the criminal justice system. So, referring to civil litigation could not credibly be proposed as a solution to real victims' needs. The traditional division of labour between several segments of the court system is - no matter how

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<sup>21</sup>Eighteen States reported that State funds for compensation to victims had been established.

<sup>22</sup>More than half of the States indicated that the judicial or administrative process endeavoured to ensure the safety of victims and to protect them from intimidation or retaliation.

<sup>23</sup>I am particularly grateful for the kind cooperation provided by Eduardo Vetere and Ralph Krech.

disfunctional this has proved to be in the past - apparently much harder to break down than many lawmakers and observers have expected.

Further assessing the impact of the UN survey in terms of implementation issues, I have to point out some shortcomings of a theoretical and a methodological nature.

The first problem concerns the format or phrasing of the questions put to the member States.

Typically, the questionnaire is structured as follows. Each entry deals with a separate requirement in the Declaration. The requirement is stated and then 5 questions are listed with standardized reply boxes:

1.This principle is applied:

always     usually     exceptionally     never

2.This practice is applied:

mandatory     mandatory, with specific exceptions      
mandatory, in certain specified cases     at the  
discretion of the government, the executive or a  
political power

3.If your answers show a discrepancy between the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and national rules or practices, do you expect reforms to be introduced in the foreseeable future?

yes     no

If yes, is there an expected date of enactment?

... / ... month / year

4. Information on the application of this principle is not available.

5. Further information on the application of this principle is attached to this questionnaire.

Studying the replies by the various States, it quickly becomes obvious that the questions have not been interpreted uniformly by all respondents. The first question, for instance, is apparently not unambiguous. "This principle is applied always or usually" was taken by some to mean to describe legal obligations under the domestic jurisdiction while others answered on the basis of the application of domestic requirements in actual cases. As an example the item on providing information can be cited. Victims are informed of their rights in seeking redress. No less than 25 countries responded that this principle is applied always. This could not mean anything but a reference to a legal obligation in all cases (after all: perfect execution is next to impossible). On the other hand, Belgium answered that this principle is applied only exceptionally. Clearly, this refers to the 'law in action', it indicates how the criminal justice system actually works, regardless of the contents of the Code of Criminal Procedure and related policy directives.<sup>24</sup>

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<sup>24</sup>Exactly the same discrepancy can be noticed in the replies to question A.6.: Victims are informed about the timing of a judicial or administrative process. A large majority of States answered this principle is

The confusion was perhaps compounded by the fact that the first question is about the application of the 'principle' while the second question inquires about 'this practice'. Clearly, this has led to misunderstandings and different interpretations. Proof of this can be found, for instance, in the replies to question A.8.: Victims are informed about the disposition of their cases. Most countries reported this practice to be mandatory, but Germany and a few other States indicated that information on the application of the principle is not available. Knowing the structure of the German legal system, compared to other jurisdictions, this odd discrepancy can only be explained by a difference in perception of what the question was exactly about.

The second source of difficulties in assessing the value and reliability of the results of the survey is connected with the identity and the professional background of the respondents. The covering sheet of the questionnaire inquires about the official responsible for responding to the questionnaire. The title or position and the agency or office where the official is employed have to be revealed. This makes sense, because it is obvious that the type of professional involvement with victims' issues may affect the outlook on the situation in any given jurisdiction. While all States have indicated which official - i.e. a civil servant - was responsible for completing the questionnaire, my own inquiries have shown important variations in the fact finding methods these officials have employed. Some have relied completely on official sources, on colleagues charged with shaping and executing victims policies, while others have also drawn on more independent sources outside of government.

Variations of this kind are visibly reflected in the answers supplied. A case in point is Belgium. In Belgium the Flemish Victim Support Organization was heavily involved in preparing the information to be submitted. As a consequence, the consumer perspective - the perspective of the individual victim and the volunteer visitor - played a more dominant role than in jurisdictions where policy departments supplied all information. Consequently, judging from the results of the survey the situation in Belgium is at times deplorable when contrasted with other jurisdictions, while in actual fact the differences are hardly significant. A typical example would be item A.12. of the questionnaire: The judicial or administrative process protects the privacy of victims, as well as that of their families and witnesses on their behalf, from intimidation or retaliation. No fewer than 25 States submit that this principle is always applied; Belgium is the sole country indicating that it is never applied. These answers obviously cannot be taken at face value.<sup>25</sup>

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applied always; only two countries, Belgium and South Africa, marked 'exceptionally'.

<sup>25</sup>Two more examples are to be reported here. The replies from South Africa were prepared by a member of the judicial

The third and final complication arises out of the static nature of the data collected in the survey. The questions pertain to the situation as it stands at the moment the answers are provided. No attention is paid to any improvements - or regressions - in the time span of nearly a decade between the adoption of the Declaration and the moment this particular survey was conducted. Let me give just one example to underscore the relevance of this observation. Nearly all jurisdictions have traditionally provided some opportunities for victims to claim restitution from the offender in the framework of the criminal justice system. Such was the case long before 1985 and it is not surprising that these legal provisions are still in existence. This has little or nothing to do with implementation of the standards set by the Declaration. If compliance were to be the yardstick, then - departing from the approach taken in this survey - the information sought should have concerned the number or proportion of victims who had actually benefitted from the long standing provisions on restitution. By contrast, there are quite a few items where real progress between 1985 and 1995 could have been recorded. Question A.6., for instance, reads: Victims are informed about the timing of a judicial or administrative process. Among many other countries, The Netherlands could answer that this principle always applies, on a mandatory basis.<sup>26</sup> Yet a decade ago nothing of the kind would have been an accurate description of our legal system. So, the static nature of the information asked for in the questionnaire deprives us of an opportunity to gauge any influence the Declaration may have had in the past 10 years.

