Keynote Speech

Current Status of the Convention on Justice for Victims of Crime and Abuse of Power

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I am proud and privileged to share some thoughts with you on the 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, the proposed *Convention on Justice for Victims of Crime and Abuse of Power*, and on the strategy we are about to pursue to have the Convention eventually adopted. My presentation will consist of three parts. First, I will some highlight some of the key features of the 1985 UN Declaration and the subsequent efforts to secure effective implementation of that Declaration. The second part will be about the idea of replacing the Declaration by a Convention. Why could that be a good idea? Part of it has to do, of course, with the content of the Convention, so I will highlight the differences and the improvements in the Convention in comparison with the text of the Declaration. Finally, I will address the question, where do we stand today and where are we going? What steps do we need to take to have the *Convention on Justice for Victims of Crime and Abuse of Power* adopted?

The first question is what makes the UN Declaration such a wonderful, inspirational, and aspirational document? It is now 23 years old and recognized as the "Magna Carte of victims' rights." Why? The essence of the answer is that the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* is such a visionary document. If you look at the basic human rights it contains, they still form the basis of all subsequent and more recent international protocols on victims' rights. If you look at the Council of Europe Recommendations, the European Union

framework decisions, and similar international instruments in other regions of the world, they all more-or-less reflect the same basic rights that have already been inserted in the Declaration. The following is a summary of the 10 fundamental victims' rights in the UN Declaration:

1. The fundamental right for victims to be treated with compassion and for the dignity of the victim to be respected.
2. The right of the victim to receive information.
3. The right of the victim to provide information to the authorities; that is, it allows for the views of the victim to be presented and considered in the course of criminal proceedings.
4. The right of victims to have proper assistance throughout the legal process.
5. The right of victims to protection of privacy and physical safety.
6. The right victims to participate in any formal dispute resolution (restorative justice was not included in the 1985 UN Declaration).
7. The right of victims to social assistance.
8. The right of victims to restitution by the offender.
9. The right of victims to state compensation.
10. The right of victims that States should build partnerships between government agencies, NGOs, and civil society to promote victims' rights.

In many areas of international law, States Parties are satisfied when they have concluded an international agreement; that is, international legal instruments are often adopted and then neglected. The United Nations should be commended because this has not been the case with the 1985 Declaration as there have been a series of efforts to promote its effective implementation. I will detail these efforts because it is important to know and realize how much has been done to promote effective implementation of this important document.

- The first was an Economic and Social Council of the United Nations (ECOSOC) resolution in 1986 urging more implementation efforts aimed at the UN Declaration.
- In 1989, a detailed list of measures of implementation was adopted

by the General Assembly that was prepared by an expert group in Syracuse, Italy.

- The UNATI Report in 1993 recommended three basic actions: (a) to intensify the monitoring of progress in implementing the UN Declaration, (b) to pre-test a survey on compliance,[1] and (c) the provision of assistance to Member States to respond to surveys circulated by the United Nations.

- In 1994 and 1995, the Secretary General of the UN sent out a detailed questionnaire to 200 member states of the United Nations with a response rate of only 44, an all-time low compared to similar questionnaires. I was able to study the results and concluded they were unreliable, in particular the answers from governments. This was because the respondents confused principle and practice. The question was, "Do victims have standing in court?" The reply by most States was, "Yes, they have standing in court because our legislation provides for that standing," but the response did not give any information about the reality of those domestic provisions. The second reason the responses were unreliable was that the answers were provided by civil servants responsible for victim policies; that is, there was an element of self-interest in the projection of a positive picture of progress made. Based on these findings, my conclusion was that victims' rights were not a priority in an overwhelming majority of the Member States of the United Nations.

