

LOOPHOLES, RISKS AND AMBIVALENCES IN INTERNATIONAL LAWMAKING; THE CASE OF A FRAMEWORK CONVENTION ON VICTIMS' RIGHTS*

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

1. Introduction
2. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
 - 2.1 Introduction
 - 2.2 Nature and Content of the Declaration
 - 2.3 The Legal Character of the Declaration
 - 2.4 Implementation of and Compliance with the Declaration
3. Reflections upon International Lawmaking
 - 3.1 Introduction
 - 3.2 The Irrelevance of the Classical Divide between Hard and Soft Law
 - 3.3 Risks and Problems of Lawmaking in the UN Context
 - 3.3.1 Strong Conventions, but Lack of Ratifications: The Cases of Indigenous Peoples and Migrant Workers
 - 3.3.2 Endangering Declaratory Texts with a Customary Law Character: The Case of the Draft Articles on State Responsibility
 - 3.3.3 Dealing with Frustrations in International Lawmaking: The Case of the Forest Convention
4. Framework Conventions and Forms of Co-Regulation
 - 4.1 Introduction
 - 4.2 The Idea and Actual Use of Framework Conventions
 - 4.3 The Idea and Actual Use of the Technique of Co-Regulation

* © W. van Genugten, *et al.*, 2007.

** W. van Genugten: Professor of International Law at Tilburg University and a fellow of the Tilburg University International Institute on Victimology, INTERVICT; R. van Gestel: Professor of Theory and Methods of Legislation at Tilburg University; M. Groenhuijsen: Professor of Criminal Law, Criminal Procedure and Victimology at Tilburg University, and Director of INTERVICT; R. Letschert: Senior researcher at INTERVICT.

- 4.4 Linking the Concepts of a Framework Convention and Co-Regulation to the Protection of Victims' Rights
- 5. Monitoring Implementation and Compliance
 - 5.1 Introduction
 - 5.2 Learning from Human Rights Monitoring Procedures
 - 5.3 Learning from the Monitoring Procedure of the Framework Convention for the Protection of National Minorities
- 6. A Preliminary Assessment of the Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power
 - 6.1 Introduction
 - 6.2 Legal Character of the Standards
 - 6.3 Framework Convention and Co-regulation
 - 6.4 Monitoring Implementation and Compliance
- 7. Final Observations and Overall Conclusions

Abstract

1. INTRODUCTION

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

- A hard law document puts more pressure on countries to implement and enforce victims' rights.
- Courts will take a convention more seriously.
- The European Union Framework Decision on the Standing of Victims in Criminal Proceedings (2001) has shown that most principles in the UN Declaration are not so obscure, vague or uncertain that they cannot be codified in a hard-law document.
- The ratification process of a convention urges states to justify why they would not be supportive of the hard-core legal protection of victims' rights.
- There is too much rhetoric in the implementation of the UN Declaration.

- The issue of poor treatment of victims throughout the world should be viewed as a matter of human rights protection; therefore there is no need to treat victims' rights differently compared to other fundamental rights, which are laid down in international conventions.¹

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

As a follow-up to Garkawe's call for a convention, the international victimology field started a discussion leading to a 'Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power'. This text was drafted at an expert meeting in December 2005 and is currently being circulated in relevant governmental and non-governmental institutions.² Be that as it may, in our mind seriously embarking upon the long road towards a convention is also a difficult and to some extent even risky enterprise which gives rise to several questions. How about the risk that relatively 'hard' elements of the 1985 Declaration might even lose their status of (being close to) international customary law? How about the risk that a strong convention with clear-cut and unequivocal language, looking good on paper, might scare off states in the process of ratification? How about creating an instrument that can count upon maximum support from the victims' rights protection field? To our mind there is a serious need to at least consider and possibly overcome these types of loopholes, risks and ambivalences, before states would be urged to work towards the adoption of a convention.

In this paper the following questions will be addressed:

- What is the current state of affairs as to the protection of victims' rights, as agreed upon in the 1985 Declaration? How about its content, legal character and the monitoring of its implementation and compliance? (section 2)
- What can be learned from today's academic discussions regarding the character of international legal standards and from recent international debates on standard setting in fields somehow related to victims' rights? (section 3)

1. S. Garkawe, 'The Need for a Victims Convention', 9 *The Victimologist* (2005) pp. 4-5.

2. More information on its history and contents can be found in section 6 of this paper.

- What legal instruments and which methods of international lawmaking might be most adequate in order to make progress in the field of victims' rights protection? (section 4)
- Once the standards and the methods of lawmaking are agreed upon, what would be the best mechanism for monitoring implementation and compliance in the field of victims' rights? (section 5)
- To what extent does the Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power meet the standards as developed in this paper? (section 6)