In conclusion, I feel the survey and the subsequent report of the Secretary-General represent a great and laudable effort to gain some basic data regarding the position of the victim in the framework of national criminal justice systems. It has yielded interesting information, particularly in areas where conspicuous gaps in the protection of victims' interests were revealed. On the other hand, the survey cannot be regarded as a reliable research project on the world wide implementation of the 1985 UN Declaration. Apart from the reasons stated above, there is one other overriding consideration supporting this conclusion. In the UN survey leading to the report in 1996, the concept of 'implementation' is - quite understandably - focused on member States as the main operational units. The vantage point, and the frame of reference, is determined by the

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branch. Hence, no single other country answered as many questions pertaining to the practice applied by ticking not 'mandatory' or 'mandatory, with exceptions', but by ticking 'at the discretion of the judiciary'. And finally: one NGO supplied answers for 6 countries; the results were much poorer than the information from the governments suggested.

<sup>26</sup>Art. 51f Dutch Code of Criminal Procedure, introduced by the Terwee Act of December 23, 1992 (Gazette 1993, 29).

question of whether - and to what extent - domestic jurisdictions coincide with the requirements of the Declaration. Much less attention, however, has been paid to the consumers' perspective. The questions were not directed at estimating the number of victims actually benefitting from opportunities provided by the law. Neither was any systematic effort discernible at establishing discrepancies between the law in the books and the law in action. In a way, therefore, the report of the Secretary-General is even slightly misleading for the uninformed reader. It includes many statements of the kind that victims were always informed about the disposition of their cases in around two thirds of the responding States. Now, 'always' does definitely not mean: in each case of criminal victimization. It can only mean that no types of crime have been excluded from the duty of the authorities to inform the victims as provided for in legislation or similar guidelines. From the point of view of individual victims - the clients of the system - this makes an essential difference.

The report by the Secretary-General also draws attention to the standards and norms proposed by the Expert Group Meeting on Victims of Crime and Abuse of Power in the International Setting, held at Vienna in December 1995<sup>27</sup> for appropriate review and follow-up action. This meeting generated a "Draft Manual on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power". A follow-up meeting was held in The Hague in March 1997, where the Manual was finalized. This manual also rests on the assumption that the adoption of an international instrument, however important, is just a first step towards actual improvements in practice. The purpose of the manual is described as follows:

"The purpose of this brief manual is to draw the attention of policy-makers to what has been done, and what can be done to ensure that the effectiveness and fairness of criminal justice, including related forms of support, is enhanced in a way that respects the fundamental rights of suspects and offenders as well as those of victims".<sup>28</sup>

This objective is then pursued in exactly the same way as in the Siracuse-document described earlier.<sup>29</sup> The manual provides for a wide range of detailed suggestions and recommendations as to how to substantiate both the general observations as well as

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<sup>27</sup>E/CN.15/1996/16/Add.5.

<sup>28</sup>The manual then continues: "The manual can also be used as a means of focusing international cooperation and technical assistance initiatives in the area of good governance and strengthening the rule of law".

<sup>29</sup>The likeness is explicitly acknowledged: "Helpful suggestions can also be found in M. Cherif Bassiouni (ed.) ... This source has been heavily used in the preparation of the present manual".

the detailed requirements of the Declaration. In some ways it looks like little progress has been made. Referring to the provisions on providing victims with relevant information on various aspects of their case, the manual does not seem to go far beyond the level reached in the Siracuse-document: it reminds the reader of courses of action like the publication of books and brochures, designation of a specific agency or official to be responsible for keeping the victim informed, and the possibility of having the prosecutor invite the victim or the family of the victim for a personal discussion, during which the decisions to be made are explained. In other areas, though, the examples of best practice have definitely gained in content and level of empirical testing. I mention the catalogue of a variety of methods for encouraging timely and fair restitution by offenders to victims. The manual refers to options like:

- providing that payment of restitution is to be deemed a mitigating factor in sentencing;
- imposing a fine that is higher than the amount of restitution, with the fine to be waived if the offender provides restitution to the victim;
- otherwise imposing a conditional sentence, with the sentence suspended on condition that the offender provides restitution to the victim;
- seizing the assets of persons found responsible for victimization, for purposes of restitution to the victim, and
- allowing for the possibility of "creative restitution", in which the offender can, with the consent of the victim, provide services directly to the victim, for example by repairing the damage or working for the victim.