- The next step was in 1997 when a group of experts, many of them attending this symposium, produced a weighty manual on the use and application of the UN Declaration. It was a very thick book on how to use and apply the Declaration combined with a much shorter,

[1] Emphasis should be placed on the word "compliance" because in the area of victims' rights too much attention is paid to the concept of "compliance." The word, in this sense, means the governing rules, the legislation of domestic jurisdictions, conforming to the standards of the UN Declaration, but formal implementation is not enough. What we need and what we are actually seeking is compliance to see that the law in action is in conformity with the standards of the UN Declaration.

briefer document entitled a "Guide for Policymakers." This was aimed at policymakers in the various countries on how they could make progress on implementing the UN Declaration. Despite this great effort put into producing the manual and guide for policymakers it is not used by governments, nor has any empirical study been conducted on its use or utility.

My conclusion is that the implementation of the provisions of the UN Declaration are still very incomplete, and that applies both to the developing world and first-world, or more affluent countries. There are still many deficiencies in terms of the three major components of the UN Declaration, namely treatment and protection, information, and reparation. While much progress has been demonstrated in many countries, it has been much more difficult to give affect to the provisions on providing information to the victims. The International Victimology Institute (Tilburg) conducted a comparative study in Europe of 22 countries and found the most successful country was able to supply actual information to 70% of the victims entitled to receive that information. While Europe is probably one of the most resourceful parts of the world in terms of victims' rights, even the best performing country still left 30% of victims without the information to which they were entitled. Reparation, included in the UN Declaration and included as a victim's right in most domestic legislation, was even worse. The success rate of achieving reparation by the offender to the victim was even less – much less – than 30% in most countries. The question is, "How do we improve this sad state of affairs?" "How are we going to make victims' rights a living reality, and not just 'law in books' but 'law in action'?" We need to (a) make use of empirical evidence on how to affect change, and (b) have a UN Convention.

The following is a of list the main findings of empirical research on how to affect reform of the criminal justice systems, or in other words, the basic conditions that need to be met for reform to happen:

- Change cannot be affected without a powerful network steering group composed of relevant stakeholders in every country; that is, law enforcement officials, victim support people, probation representatives, and social workers.

- The attitude of relevant officials should be favorable to change. It is important to change the attitude of people running the agencies, for example, the administration of police forces as well as the police working-the-streets. The general police attitude in many countries is still that the main job of the police is to catch criminals while tending to the needs of victims is considered by many police officers, and a few police forces, as not hardcore police work that is better handled by social services.

- A favorable attitude by itself is insufficient, however, and may even be counterproductive, which raises the issue of providing knowledge of victims' issues. This can only be gained by training and for training to be effective, it needs to be mandatory. It needs to include the judiciary despite the fact that in many countries the judiciary has refused mandatory training, invoking their right of independence. However, the "right to independence" should not encompass the "right to ignorance," or the "right to arrogance."

- Reform can only be achieved if adequate resources are supplied. To affect this, senior officials in relevant ministries should be charged with an express responsibility for victims' issues. Examples of best practice in this regard can be seen in the United States, Canada, and England where powerful and influential Office(s) for Victims of Crime (OVC) within their respective Ministries of Justice have been established. The absolute necessity of an OVC in promoting change is obvious when drawn in comparison to countries without one.

A second line of reasoning on how to make victims' rights "a living reality" is to have a UN Convention although there are counter-arguments to this proposal that may be dealt with at a later stage if they arise. In support of a *Convention on Justice for Victims of Crime and Abuse of Power*, Sam Garkawe argues that:

1. A Convention would increase the visibility of victims' issues.
2. A Convention is a hard-law instrument in comparison with a Declaration that is labeled a soft-law instrument. As such, a hard-

law instrument may pressure governments and courts to take a Convention more seriously than a Declaration.

3. A Convention would provide a framework for analysis to assess progress and evaluate developments.
4. The ratification process, which is essential after adopting a Convention, may motivate States to question why they do not support victims' rights. A refusal to ratify would require embarrassing explanation of such refusal.