Whatever the mode of (non-)codification of victims' rights is going to be, ultimately the success of any codification lies in the internalisation of the rules and principles in the behaviour of people and the willingness of states to implement the standards and guarantee compliance. Thereby, the words 'implementation' and 'compliance' may seem to speak for themselves, while they are often used interchangeably. However, for the present paper it is important to keep in mind that they refer to different things. In the words of Dinah Shelton, 'implementation of international norms refers to incorporating them in domestic law through legislation, judicial decision, executive degree, or other processes', while 'compliance includes implementation, but is broader, concerned with factual matching of state behaviour and international norms'.³ Compliance, in other words, refers to the question whether or not states do really live up to their obligations. In this paper the question will be raised what type(s) of legal instruments and which methods of international lawmaking would be needed in order to realize the highest attainable level of compliance.

Having said that, we would like to add from the very beginning that it would be an illusion to think that there is one single 'optimal solution' when it comes to the codification of victims' rights. To be able to determine the optimum presupposes that one can anticipate what the interested parties expect from codification. In general, most states will undoubtedly want to strengthen the worldwide protection of victims' rights in, for instance, criminal proceedings. However, such an overall consensus would not necessarily mean that there is consensus about every aspect: how strict would the legal protection of victims have to be, how can states best be

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

held responsible for upholding these rights, and which methods and techniques for monitoring compliance and for financial compensation of damages caused by insufficient state action to protect victims' rights would be the most adequate?⁴

Further to that, striving for an optimum also suggests that the parties involved in the lawmaking process will come to rational decisions on the basis of clear and unequivocal evidence about the practical and legal consequences of different regulatory options. In short, rational approaches emphasise the importance of deterrence and explore the optimal level of sanctions required to sustain cooperation and compliance. These theoretical approaches explain compliance in instrumental terms, linking actor behaviour to the nature of the problem, the structure of the solutions chosen, and the costs and benefits associated with different behaviours.⁵ In the international daily reality such rational evidence is often lacking or incomplete, while, on the contrary, aiming for deliberate ambiguity is not an uncommon practice in the negotiations on draft conventions and other legally binding documents.⁶

Finally, there is still fairly little knowledge about the pros and cons of using the instrument of a convention when it comes to the responsiveness to the needs felt in daily practice. Experience so far in the field of victims' rights, both on the national and the international level, has taught us that a codification in order to be successful requires a complicated process of 'multi-level implementation' in which states, NGOs, judges, prosecutors, probation officers, police officials etcetera participate. All have to play an important role in safeguarding that the 'chain of protection' remains unbroken.⁷ One should bear in mind that drafting a convention is only a small, though not unimportant, link in the total regulatory chain.

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

5. Apart from rationalist approaches, there are also more norm-driven theories and liberal theories about state behaviour towards international law. For an overview, see K. Raustiala, 'Compliance & Effectiveness in International Regulatory Cooperation', 32 *Case Western Reserve JIL* (2000) pp. 387-440.

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

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

2. THE 1985 DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER

2.1 Introduction

The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was prepared in surprisingly little time. Plans to make a first draft originated only in 1982 and were executed by members of the World Society of Victimology, the world's premier organisation discussing and lobbying for victims' rights internationally. Three years later, the Declaration was unanimously adopted by the Seventh UN Congress on Prevention of Crime and Treatment of Offenders, held in Milan in August/September 1985. Later that year, on November 29, the General Assembly of the UN did the same.⁸ In the present section, the nature and contents of the Declaration will be further introduced, followed by an assessment of its legal character and of the ways in which the implementation and compliance are organised.

2.2 Nature and content of the Declaration

The nature of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power is adequately reflected in its official reference. Alongside specific victims' rights, it also contains 'basic principles of justice'. Basic principles are usually formulated in a more abstract way compared to individual or collective rights. On the other hand, it is exactly this rather general nature which made the provisions in the Declaration universally appealing. As a matter of fact, the adoption of the Declaration has been hailed as a substantial moral victory. Many regard it as a *Magna Charta* for victims.⁹ In our eyes as well, it is without any doubt a major contribution to international law, and it also inspired international organisations other than the UN to follow suit.¹⁰ And while not being a legally binding document, the strength of the Declaration emanates from its inspirational power, its symbolic value being derived from its aspirational content.

Why is it justified to attribute this high praise to the Declaration? We feel this is the case because the Declaration strikes the right balance between idealism and realism. It sets standards worth aiming for, yet it also radiates an awareness of the fact that full and instant compliance is unattainable. Having said that, it is useful to

8. A/RES/40/34.

9. Z.P. Separovic, 'The Victim Declaration: A Substantial Moral Victory for Victims of Crime and Abuse of Power', in A. Gaudreault and I. Waller, eds., *Beyond Boundaries. Research and Action for the Third Millennium* (Montreal, Association québécoise Plaidoyer-Victimes 2000) pp. 277-282.