There are other novelties included in the manual which were completely unknown at the time of the Siracuse-meeting. The manual - befitting the spirit of the day in the late nineties - calls upon the States to make use of the fullest extent possible of the rapidly increasing possibilities to make information on provisions for victims available through the Internet. Elsewhere it refers to cases of harm to large groups of victims, in which several jurisdictions allow the presentation of class actions to represent victims and seek redress. Ultimately, the manual advises that policies to implement the Declaration and otherwise improve the treatment of victims should be based on a comprehensive strategy. This is undoubtedly a wise admonition or exhortation. It does, however, still leaves us somewhat in the dark as to how any such strategy can be shaped and executed. The one and only question neither the manual nor the other UN documents answer (except on a high level of abstraction), is what will work and why. Just one final example. At a certain point, the manual concludes that its findings underline the urgent need for better treatment of victims by the police and other agencies in the criminal justice system in many jurisdictions. Sure, but regrettably no clues are provided as to how to go about such a project.



### 3.2. The 1985 Council of Europe Recommendation

The Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedures (1985) shows remarkable similarities to the UN Declaration. As far as substance is concerned, the basic rights awarded to victims are by and large the same. And the legal status of these proclamations is also equal: they provide guidelines, yardsticks to measure the state of the art, but they do not have the binding force of rules of law. Against this background, it is remarkable that the Council of Europe has not shown the same measure of concern about implementation of the Recommendation as was witnessed by the UN in relation to its Declaration. As far as I know, no overall assessment has taken place as to the level of compliance by the member States with the provisions of the Recommendation adopted in 1985.<sup>30</sup>

In 1994, therefore, a private initiative was taken to start a major research project on the implementation of the provisions of the Council of Europe Recommendation. The project was to be carried out by members of the Criminal Law Department of Tilburg University in The Netherlands.<sup>31</sup> The main objective of this project, which is still pending, is to gain knowledge about the question why some actions on behalf of victims of crime are successful while others have proved to end in failure. More specifically, our main concern is to try to understand how it can be explained that quite a few of universally agreed measures to emancipate the victim still fail to materialize in the daily operation of the criminal justice system. Drawing on the experience from the UN efforts described in the previous section, the first basic decision was to focus on a consumer based concept of implementation. When the Recommendation was designed to improve the position of the victim in the criminal justice system, the standard for effectiveness in implementation should not be whether domestic law is in accordance with the provisions of the Recommendation, but whether real life and blood victims are actually treated according to these standards. This basic decision carries as one of its corollaries that productive comparative research can not be conducted only on the basis of legal documents and other printed information. The law in the books is notoriously insufficient to grasp the situation of everyday victims. Even additional written questionnaires do not suffice to really get a feeling of what is going on in a given jurisdiction. The minimum requirement to achieve our objective is to have extensive site visits, where all the written documentation can be tested and supplemented by interviews with all agents possess-

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<sup>30</sup>Apparently, the Council of Europe has circulated a questionnaire among its member states inquiring about the state of domestic legislation in these matters. However, no report on the results has been published.

<sup>31</sup>Funding was provided on an equal basis by Tilburg University and the Dutch Ministry of Justice.

ing extensive experience with the system. Fortunately, we were lucky to find two able and dedicated researchers, Ms. Marion Brienen and Ms. Ernestine Hoegen, who are together capable of commanding nearly all languages spoken in the member states of the Council of Europe, thus enabling them to gain first hand experience from judges, prosecutors, law enforcement officials, academics, and victims' advocates. The next lesson we drew from earlier studies on compliance is that we need a dynamic criterion for success. When there is only partial conformity to the standards set by international proclamations, there is always the risk of a fruitless debate on how serious the shortfall is. Instead, we proposed a more longitudinal approach. The basic question on each provision of the Recommendation is whether the situation at present is better or worse than a decade ago. If improvements can be demonstrated, we regard that as success, even when current practice still falls short of the level required by the international community. If nothing has been done, while the benchmark has not yet been met, there is reason for concern. We feel this approach has the additional advantage of offering an opportunity to take into account in a reasonably way the differences in cultural circumstances that obtain between various countries and the widely differing points of departure they were faced with when the Recommendation was issued.

The overriding objective of this research project is to draw up a reliable list of critical conditions for success. We expect the factors involved to be changing according to the specific victims' right concerned and - very importantly - according to the basic features of the jurisdiction in which that specific right is expected to have a useful place. The next question, of course, is what method to use to pursue this challenging objective. Apart from the site visits - accompanied by the tool of participatory observation - extensive use is being made of available results of small scale action research. In a sense this could be called meta-evaluation. It is concerned with critically reviewing the relevance of completed empirical victimological research from the point of view of comparative, cross border purposes. As an example of this modus operandi I will mention some of the projects which have been undertaken in The Netherlands in recent years.

### 3.3. Trial and error in The Netherlands

Like so many other countries, The Netherlands have been quite active in trying to improve the position of the victim in the criminal justice system. One of the landmark achievements was the introduction of the so-called Terwee-Act, providing for several new procedural rights, accompanied by administrative guidelines designed to assure more sensitive treatment of the victim by the police and by prosecutors.<sup>32</sup> From a comparative point of view, this piece of legislation in itself is nothing special. As already noted, many other jurisdictions have

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<sup>32</sup>See footnote ...

preceded or followed the Dutch with similar measures. There is, however, one side to this reform which is rather unique. The Terwee-Act was adopted by Parliament in late 1992 and was then put in force by April 1 1993, but only in two out of the nations 19 judicial districts. It was decided to use these districts - one relatively small in size, the other much larger - as pilot projects. The experience gained in this experiment was to be used in shaping the implementation of the Act nationwide, which was scheduled for April 1 1995. In itself, this arrangement is daring as well as sound; it is theoretically justified by the victimological groundrule that one should never raise expectations with victims which can later on not be fulfilled. So far, so good. This clever scheme did not, however, yield all the advantages that were expected of it. It turned out to be very difficult to draw hard lessons in terms of do's and don'ts from the experience in the pilot regions. The two pilots operated very differently. When things went wrong, it was not easy to attribute this to a single cause. In short, it was more difficult to learn by trial and error than the government had anticipated. As I see things, the experiment mainly led to three insights which could be useful for shaping policy elsewhere.