The idea of having a Convention was realized by some prominent members of the World Society of Victimology (WSV), including Marlene Young, Irvin Waller, and Sam Garkawe who approached INTERVICT in Tilburg (the Netherlands) and, subsequently, TIVI in Mito (Japan). We decided to join forces and try to get a first cogent draft of a Convention because the idea of a Convention, of course, can only be realistically discussed if you have an idea of what can be included in such a Convention. An expert group meeting was organized in December 2005 in Tilburg, the Netherlands and a draft was produced. We then solicited critical comments on this draft by victimologists from all over the world on the Internet, subsequently modified the text and now are at the stage of a 4th Draft, the focus of this symposium (Appendix 1).

The most striking innovations of the Draft Convention in comparison to the original UN Declaration of 1985 have been the result of empirical evidence in victimology accumulated in the last two decades. The first difference is that we have come to the conclusion that *not all victims are the same*; that is, they do not have the same needs and interests. This important finding is reflected in Article 3 (3) of the Draft Convention which contains the non-discrimination clause; that is, victims cannot be discriminated against on the basis of age, gender, sexual orientation, and so on, and "*...without prejudice to provide special justice and support best-suited to victims who are particularly vulnerable because of age, gender, disability or other characteristics.*" This is important and the reference to "particularly vulnerable victims" is borrowed from most of the modern international protocols listing victims' rights. For instance, recent documents such as the Council of Europe's *Recommendation of Victim Assistance* (2006) make specific reference to the special needs of "particularly vulnerable victims." This is a major improvement in comparison to the vague references in the

Declaration. Article 17, for example, was limited to assistance and mentions that attention should be given to those who have special needs. While this reference is both valid and important, it much less sophisticated than the reference in the Convention to "particularly vulnerable victims."

The second difference relates to prevention of victimization. Article 4 of the Draft Convention contains a clause that commits us to reduce victimization, which is a classic provision on crime prevention. However, whether or not a provision on crime prevention is appropriate in a document on victims' right is debatable (see later). Article 8 under 5F about preventing and reducing repeat victimization is a much more important provision in this respect, and is a major step forward. In 1985 the phenomenon of repeat victimization was little known but during the last 20 years there has been an enormous amount of research done on repeat victimization and its frequency. The incidence of repeat victimization is staggering. If, for example, your house is burgled, the chances of re-victimization within four weeks are 400% and, with the exception of homicide, this extends to all categories of crime: property crime, violent crime, assault, and sexual crime. This phenomenon was not addressed in the 1985 UN Declaration but now has an important place in the Draft Convention.

The third example is Article 5 (2) under E in the Convention about the right to appeal a decision not to prosecute. This right is not in the UN Declaration but is in the Draft Convention. It is important because people have long realized that victims need some protection against inaction by the prosecution service. Protection was usually afforded by having the right to private prosecution. This is a common constant factor in all criminal codes and codes of criminal procedure; that is, virtually all have a possibility for the victim to privately initiate criminal prosecution in the case of inaction by the prosecutor's office. Despite this, empirical research on the effectiveness of this provision by the International Victimology Institute (Tilburg) found this is very dangerous victim's right because it never works; there is no single jurisdiction we found where private prosecution is successful. It is "dangerous" because it exposes the victim to the risk of intimidation by the offender and to financial risks. If private prosecution fails, as it does in actual practice quite often, the victim is liable for the costs of the proceedings and often has to reimburse the offender. Can you imagine how quickly that gives rise to secondary victimization? This is the general picture,

but there are some spectacular cases of success, in particular some successful private prosecutions in the U.S., but they are really the exception to the rule. Research evidence strongly suggests we should not revert to what is called the *citatión directe,* or direct prosecution by the individual victim. We should have a superior mechanism of *citatión indirecte*, or indirect prosecution by the individual in which a victim appeals a decision not to prosecute to the court and then the court will order the prosecutors to initiate ~~criminal~~ prosecution.