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

take a closer look at the means that have been used in order to achieve the Declaration's complicated and multi-layered objectives.

The key-issue here is language. It is the variety of the wording in the relevant propositions that is essential for a proper understanding of the document and of its acceptability in the eyes of states. A few examples suffice to underscore this point. The principles are sometimes stated in a clear, uncompromising way. To illustrate: 'Victims should be treated with compassion and respect for their dignity' (Para. 4). In other parts of the Declaration, the wording is slightly more cautious. This applies, for instance, to the provision on information. Victims have to be informed of their role, of the scope, timing and progress of proceedings and of the disposition of their cases, but this is put in perspective by the addition 'especially where serious crimes are involved and where they have requested such information' (Para. 6(a)).

In still other instances the standards set by the Declaration are easy to accept for all the UN Member States because a qualifier has been inserted. Such is the case, *inter alia*, in connection with informal mechanisms for dispute resolution, including mediation. The Declaration suggests that these practices should be utilised 'where appropriate' (Para. 7). A comparable technique has been used in Para. 8: 'Offenders or third parties responsible for their behaviour should, *where appropriate*, make fair restitution to victims, their families or dependants (...)'¹¹ It is left to the discretion of the UN Member States to determine when this is the case.

Another technique to secure universal support is to merely demand that governments 'consider' certain steps. An example is Para. 9, reading that governments 'should review their practices, regulations and laws *to consider* restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions'.¹²

As a final example, illustrating the character of the Declaration and its acceptability for states, we refer to the provisions on compensation. State compensation is by nature an extremely sensitive topic, since it may involve large sums of money, while many states either just do not have the required resources or are unwilling to prioritise funds for this particular purpose. Hence it is obviously difficult to reach consensus on state compensation on a global level. Again, the Declaration does comprise provisions on this issue, facilitated by the carefully chosen flexible wording: '(...) States *should endeavour* to provide financial compensation to (...)' (Para. 12).¹³ And: 'The establishment, strengthening and expansion of national funds for compensation to victims *should be encouraged*' (Para. 13).¹⁴ Even poor and unwilling UN Member States could hardly object to this language.

11. Emphasis added by the present authors.

12. *Ibid.*

13. *Ibid.*

14. *Ibid.*

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

- Mechanisms should be established in order to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible (Para. 5).
- Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected (Para. 6(b)).
- Providing proper assistance to victims throughout the legal process (Para. 6(c)).
- Taking measures to minimize inconvenience, protect their privacy and ensure their safety from intimidation and retaliation (Para. 6(d)).
- Avoiding unnecessary delay in procedures (Para. 6(e)).
- Receiving the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means (Para. 14).
- Police, justice, health, social service and other personnel concerned should receive training to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid (Para. 16).
- In providing services and assistance to victims, special attention should be given to particularly vulnerable victims (Para. 17).¹⁵

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

15. For a number of reasons, the 1985 Declaration refers to 'those who have special needs', but nowadays these categories would be labelled as 'particularly vulnerable victims'.

2.3 The legal character of the Declaration

The UN Declaration has been adopted by a resolution of the UN General Assembly. It should be kept in mind that in United Nations practice a declaration is a special instrument, only suitable ‘for rare occasions when principles of great and lasting importance are being enunciated’.¹⁶ Although not legally binding, using that particular instrument creates ‘a strong expectation that Members of the international community will abide by it’.¹⁷

In the 1980s, the drafters of the Declaration clearly did not intend to create legally binding obligations, and the subsequent practice of UN Member States so far does not give reasons to believe otherwise. Exercising the rights of the Declaration is dependent upon national legislation – or international customary law; see below – as well as appropriate governmental policies and procedures. Thereby, it is again relevant to mention the fact that the Victims’ Rights Declaration has been adopted unanimously. This at least implies that states accepted the content of the norms and were prepared to show their commitment to the outside world towards the implementation of the norms in domestic legislation and policy and to comply with them in principle.