First, real progress proved to be possible in providing victims with the information they are entitled to. Bureaucratic obstacles can be overcome by careful planning and learning from initial mistakes. Promoting restitution by offenders to victims, on the other hand, turned out to be much harder to achieve. Although several different models have been tried to improve things, success has been very limited indeed - and for a variety of reasons. The second notion we gained is the hard and fast rule that reforms of this kind can only be effectively implemented by creating a network of all the major actors involved in the operation of the criminal justice system. Consequently, every judicial district now has a 'steering group', composed of representatives from the police, the prosecutors office, the probation service, victim support schemes, the bar, and whenever possible the judiciary. And thirdly, we learned that money not always determines the outcome of a project. The pilot districts were relatively overfunded for a long period, but did not perform significantly better than their colleagues who had to get by with scarcer resources.<sup>33</sup>

One of the innovations in the Terwee-Act is that it introduced the compensation order as a penal sanction in its own right. Up until that time, reparation could mainly be achieved by the French model of the partie civile, allowing the victim to present a civil claim for damages to be decided on in

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<sup>33</sup>Four different evaluation studies were conducted on the introduction of the Terwee Act. A summary of the results is presented by A. Slotboom, J. Wemmers, Tevree met Terwee? Samenvattende rapportage van de evaluatieonderzoeken, Den Haag 1994.

the criminal trial. One of the main arguments underlying the introduction of the compensation order concerns the execution stage. In the partie civile-model, the victim is charged with the burden of executing a court order on his own behalf. There are expenses involved in this process and research has shown that chances are slim that he will actually acquire the money he was awarded by the verdict.<sup>34</sup> On the other hand, a compensation order, as a punitive sanction, will be executed by the government on behalf of the victim. Foreign experience documented in research findings, shows that this vastly increases the likelihood of the victim receiving the reparation the judge has decided on.<sup>35</sup> Now, against this background one would have expected the Dutch government to have carefully prepared for the execution stage after introducing the Terwee-Act. But nothing of the kind happened. The pilots started, as said before, on April 1 1993. All other districts followed on April 1 1995. Yet it took until late 1996 until serious steps were taken to have the execution of the compensation orders assigned to a central agency, which is also responsible for collecting fines.<sup>36</sup> This delay is, to say the very least, inconsistent with making full use of available victimological knowledge. This should not be taken lightly, because a bad start can easily ruin the prospects of a program. Poor preparation of the initial stages can have grave and lasting effects on the viability of reformist legislation. I will return to this theme in section 4.

The third item to be covered is the perennial problem of specialization versus despecialization. The UN Manual on the implementation of its Declaration points out the possibility of appointing special officers or agencies charged with the responsibility of taking care of victims' interests. In The Netherlands, several experiments have been carefully examined which confirmed the wisdom of this suggestion. A well known project to improve police performance in bringing about claim settlements between victim and offender failed in its initial stage but was turned into a remarkable success after one officer in the force was specifically charged with the supervision of the efforts.<sup>37</sup> A similar fate befell an experiment in

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<sup>34</sup>In only 25% of the cases involved, the court order is effectively carried out. Marie-Pierre de Liège, Concrete Achievements toward the Implementation of the Fundamental Principles of Justice for Victims in France, Paris 1988.

<sup>35</sup>D. Moxon, J.M. Corkery, C. Hedderman, Developments in the Use of Compensation Orders in Magistrates' Courts since October 1988, London 1988: early findings indicate an 80% success-rate.

<sup>36</sup>The matter was finally resolved by a decision of the Minister of Justice of Februari 5, 1997 (Gazette 1997, 116) (Besluit tenuitvoerlegging ontnemings- en schadevergoedingsmaatregelen).

<sup>37</sup>M.I. Zeilstra, H.G. van Anandel, Evaluatie van het

one of the countries' prosecutors offices endeavouring to provide better services for victims of crime. It was again demonstrated that real progress could only be achieved when one member of the profession fortifies the collective conscience of the corps.<sup>38</sup> The backside of these findings, however, is that appointing specialist officials for this purpose might very well dilute the sense of responsibility throughout the force at large. It has often been said that paying attention to victims needs should not be regarded as the "soft side" of police work or of the job of the prosecutor, a task to be left to the less than fully qualified officials. It has equally often been stressed that real improvements can only be brought about when the need for change is deeply felt both by the leadership of the organization and the rank-and-file agents who have to face the clients on a day-to-day basis. What it all comes down to is to strike the right balance between specialization and a sense of collective responsibility. Examples of best practice in this regard will have to be a crucial part of any theory of implementation of victims' rights.

