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General Report on Rights and Obligations towards Victims

1. Introduction

In the keynote speech by Cécile Rousseau, Sigmund Freud was quoted as saying: "Let me introduce a little bit of obscurity into your sense of clarity". The objective of a general report is to provide exactly the opposite. Taking into account the limited space available for the report, it proved to be impossible to refer to all the interesting contributions made during the symposium. The most relevant papers are those which reflect general trends. Hence, this report will focus only on the major developments since the IXth symposium took place in Amsterdam. According to the division of labor agreed between the rapporteurs, my perspective is restricted to the rights and obligations towards victims of crime from a legal point of view.

2. New victims' rights in many jurisdictions

During the opening session of the symposium, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) was discussed. It was noted that according to the standards set by this document, progress had been made in many countries, but that much work remains to be done. Many papers that were presented in the sessions have provided illustrations of the validity of this observation.

First we have to identify some of the areas where progress has actually been achieved and other topics where victimology has not yet found adequate answers to pertinent questions.As far as progress is concerned, it is obvious that since the previous symposium in Amsterdam many jurisdictions in all parts of the world have introduced new victims' rights.[1] Regardless of the nature of the legal system involved[2], reform generally included the same key-rights. Every jurisdiction recognises the importance of the right to *information*: the right

[1]Papers were given on new rights in - inter alia - Australia, Belgium, Japan, South Africa, United States.

[2]In this connection it is usual to distinguish between adversarial systems on the one hand and inquisitorial systems on the other.

to be notified of the main developments when the case is processed. Equally general in nature is the right to *compensation and restitution*. The requirement that the victim is refunded for moral and material damages appears to be so self evident that little time is spent on providing philosophical justifications. More complicated is the right for victims to be treated with *respect* for their dignity. This right can be based on the victimological finding that acknowledgement and recognition of victimization is even more important in recovering from the event than financial amends. And finally, all legal systems show an awareness of the vital meaning of the right to *protection:* the privacy and the physical safety of victims have to be guarded against invasions by the offender or by the media.[3]

It is remarkable that some countries decided to incorporate these rights in Statutory Acts, while others laid them down in administrative guidelines. Empirical research in Europe shows that both approaches can be equally effective, a point that was confirmed in the paper by South Australia's Attorney General Trevor Griffin. American researchers, on the other hand, indicated a clear preference for statutory provisions.

Taking this issue of the *legal status* of victims'rights one step further, this symposium has demonstrated a revival of the call for constitutionalization of victims' rights.[4] In the United States our colleagues came very close to achieving an amendment to the federal Constitution, and similar aspirations were expressed by, among others, participants from South Africa and the Republic of Macedonia. It remains to be seen, though, whether or not such an upgrading of the status of victims' rights would actually contribute to their effectiveness in the daily operation of criminal justice systems.

3. Implementation issues

Which brings us to the all important issue of implementation. Many speakers have emphasized the crucial meaning of effective implementation of victims' rights. Marlene Young said that quite often the toughest fights and battles have to be fought after the adoption of standards. So I am happy to report that some real progress has been made in this area since

[3]These rights are also included in new initiatives on an international level. One of the papers referred to the new International Convention against Organised Crime, adopted in 2000 in Italy.

[4]For a detailed examination of the arguments pro and con see LeRoy L. Lamborn, *Victim participation in the criminal justice process: the proposals for a constitutional amendment*, The Wayne Law Review, Vol. 34, no. 1 (1987), p. 125-220.

the previous symposium.