Article 5 (2), under J, is about ensuring enforcement of an order and the decree granting of awards to victims. Simply, this means ensuring that whenever a court or an authority awards damages to a victim, the enforcement of such orders should not be left to the victim but should be taken-over ~~by the government~~. The same idea is expressed in even stronger words ~~in~~ Article 10 (4), of the Draft Convention. It is interesting to see this same idea in two places in the Draft Convention. Article 2 (4) reads for example, "...*(when) there is a court order for restitution the State Party should be responsible for enforcing the order*." In many jurisdictions, the enforcement of court-ordered restitution by the offender to the victim used to be the responsibility of the victim. In our investigation of 22 jurisdictions within Europe and a number outside of Europe (see International Victimology Institute, Tilburg) we generally found that if the execution of court-ordered reparation to the beneficiary is the left to the victim, in 75% of cases the victim will fail. Unacceptably three quarters of victims awarded court ordered reparation received nothing. If the victim gets a favorable court order this raises expectations and, as victimologists we are aware that the worst thing you can do with victims is raise expectations and then not honor them. In France we have *parte civile*. This is when the civil party that joins the criminal proceedings has a standing of his or her own and can claim damages. However, even if the civil party is successful in securing court ordered damages, in 80% of cases in France the victim did not receive any money and in the 20% of cases where the victim did receive money transferred from the offender to the victim, sometimes it took years and many monthly installments to get the damages covered. Conversely, if we charge the government with enforcing court-ordered reparation, the numbers will be reversed. Research has indicated that in those jurisdictions where they have court-ordered reparation, the government will be successful in 80-90% of cases and actually retrieve the money from the offender and hand it

over to the victim. Therefore, this is an important provision in the Draft Convention. Allow me to propose one additional and final step. It can easily be addressed and argued that if the court orders the offender to pay reparation to the victim and the government is charged with enforcing that order and is successful in 90% of the cases, what happens to the remaining 10%? How can the discrepancy be justified? To my knowledge, for the first time in the history of my own country, the Netherlands has adopted a rule that for those 10% of cases, the government pays the court ordered restitution that should be paid by the offender. That is, the government pays the victim and then reclaims it, or attempts to reclaim it, for a number of years from the offender.

Article 7 of the Draft Convention is about the provision of information to victims. In comparison the Declaration is very limited when it come to informational rights simply mentioning that victims should be informed about their role and scope, the timing and progress of the (criminal) proceedings and of the disposition of the cases, especially when serious crimes are involved, and where victims have requested such information. Much progress has been made in this area in terms of subsequent international protocols. In the *European Union Framework Decision* of 2001 there is a much larger provision on informational rights; the same is true for the previously mentioned *Council of Europe Recommendation* of 2006 and this had been replicated in Article 7 of the Draft Convention. The specific information victims need is (a) about services, (b) the type of support available, (c) how to report an offense, (d) procedures following the report, (e) how to receive get protection, (f) how to get legal advise and legal aid, requirements for them to be entitled to compensation, and (h) where and how they can obtain more information. In addition, the special items of information given only to victims who have expressed a wish to that effect are (a) about the outcome of the complaint, (b) the court's sentence, and (c) informing the victim of the release of the convicted offender (refer Article 7, Section 3). The right of a victim to know about the release of the offender is indicative of real progress made but in many jurisdictions it is controversial because governments are reluctant to provide information on the release of prisoners to victims. On the other hand, research has shown this information is vital for victims. Can you imagine victims living in a neighborhood, being under the impression that their offender has been locked away safely, and all of a sudden they meet the offender in a supermarket or in the street when