The question of resources was touched on briefly in the above. I explained that in effecting reform, money is not the whole story. But this message should not be turned around as if funding would be irrelevant. It obviously is most important. Police forces and prosecutors offices by definition feel overworked and understaffed. Regardless of the accuracy of this perception, it would be irresponsible to ignore it. When legislating new victims' rights entails an additional workload for police and prosecutors, the effort is destined to be futile if no resources are provided to meet the requirements. Acknowledging the applicability of this principle, the Dutch government commissioned a reputed accounting firm to conduct a study on the costs involved in the implementation of the Terwee Act. The resulting report indicated that the effort required by the provisions of the Act involved a total expenditure of some Dfl 33 million. But then, instead of either appropriating the budget required to do the job - or challenging the methods by which the amount had been calculated - the government invented all kinds of ingenious arguments to cut back on the necessary funds. It decided on "a gradual increase of appropriations". Most likely, according to the official accounts, not all victims would be making use of the new legal opportunities from day one. Furthermore, it was argued, the demand on extra time and effort would hit the police earlier than the prosecutors, and the court system would be affected even at a later date. Hence, funding in the first year after the reformist legislation was put into effect would be way below the level calculated by the accounting firm, with a commitment to

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schadebemiddelingsproject bij de Leidse politie, Den Haag 1989.

<sup>38</sup>T. van Hecke, J. Wemmers, Schadebemiddelingsproject Middelburg, Den Haag 1992.

increase the budget step-by-step as time progressed. There is no denying some logic behind this reasoning. The practical effect of this approach, however, has been that the agencies which are first confronted with victims expecting to be served in a new and improved manner, have become frustrated because they have not been supplied with the means to do a proper job. This is particularly true for the police and for regional victim support schemes. The effects of such a mistake can be graver and more longlasting than some would expect. When the initial stage of a new legal structure is disappointing, some permanent damage may well be inflicted and things may be hard to correct later on. So, it is particularly important to aim at a solid start for such reformist action and not compromising that effort by a predictable lack of funding.

The Manual on the implementation of the UN Declaration suggests as a first step on the way to a comprehensive strategy to establish a high-level committee or working group with representatives from all relevant bodies, such as, inter alia Ministries of Justice, The Interior, Welfare and Health, the police, prosecutors, courts, as well as legislators and local government. According to the Manual, the academic community, the health and mental health professions, and various voluntary organizations such as women and youth groups, religious organizations as well as the business sector should also be represented. Such advisory bodies can be assigned the task of:

- carrying out needs assessment studies
- assessing the shortfall between needs and provision of services
- making proposals for improvements in the treatment of victims in the immediate and longterm.

In The Netherlands, like in many other countries, such an advisory committee was installed at an early date. Its composition corresponded closely to the specifications in the Manual; it was felt important, though, to also include representatives from the National Victim Support Organization, from the probation service and the Criminal Injuries Compensation Board. From a philosophical point of view it must be noted that the national advisory committee was not only consulted during the stage of first preparing new legislation, but its operation was continued after the Terwee Act got the force of law. At present, the committee serves primarily as a think-tank to improve policies on effective implementation of the newly established victims' rights. Future evaluation studies will have to show whether committees like these have either really been instrumental in effecting actual changes in the system, or have, because of protracted deliberations and painful compromises, in the end rather slowed down progress.

The final project to be mentioned here as a possible example of best practice is the development of a so-called "measurement model" on victim care. This extremely interesting technique was designed in order to supply the police and prosecutors with exact data on their dealings with victims which would then provide them with an opportunity to intensify their activities and change obtaining practices whenever

necessary. It is an instrument for monitoring actual achievements enabling the authorities to check to what extent official objectives are met and what changes are called for. The hard core of this system consists of a list of 'key numbers' - or: key figures - which have to be collected on a daily basis. For the police activities eight such indicators have been identified:

- A.1.The number of victims who reported a crime
- A.2.The number of victims who expressed the desire to be kept informed
- A.3.The number of victims who could be connected to a suspect
- A.4.The number of victims who expressed a desire for reparation
- A.5.The number of victims who have actually received reparation
- A.6.The number of victims whose case files were handed over to the prosecutor's office
- A.7.The number of victims who did not receive information within the agreed period of time
- A.8.The number of letters send to victims

The list of key figures for the prosecutors is as follows:

- B.1.The number of victims being placed under care of the prosecutor on the basis of the police reports
- B.2.The number of victims who have expressed the wish to be kept informed
- B.3.The time span elapsed between the moment the police report was received and the first written communication send to the victim
- B.4.The total number of written communications to victims with regard to how cases have been disposed of
- B.5.The number of invitations extended to victims for a personal interview with the prosecutor
- B.6.The number of victims who formally filed a civil claim for damages
- B.7.The number of civil claims for damages awarded by the courts
- B.8.The number of victims who asked for reparation of any kind
- B.9.The time span between a claim settlement and the moment the victim actually received the money involved
- B.10.The total number of out of court claim settlements
- B.11.The total number of out of court claim settlements which have led to full payment to the victim
- B.12.The number of compensation orders demanded by the prosecutor in court
- B.13.The number of compensation orders in court sentences
- B.14.The number of compensation orders fully complied with by convicted offenders.