Marion Brienen and Ernestine Hoegen from the Netherlands have presented their comprehensive pioneering study on the implementation of victims' rights in 22 European jurisdictions.[5] Their research has revealed many ground rules which have to be observed in order to prevent failure at the implementation stage. Victims' rights need to be drafted clearly and concisely; responsibilities for execution have to be allocated precisely, and the relevant provisions should not allow for easy escape clauses.[6] More importantly still, legal standards should be backed up by support structures providing for adequate logistics.[7] And it was shown that rights can only be effectively implemented when criminal justice authorities cooperate with other agencies in a *network* involving - inter alia - victim support, the probation service, and legal aid centres. The study by Brienen and Hoegen furthermore deals with the role of intangibles like the 'attitude' of the officials running the system and the 'culture' of a traditional criminal justice system, two of the factors which can pose virtually insurmountable obstacles to change. Equally useful insights were offered by Juan Nel and Johan Kruger from South Africa on the do's and don'ts of successfully implementing victim empowerment programs.[8]

The next step in shaping research programs should be to find out to what extent these findings also apply to other regions in the world. Some of the critical conditions for achieving success may turn out to be linked with specific cultural circumstances, while others could be more universal. When expanding research into these areas, special attention should be paid to

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[5]M.E.I. Brienen & E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems. The Implementation of Recommendation (85)11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Wolf Legal Productions: Nijmegen, The Netherlands 2000.

[6]Escape clauses are easily constituted by provisions which allow for too much discretion at the litigation stage, for instance when the trial judge can dismiss a claim for damages on the ground that a decision to that effect would complicate or delay the penal process (examples can be found in German and in Dutch law).

[7]Providing additional resources to the agencies charged with new responsibilities towards victims has been demonstrated to be a necessary - but *not* a sufficient - condition for effecting change.

[8]A full account of their findings is given in Juan Nel & Johan Kruger, *From Policy to Practice: Exploring Victim Empowerment Initiatives in South Africa*, a CSIR Publication, Pretoria 1999.

the role played by NGO's. In some of the industrialised countries NGO's have been instrumental in shaping and effecting new victim oriented policies.[9] This begs the question as to the role similar organisations might have in other regions of the world. Another recommendation which follows from the symposium is to try to learn from the experience gained by countries in transition (Arléne Goudreault). The formerly socialist states in eastern Europe and nations like South Africa have reformed their legal systems dramatically. Traditional values have been completely reassessed and a new balance of competing interests has been incorporated into modernised constitutions. These large-scale-experiments pose challenging opportunities to the rest of the world to find out which socio-political conditions are conducive to effect desired changes while minimising the risk of unintended harmful consequences. And finally, new knowledge of implementation issues could be gained by studying the proceedings before international tribunals (such as the *ad hoc* tribunals for the former Yuchoslavia and for Ruanda), where separate victims'units have been established and special protective measures apply. From this point of view, Sam Garkawe from Australia presented a useful paper on the position of victims in the proposed International Criminal Court.

4. Vulnerable victims

I was also struck by the very large number of papers on the rights of particularly vulnerable categories of victims.

Of course the research on domestic violence is booming. This is unsurprising, considering the fact that in 'ordinary' cases there is an average of 30 instances of physical violence before the first report is made to the police. Hence there is a dreadful dark number and a corresponding level of silent and anonimous suffering. The problems connected with domestic violence will be at the centre of victimological research for a long time to come.

I counted no less than 35 papers on the special problems involved with victimization of children; 10 papers on the position of the elderly; and many observations on the plight of tourist victims. Research into these areas yields two types of useful insights. On the one hand it reveals special needs which are unique to the classes of victims involved. The criminal

[9]Céline Hervieux-Payette, senator from Canada, reported this to be the case in her country. Similar findings were recorded from the United States and the United Kingdom.

justice system and service providing organisations may have to adapt in order to accommodate special sensitivities. But on the other hand particularly vulnerable victims may show responses to crime which turn out to be less conspicuous but nevertheless also prevalent in many other types of cases as well. Juveniles, the elderly, and tourists in this respect serve as heuristic tools enabling researchers and practitioners to add more content to previously existing theories about criminal victimisation.

Furthermore, we had two keynote speeches (by Rivka Augenfeld and Cécile Rousseau) dealing with the needs of refugees, who quite often suffer secondary victimization when trying to be admitted in western democracies after having gone through traumatic events in their home country. In this respect, victimology shares the same fate with many other academic disciplines. Although it has been neglected - or even denied - by many scholars, we are living in an age of massive migration. In fact, the sheer number of dislocated people in our times is unparallelled in the entire history of mankind. The implications of this phenomenon are sweeping to an extent that can hardly be overestimated. It follows that the plight of refugees is a pressing new topic for research by victimologists who are dedicated to the study of the effects of abuse of power.