they leave their house? It can be a horrific experience. The same is true for the suspension of pre-trial custody; this is another item important in this respect. If pre-trial custody is suspended for a certain reason or a certain limited time, this can be a shocking experience for a victim if he or she is not informed and all of a sudden unexpectedly runs into his or her offender. Therefore, despite the opposition of many governments and, indeed my own government who is very much opposed to a provision like this, I am proud to have it included in this Draft Convention and feel strongly that we need to retain it. Finally, it is interesting to note that in the Declaration some items of information will only be supplied and given to the victim when the victim has specifically asked for them. In the Draft Convention the opposite applies. There is a specific opt-out procedure, meaning that the victim can indicate to the authorities that he or she does not want to receive any information. This is also supported by empirical evidence. There are a number of victims who want to report a crime and then do not want any further involvement or any information from the authorities. This important opt-out procedure was suggested by the *European Forum for Victims Services*, which is an NGO consisting of all national victim support organizations in Europe. During the past 25 years it has dealt with millions of victims and it reports that many victims do not want to receive any information at all. This is the reason they have included an opt-out procedure in their policy documents that has been translated into the more recent international European protocols and has now found its way into the Draft Convention we are discussing.

The next striking difference between the Declaration and the proposed Convention concerns restorative justice. Number 7 of the Declaration reads as follows: "*Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims*." This is an unqualified sentence to promote these kinds of informal mechanisms to achieve justice. In contrast, Article 9 of the Convention dealing with restorative justice is more balanced and represents a measured improvement on the Declaration. It reads: "*States Parties shall endeavor where appropriate to establish or enhance systems of restorative justice that seek to represent victims' interests as a priority. States shall emphasize the need for acceptance by the offender of his or her responsibility for the offense and the acknowledgement of the adverse consequences of the offense for the victim.*" Then Section 2; "*States Parties shall endure that victims*

shall have the opportunity to choose or to not choose restorative justice forums under domestic laws, and if they do decide to choose such forums, these mechanisms must accord with victims' dignity, compassion and similar rights and services to those described in this Convention." Why is this so important? When the notions of mediation and of restorative justice were gaining momentum in all regions of the world during the last twenty years, it was assumed by some, or by many, that mediation and restorative justice was automatically "a good thing" for victims of crime. I still remember that there were very different perceptions between the North American continent, on the one hand, and Europe on the other. In one part of the world victim-support people promoted restorative justice, whereas in other regions of the world they and victimologists were concerned about mediation and restorative justice. Now some common ground exists in the sense that we all agree that mediation and restorative justice can be beneficial for victims provided the norms governing the standards of restorative justice pay specific attention to victims' needs and interests. Do not forget that most restorative justice programs and many mediation programs were not initiated by victim support groups but rather were promoted or initiated by offender groups. That is the reality in most parts of the world and most restorative justice programs in Europe were initiated not to promote victims' interests but to promote offenders' interests. This is not a negative situation as long as restorative justice programs are structured in a way that has now been described in Article 9 of the Draft Convention. Provided the conditions that these mechanisms must accord with a victims' dignity, compassion and similar rights and services to those described in this Convention are met, restorative justice could be an extremely useful addition or supplement to criminal justice interventions.

Finally, Articles 12-25 describe monitoring and implementation and the focus of my comments will be on the proposed *Committee on Justice and Support for Victims of Crime and Abuse of Power*. This committee is a construction borrowed from some other UN Conventions, where it has proved to be effective. However, the establishment of such a committee is an ambitious and controversial proposal that may prove to be an impediment in negotiating subsequent steps for this Convention because of the high costs involved and because many countries may be reluctant to accept a committee with powers to investigate and conduct on-site visits on their territory.

The original draft *Convention on Justice for Victims of Crime and Abuse of Power* has been revised four times and UN agencies have been lobbied to gain support for the idea of having a UN Convention on victims' rights, but what are the next steps in the pursuit of this goal? Before addressing this issue, I will outline the steps that have already been taken.