The findings will have to be entered into automated data processing systems and will lead to quarterly reports. The reports should also provide an analysis of the results and should specify projected objectives for improvements. An example of such a target could be, for instance: "To send a written communication to all registered victims about the prosecutors decision on the case in 50% of instances within one week and in 90% within three weeks after the decision was

taken".<sup>39</sup> It is obvious that this model is intended to improve the quality of the care provided to victims in the criminal justice system, particularly in the pretrial stages. It is furthermore supposed to enhance the added value of cooperation in the network of various parties involved. The system has been tested in two judicial districts and it has proved to be workable. Subsequently, the model has become operational nationwide as of the last quarter of 1996. This could be the start of a major step forward in advancing victims' rights which in the past have been so hard to implement effectively. In a way, it is a new test-case. When the method will be applied as intended, it could yield very practical and beneficial results. If, however, police and prosecutors would regard this instrument as a burdensome bureaucratic hurdle, the whole program could easily collapse under the sabotaging weight of footdragging and administrative failure. Only time will tell to what extent this great opportunity for systematic learning has been taken advantage of.

#### 4. Implementation theory

##### 4.1. A developmental model

In the previous section I have dealt with various case studies, projects, models and experiments all aimed at reforming the criminal justice system on behalf of victims. Similar research has been conducted in many other countries. All of this is the raw material which is being examined on a comparative basis in the Tilburg research project on the implementation of the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure. The objective of the project is to find out what works and, more importantly, why. The real value of this kind of academic research is to gain a better understanding of social realities. Hence, what we are after is not a mere collection of statistical findings or an inventory of unconnected examples of best practice. We aim for uncovering fixed patterns of causal relationships. We are trying to get a grasp of the underlying structures and principles which can really provide an explanation for the success or failure of various efforts in this area.

Hence the call for more comprehensive implementation theory. In my view, this is a major challenge for victimologists all over the globe. The Tilburg research project will certainly not lead to all the answers we are looking for, but it may constitute a relevant step forward on which future researchers can build.

Let me propose and explain some key elements which might be incorporated in the framework of a broader implementation theory. Most prominently, the theory must be of a dynamic

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<sup>39</sup>Another topical example is: "To dispatch before July 1st at least one written communication to 97% of all victims registered in the first quarter of that year."



nature. It should contain a developmental model, allowing for advancements and regressions to be the main perspectives. Drawing on similar work done in connection with reforms in other parts of the criminal justice system<sup>40</sup>, I suggest to distinguish four different stages in the implementation of victims' rights:

- a the stage of resistance
- b the stage of acceptance
- c the cynical stage
- d the stage of assimilation.

The first stage is one in which the main players within the system reject the existence of a real problem and oppose any fundamental changes to be made. Partly this is caused by some innate conservatism, partly it is anxiety in the face of being confronted with the unknown. In the case of victims' rights many contributing factors of this kind can be identified in past and present. To mention just one of these: the fear of getting in touch personally with victimized people and not knowing how to handle the emotional aspects involved.

During the stage of acceptance the problem is adopted as a genuine concern of the professions participating in the system. They recognize the fact that they have a responsibility in contributing to the solution of the problem. It is vital that the partners in the network agree on a mutual preparedness to act and that they share the belief that a common effort can produce positive results. It is this stage which leads to new legislation, to training programs and other measures to increase knowledge of the issue, and to professional codes of conduct. A useful distinction can be made between "caring acceptance" and "legal acceptance".<sup>41</sup> The former concept means that the authorities really try to apply new provisions in the way they were intended to be used. The latter approach implies a very narrow interpretation of the new rights, often rendering them completely ineffective. An example of this which can be found in quite a few jurisdictions is the power of the court to dismiss a civil claim for damages in the criminal trial and refer it to the civil court. A narrow, legalistic application of this provision can lead to frequent use of this 'escape route' with predictable frustrating consequences for the victims.<sup>42</sup>

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<sup>40</sup>The model was first presented in connection with financial crime (money laundering) by C.D. van de Vijver, Politie, justitie en partners: nieuwe stappen, in: C.D. van de Vijver (ed.), Crimineel geld: dreiging en aanpak, Arnhem/Antwerpen 1995, p. 72 ff; it was later slightly refined by A.B. Hoogenboom, Cynisme en 'opstandige gehoorzaamheid'; de implementatie van de Wet MOT, in: Financiële sporen van misdaad, Justitiële Verkenningen 9/96, p. 22 ff.

<sup>41</sup>See A.B. Hoogenboom, op. cit. p. 24-25.

<sup>42</sup>This is what happened in Germany in the case law

During the cynical stage people start to wonder if it is worth all the trouble. Doubts arise as to the feasibility of many of the new projects. It is a period of reaction and partial retreat. Unanticipated drawbacks of new provisions become apparent. Different agencies start to look after their own interests again and try to shift some of the burdens to other partners in the network. When the job appears to be more complicated than initially expected, some will predict the futility of the whole effort and will start challenging its underlying assumptions. A typical example of this could occur when newly introduced guidelines instruct the police to try to arrange claim settlements in categories of cases which are obviously unsuitable for any such efforts, like when a penniless drug addicted offender has committed hundreds of burglaries.<sup>43</sup>

The stage of assimilation, finally, is characterized by a new balance of responsibilities. The kind of naive enthusiasm of the previous times is being replaced by a more mature approach.<sup>44</sup> The new legislation and accompanying guidelines are integrated in the daily routines of the agencies operating the criminal justice system. The main objective during this stage is to plan on the basis of strategic decisions. Scenario's on future developments have to be designed, comprising main targets, predictable responses to all initiated actions and the next steps to be taken when these eventualities occur.