Finally, compared to the Amsterdam Symposium, more attention was paid to the victimisation of marginalised groups such as transsexuals and prostitutes. In her key note address, Kristiina Kangaspunta offered us interesting information about trafficked women, a prime example of victims who are not always regarded as very popular in many societies

It has been suggested by one of the speakers in a plenary session - prof. Ezzat Fattah from Canada - that victimology is selective in the choice of victims we pay attention to. He argued that because of the ideological character of the discipline of victimology, different classes of victims have been created on the basis of moral judgements. And Fattah asserted that considering the interests of victims also means taking a stand against the offender.

Now, it touches on the very heart of academic discourse to be provoked to do some soulsearching. But after carefully reviewing the evidence produced at this Montreal symposium, I have to conclude that these allegations can not be substantiated. They are generally mistaken or at best highly exaggerated. As the preceding paragraphs of this report show, victimology *does* pay attention to the so-called unpopular classes of victims, and collegues from different parts of the world *are indeed* constantly looking for special groups of victims

who are currently underserved or neglected. And in most regions of the globe victimologists are by no means anti-offender.[10] In all authoritative international documents on this subject matter - like the UN Declaration of 1985 - it is stipulated explicitly that the participation of the victim in legal proceedings is guaranteed only in so far as it does not prejudice the rights of the defendant.

5. Restorative justice

Another item which needs to be highlighted is mediation and restorative justice. More than 30 papers were given on this theme, outlining many interesting and promising programs and experiments in all regions of the world. It cannot be denied that mediation and other examples of restorative justice are very promising tools to amend and reform traditional criminal justice systems. Hence we should continue and expand our efforts at reducing punishment by replacing it with positive measures benefitting the victim, the offender and the community at large. But let us be cautious. For some colleagues, the concept of restorative justice appears to have acquired near-religious dimensions. In some papers restorative justice clearly was conceived of as abolitionism in disguise. I contend that such an approach is both counterproductive and dangerous.

In his keynote address, Greame Simpson warned the audience that restorative justice is often, but mistakenly, seen as the exact opposite of a punitive approach. And in one of the workshops John Stein from NOVA correctly interjected that we need a punitive criminal justice system as a fall back system for the many cases where restorative justice just does not work. Let us never forget that in the vast majority of cases the perpetrator is never found or arrested. In all of those instances the concept of restorative justice loses much of its meaning, but the victims involved are still in need of assistance. And we really need to consider the important observations in the keynote by Helen Reeves, on the large numbers of intimidated victims. She argued convincingly that when victims are too frightened to report a crime, they are automatically denied all rights and services which are available for others (support, compensation, legal rights).

The best paper on restorative justice I heard was given by a young researcher called

[10] One of the most repeated phrases in this respect is that victimology is not a zero-sum-game.

Jason Nadeau from Leuven in Belgium.[11] He carefully reviewed the pros and cons of this approach, he restated the - well known but yet astonishing - fact that we still don't even have an adequate definition of restorative justice, and he called for the development of an integrated model. His paper could well influence the agenda for research on restorative justice until we meet at the next symposium in South Africa.

6. Repeat victimisation

Just a brief remark on repeat victimisation. This concept has properly been labeled as "the biggest invention of the past decade". It opened the road to studies into the model of a 'victim-career' (Schneider), since it became clear that victimisation is the best predictor for future victimisation. Against this background it is slightly dissapointing that little original theoretical work was presented on this topic. On the other hand, many new action plans have been developed throughout the world in order to prevent cases of revictimisation (as outlined in the keynote by Graham Farrall on policing).

7. Victim impact statements

And of course the debate about victim impact statements went on. Edna Erez and Helen Reeves were invited to review the basic arguments pro and con.