A large delegation of representatives of the WSV, INTERVICT, and TIVI attended the 15th session of the *United Nations Commission on Crime Prevention and Criminal Justice* in April 2006 and lobbied for the cause. It was able to get some points included in the Conclusions of the 15th session of the Commission. One of the most important of these was that the Commission request the Secretary-General to convene an inter-governmental expert group meeting with a dual mandate (a) to design an information-gathering instrument (i.e. questionnaire), and (b) to study the ways-and-means of promoting the use and application of victims' rights. The second part of the mandate meant, of course, working in the direction of a Convention. As a consequence, an inter-governmental expert group meeting was convened in Vienna in November 2006, and the WSV was represented. In addition to the main task of producing a questionnaire, the WSV managed to get three of its main principles incorporated in the final conclusions of the expert group meeting:

1. Reference to a Draft Convention as a possible next step in the promotion of victims' rights.
2. The idea of voluntary peer review, a process by which some countries volunteer to make an assessment of each other's performance in connection with the promotion of victims' rights. For example, the United States and Japan could agree on a bilateral arrangement where a group of experts from both countries would compare the state of compliance with UN Declaration in both countries and make an assessment of the reasons why one of the countries had a more impressive performance than the other.
3. Motivating governments to seek the assistance of NGOs in completing the questionnaire. I refer back to the unreliability of the responses to the questionnaire circulated in 1994-95.

The 16th Session of the *Commission on Crime Prevention and Criminal Justice* in April 2007 was again attended by a large delegation of WSV

members, including its President, with the aim of implementing three goals: (a) to attain higher priority for victims' issues in the UN United Nations Office for Drugs and Crime (UNODC), as it was believed the priority of their activities had shifted away from victims' rights and issues; (b) to explore the interests of governments in supporting a UN Convention on victims' rights; and (c) to ensure and follow-up on the recommendations made by the inter-governmental expert group meeting, in particular the implementation of voluntary peer review and the idea of having a Convention. The conclusions of 16th session of the *Commission on Crime Prevention and Criminal Justice* were disappointing in two respects. First, while the questionnaire was amended and adopted, its actual relevance is debatable because of what is referred to in UN jargon as "Convention fatigue," and "questionnaire fatigue." So, we are very afraid that when we send out the questionnaire the response rate will be low and that the idea of a Convention will not be really supported. There is no doubt that both the official organs of the United Nations and countries that could be and should be willing to take a leading position in a campaign working towards a Convention are insufficiently committed at present. The next step was taken in November 2008 at an ISPAC meeting.[2]

The next steps, as I see them, are that we have to go to Vienna again in April 2009 for the *17th Session of the Crime Commission* and pursue the same three objectives as in 2008: that is, (a) to promote the priority for victims' interests, (b) to work in the directions of a Convention, and (c) to seek support for our ideas. As to be discussed in future sessions of this symposium, it is proposed we target many key events and many key people – academics and civil servants – to promote our ideas and work in the direction of the next *United Nations Crime Congress* in 2010 to be held in Brazil. The World Society of Victimology's UN Liaison Committee has agreed on some priorities in this respect, even apart from our work in the direction of a Convention. The first priority should be to try to have a reference to victims' issues included in the title of the conference. A UN Congress, which is held every five years, has a major congress theme and

[2] ISPAC is a UN-related organization comprising NGOs, and again the World Society of Victimology was represented by John Dussich, Janice Joseph, and Maria de la Luz Lima. I have been told from various sources that they really made a great impact there and that is probably one of the lines that we need to pursue to make progress; that is, work through ISPAC and through other agencies to achieve our goal.

what we should aim and work for in the next one is to include a reference to victims' issues in the conference theme. Secondly, we should organize at least two workshops focusing on victims' issues on the fringes of the United Nations congress, in Brazil. There usually are five or six different workshops and we would like to see two of these workshops specifically devoted to victims' issues.

In conclusion, the objectives are clear. It is obvious where we want to go and it is satisfying to have an opportunity to spend two days with such an impressive group of colleagues, friends and experts to discuss the content of the Convention and the best strategies on how to pursue our objectives and achieve success.