What is the epistemological status of a model like this? Basically, it is a rational reconstruction of a successful implementation effort. A model like this can be useful because it serves analytical purpose, enabling us to better understand why certain projects fail while others succeed. It offers opportunities to provide explanations, since it is designed to identify and classify factors which might put effective implementation at risk. All the well known variables which feature in individual case studies and in action research on isolated subjects can be coherently interconnected in the framework of a

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concerning § 405 StPO. Complaints about this restrictive attitude of the judiciary have been lodged in vain for decades; G. Meijer, Zur Geltendmachung von Schadensersatzansprüchen im Strafverfahren, Süddeutsche Juristenzeitung 1950, p. 194 speaks of an 'abuse' which renders the entire procedure 'futile'.

<sup>43</sup>We have seen another example in section 3.3., where it was stated that poor preparation of the initial stages of a project can have grave and lasting effects. The long overdue planning of the execution of compensation orders was a case in point, the same holds true for underfunding in the first period of time; it is mistakes like these which can contribute to the advent or the continuation of the cynical stage in the developmental model.

<sup>44</sup>Van de Vijver, op. cit. p. 74.

developmental model like this. I refer to factors like the authorities' lack of knowledge on victims issues and the need for training of all officials involved, the lack of knowledge on the part of victims themselves as to the rights they have according to law, shortage of manpower in responsible agencies like the police and the prosecutor's office, underfunding of projects, competing rights of suspects and offenders in the criminal justice system, competing interests which prevent some professionals from really assisting victims<sup>45</sup>, and the often mentioned intangibles like the "attitude" of the respective authorities or the "culture" of an agency. All of these factors can be reexamined and empirically tested from the point of view of contributing to - or the opposite: obstructing - the transition from one stage of the model to the next. The open structure of the model allows for cultural differences to be taken into account.

In the next sections, I will elaborate the basic value of this model on a somewhat more abstract level, by pointing out some general impediments to effective implementation of victims rights.

#### 4.2. The victimologists fallacy

Some victimologists and victim advocates adhere to the principle: the more victims rights, the better. I shall call this a populist fallacy, or better: the victimologists fallacy. My thesis is that claiming excessive rights can and will be counterproductive. Overreaching in this respect might jeopardize the implementation of the catalogue of basic victims' rights as exemplified by the European Forum's Statement of Victims' Rights in the Process of Criminal Justice. This can be explained and understood on the basis of the dynamics involved in the developmental model just sketched. The model demonstrates room for negotiations between the various actors in the criminal justice system. Interests of the partners in the network operating the system will have to be balanced permanently. This calls for never ending readjustments. The logic behind my thesis is that claiming excessive rights for victims will evoke opposition and generate resistance by others. Hence, a stage of assimilation will never be reached and regressions to earlier stages of the model are likely. I will present three examples of what I consider counterproductive types of rights.

The first one concerns veto rights. According to the European Forum Statement of Victims' Rights in the Process of

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<sup>45</sup>Example: In many countries it is more lucrative for a lawyer to represent a client (victim) in civil litigation than to have the claim for damages settled in the course of the criminal proceedings. Quite understandably, this type of fee-structure will lead attorneys to present all kinds of arguments to the victim in order to persuade him that the civil court offers definite advantages.

Criminal Justice a victim must have the right to provide information to officials responsible for decisions relating to the offender. The purpose of this right is to ensure that the victim is heard, that he can express his feelings, and that all of this can be taken into account when decisions have to be made. This arrangement is compatible with the basic structure of the trial and the pre-trial stages and respects the sense of responsibility of actors like the prosecutor and the bench. Veto rights, on the other hand, would for the very same reasons mobilize resistance. So, the victim should - in my view - not be awarded a final say in decisions on pretrial detention, in plea bargaining or the use of the expediency principle, in sentencing or parole. It is very important to retain a firm distinction between taking victims' interests and opinions into account on the one hand, and taking instructions from them or leaving decisions to them on the other.

The second type of rights to be avoided are the ones which would compromise the right to a fair trial for offenders. Since the right to a fair trial is a generally accepted human right, it just would not do to answer a historical injustice to the injured party with intentional and institutional unfairness to the accused.<sup>46</sup> For present purposes, however, the main point is that such a course of action would not only be hard to justify, it would also reduce the willingness of the main players in the criminal justice system to contribute in the implementation of the basic victims' rights. So this state of affairs provides an additional argument for the condition stipulated in the preamble of most national and international statements on victims' rights that these rights will be awarded "without prejudice to the right to a fair trial for offenders".

The third type of rights I would label as excessive are the ones which would transform the criminal trial into a three party system. The traditional justification for this opinion is derived from dynamics which are inherent in any procedure. What it all comes down to is that attack will always lead to defence and counterattack. Hence, if we would place the victim in the position of opponent of the accused<sup>47</sup>, with offensive rights of his own, this would expose him to countervailing pressures. Consequently, the victim would become vulnerable again and exposed to abuse by the defendant and defense council, and he

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<sup>46</sup>This point was previously articulated in my paper Conflicts of Victims' Interests and Offenders' Rights in the Criminal Justice System, in: Chris Sumner et. al. (eds.) International Victimology, Canberra 1996, p. 172.