Erez reiterated the most compelling grounds to introduce this participatory right. Victims want to have an imput in sentencing; they just want to be heard. Being heard is a source of empowering victims, which positions the v.i.s. as part of a procedural justice theory. She refuted the most common arguments against the v.i.s. The imput by victims does *not* lead to increased sentences, she argued. Usually there is no influence at all, and where there is an effect, it tends to *decrease* punishment. Impact statements lead to better sentencing, and does not reduce sentencing consistency. As to the argument that v.i.s. will violate or reduce offenders' rights, she indicated that her research has shown that victims do not bash offenders or exaggerate the consequences of the crime (the reason being that usually there is an

[11]The paper was titled *The End of the Restorative Justice Myth... Towards an Integrated Model for the Restorative Paradigm*. It may be observed that in many workshops the most interesting papers were presented by victimologists who have entered the field recently. This should not be taken as crticism of the 'old guard', but rather as an encouraging sign that there is definitely a promising future for the discipline of victimology.

intermediary). Quite often they were, on the contrary, too mild. And finally, she contended that empirical evidence refutes the claim that v.i.s. will harm the victims because they are compelled to relive the experience or that they are unduly burdened with responsibilities. Instead, most victims feel empowered; v.i.s. contributes to a positive therapeutic effect. The only remaining negative aspect is that victims tend to have their expectations raised to an extend that cannot be met. To counter this they need solid explanation of the purpose - and limits - of the v.i.s.

Helen Reeves countered by explaining that *a.* v.i.s. is too late; and *b.* v.i.s. cannot influence sentencing and victims should not be made to believe differently. Victims deserve an opportunity to express themselves in the pretrial stages. The police and the prosecutor need to know more about victim impact when they process the case. Hence the need for a *'victim personal statement'*, expressing special needs of the victim, his wish to be informed, to be compensated, to be referred to support services and to take part in mediation procedures. The victim should, in her opinion, be offered a range of opportunities: not limited to sentencing, but also related to decisions to prosecute, restorative elements etcetera. She also pointed to a 'gray area' of unforseen levels of social and psychological harm and the danger that judges won't believe the victims in this respect. The long term consequences of crime can be devastating and even the victim may not be aware of that. This is inconsistent with the 'snapshot' approach of the v.i.s.

The debate was illuminating in more than one sense. Opposing arguments were articulated exhaustively and eloquently. Under the surface of disagreement, however, I have spotted an increasing area of common ground. Without trying to reconcile incompatibles, it is my impression that the still widely differing points of view are to some extent converging. All participants in the debate agree, for instance, that the right to be heard is of vital importance. Disagreement persists as to the best moment - and the best way - to effect this opportunity. As a next step, I believe that there is a growing awareness that information on victim impact should be made available to the authorities as early as possible during the preliminary stages, with updates later on. Furthermore, no-one seems to object to a written v.i.s. to be entered into the case file. All of this is intended, of course, to enable the authorities to take the victims' interests into account when making decisions during the course of the proceedings. And finally, there is widespread agreement that it is unwise to award the victim the formal

right to express a view as to the level of punishment he would deem desirable. This so-called *victim statement of opinion* does exist in some jurisdictions (e.g. in some states in the USA), but there appears to be a growing scepticism to adopt similar measures in other criminal justice systems.

8. Conclusion

In his opening address, Irvin Waller challenged us to develop ideas that can shape our future. Reviewing the many papers presented during this Symposium, I have two recommendations to make.

First, more intense attention should be payed to the rights of victims of war crimes. Let us hope that the establishment of a permanent International Criminal Court will prove to be a major step forward, as was suggested by Paul Separovic and by Greame Simpson.

And secondly, let us be aware of the core values of victimology.[12] As far as I can see, we ought to be particularly conscious of the fact that victimology could never be, and should not be, a value-free discipline. It must openly and explicitly aspire to promote justice for all. To me, that is self-evident, like the obvious ultimate objective of the medical science is to promote health. The theme of this Symposium has been "Beyond Boundaries". So let us keep trying to transcend existing boundaries of ignorance while keeping in mind that there is no boundary to compassion.

[12]Sara Ben-David & Ellen Jabstrebske presented a memorable paper on this, titled *Normative Victimology or Victims' Victimology*.