<sup>47</sup>This is the core of what I conceive as a third party in the system: to position the victim as the opponent of the defendant in proving guilt or innocence and/or in setting sentence. Hence, allowing the victim to present a claim for damages as partie civile does not qualify as transforming the system into a three-party-affair.

might very well end up being the weaker party running a serious risk of secondary victimization. On top of this traditional line of reasoning I would now argue that the transition to a three party system would also compromise efforts to effectively implement the more modest victims' rights. The explanation of this is again to be found in the dynamics of the developmental model with its stress on cooperation between networking parties. To mention just a single practical example, I would not favor granting the victim the right to appeal a sentence he considers to be too lenient.<sup>48</sup>

By referring to this example, it can also be demonstrated how the various elements of this general theory of implementation can be empirically tested. I have identified three types of rights and labelled them as excessive in scope. I have expressed the expectation that the introduction of such rights will jeopardize the implementation of other reforms on behalf of victims. These expectations - or: predictions - are essentially hypotheses which lend themselves to empirical tests. In this sense the larger framework of a comprehensive theory of implementation provides many starting points for new comparative action research in different jurisdictions.

#### 4.3. Restorative justice

I now turn to an even more controversial matter. What could be true with regard to the extend of victims' rights, might very well also apply to their status.

In recent years, much has been said about the nature of the effort to reform the criminal justice system on behalf of crime victims. Some victimologists have argued that the introduction of additional victims' rights is a piecemeal adjustment of the system, while many others regard it as a major step in replacing the current paradigm of retributive justice by a new paradigm of restorative justice. Proponents of the latter view furthermore tend to explain the relative ineffectiveness of victims' rights implementation efforts by pointing out that they are fundamentally alien to the basic problems and concepts of the retributive paradigm.<sup>49</sup> Real success and genuine reform could therefore only be achieved by abandoning the current obsolete system. Now, acknowledging some compelling logic behind this argument, I take exactly the opposite view. In my opinion it has been precisely the call for a new paradigm of criminal justice which has slowed down both the pace and the extend of implementation of victims' rights. Linking reform to

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<sup>48</sup>Just as an encore: on the same grounds I am opposed to the institution of private prosecution in criminal cases.

<sup>49</sup>Ezzat Fattah, From a Guilt Orientation to a Consequence Orientation. A Proposed New Paradigm for the Criminal Law in the 21st Century, in: W. Küper, J. Welp (eds), Beiträge zur Rechtswissenschaft, Heidelberg 1993, p. 771-792; T. Peters, J. Goethals (red.), De achterkant van de criminaliteit, Leuven 1993.

a change of paradigm is tantamount to inviting all agents operating the criminal justice system to abandon all previously held convictions, values, priorities, principles and problems. A debate on paradigms doesn't allow for any compromise or gradual change. By definition, there is even hardly room for rational discussion between people who adhere to different paradigms. Success and improvements in one paradigm is futile or irrelevant in another frame of reference. This is the very essence of the concept of incommensurability as developed by Thomas Kuhn.<sup>50</sup> And in my theoretical exposition it is exactly discussion, persuasion, cooperation and negotiation which is designated as crucial in determining the fate of reformist efforts. When there is not even a shared frame of reference, chances to effect change are very slim indeed. The call for restorative justice as a new paradigm of criminal justice is therefore in my view rather an obstacle to reform than a precondition for effective implementation of victims' rights. But maybe this fundamental difference of opinion between victimologists can also be included in future action research as indicated above.

##### 5. Concluding remarks

In the years ahead, there will be other Dutroux-like cases. There will be more massacres like the one in Dunblane. And most probably there will be new incidents of horrendous mass victimization like the Oklahoma bombing. On top of that, millions of so-called ordinary crimes will be perpetrated, maybe less spectacular and not known to the public at large, but equally dramatic for the individual victims involved. In response, governments will be urged to take new and additional steps in order to safeguard the interests of victims of crime. New rights will be called for, and attention will be drawn to the fact that existing rights are not yet effected as intended. Governments must prepare themselves for such crises. In order to avoid ill considered decisions based on the pressures of the moment, strategic planning must be undertaken, resting on solid knowledge of the issues. This kind of knowledge must be provided by victimologists. In my paper I have described one part of the type of knowledge required. We are in dire need of more understanding of the process of implementing victims' rights. Hence the call for a comprehensive theory on this subject. It will not be easy to make real progress in this area. Actually it is a momentous task we are faced with. It is indeed a major challenge for the profession of victimologists. Some may even regard it as a mission impossible. To colleagues who feel that way I would like to quote a pertinent remark by a former President of the United States, who was heavily involved in improving civil rights. He said: "Early in my life I learned

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<sup>50</sup>Thomas Kuhn, The Structure of Scientific Revolutions, Chicago U.P. 1962.

that doing the impossible frequently was necessary to get the job done".<sup>51</sup> So let us not despair. Let's get to work.

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<sup>51</sup>Lyndon B. Johnson, The vantage point. Perspectives of the Presidency, New York/Chicago/San Francisco 1971, p. 27.