The value of political commitments to implement the norms should not be underestimated. Being adopted at the highest political level normally increases the status of the norms. The fact that they lack binding legal consequences therefore does not necessarily mean that states can easily neglect these norms or that they will not comply with them. The other way around, history shows that a formal commitment towards implementation does not automatically imply action in terms of adapting national legislation and creating the necessary infrastructure for bringing victims’ rights into effect and, if necessary, enforce compliance. Even the implementation of the 2001 legally binding European Framework Decision on the Standing of Victims in Criminal Proceedings proved to be difficult, considering that most EU Member States did not establish an integrative legal framework for the transposition of all the rights and duties into national law.¹⁸

In a pioneering study by Marion Brienen and Ernestine Hoegen, it was analysed to what extent 22 European jurisdictions belonging to the Council of Europe do practice the commitments following from the 1985 Declaration.¹⁹ It was established beyond doubt that in virtually all these jurisdictions it proved to be possible

16. Commission on Human Rights, Doc. E/CN.4/832/Rev. 1, Para. 105.

17. Ibid.

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

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

to make improvements in informing victims of their rights, of the processing and of the outcome of their case. Conversely, it turned out to be much more difficult to increase the proportion of victims actually receiving the compensation they are entitled to from the offender. In evaluating the performance of the authorities in providing information, the standard to be applied was usually a simple dichotomy: a leaflet was either given to the victim or it was not; the victim was either informed of the time of the trial or he/she was not. Recognition and respect for dignity are by their very nature much more complicated, as is also made clear by Brienens and Hoegen.²⁰

The study conducted by Brienens and Hoegen relates to European states. So far, there is no similar study on a global scale. For that reason, we can only *tentatively* discuss the question whether and to what extent the Declaration consists of standards that have reached the level of international customary law (especially the demand for settled state practice). In doing so, we are using the standard criteria as developed by the ICJ: the acts concerned ‘must be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’ and ‘the States concerned must therefore feel that they are conforming to what amounts to a legal obligation’.²¹ Further to that, we have in mind the ICJ ruling that ‘the frequency, or even habitual character of the acts is not in itself enough’, while acts should not be ‘motivated only by considerations of courtesy, convenience or tradition’.²² In addition, ‘State practice, including that of states whose interests are specially affected’, should be ‘both extensive and virtually uniform (...)’,²³ while ‘minor inconsistencies’ are acceptable.²⁴

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

With respect to the more specific victims’ rights, a more differentiated approach is warranted. We would argue that most of the more detailed rights included in the Declaration have a similar, generally accepted foundation. The right to information, the right to restitution by the offender, the right to have one’s privacy and

20. *Ibid.*, passim (all country chapters have a section on ‘Treatment and Protection’).

21. *North Sea Continental Shelf Cases*, Judgement of 20 February 1969, para. 77, *ICJ Rep.* (1969).

22. *Ibid.*

23. *Ibid.*, para. 74.

24. E.g., *Fisheries case*, Judgement of 18 December 1951, *ICJ Rep.* (1951) p. 138.

physical safety protected are all, *inter alia*, rooted in the belief that the rule of law cannot be sustained unless these demands are met.²⁵ Only in exceptional instances must it be doubted whether a specific right is embedded in such a firm way. An example might be Para. 9 of the Declaration, calling on governments to review their criminal justice system to consider restitution as an available sentencing option. It might be difficult to collect convincing evidence that this does in fact reflect the international consensus as to how the sanction system should ideally be constructed.

As to the second part of the ‘customary law test’ – on the settled state practice – we are facing serious problems. State practice should be both extensive and virtually uniform, including the practice of states whose interests are specially affected, so: virtually all UN Member States. We feel it cannot be credibly argued that this is the case with regard to the vast majority of the provisions of the Declaration. The (limited amount of) empirical data clearly indicates that compliance with the standards of the Declaration is neither extensive, nor virtually uniform. There are vast differences between states in this respect, and it is obvious that a very substantial number of jurisdictions hardly pay any attention at all to the specific provisions of the Declaration. It is either the cultural environment, the lack of infra-structural circumstances or of financial resources that prevent these states from complying with many of the aspirational standards they endorse in the abstract.²⁶

In conclusion, it can be stated that the 1985 Declaration meets the standard of the *opinio juris*, but in many ways fails to meet the ICJ standard of settled state practice.

2.4 Implementation of and compliance with the Declaration

Declarations generally do not make any reference to a monitoring mechanism, as is also the case with the Victims’ Rights Declaration. There is, however, no question that such a mechanism is needed for a serious application of the standards contained therein.²⁷ To its credit, the United Nations stands out as an organization

25. The preceding observations can be substantiated by the fact that the content of the Declaration has been reaffirmed many times by the global community. On the UN level, we refer to the ‘Handbook on Justice for Victims’ and the ‘Guide for Policymakers’, which will both be addressed in the next section of the present contribution; and to the Bangkok Declaration on ‘Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice’, adopted by the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, 23 April 2005, UN Doc. A/CONF.203/L.5.

26. In subsection 2.4 *infra*, more detailed information will be provided on the conditions that have to be met in order to achieve effective reform in this area.

27. What follows is a brief account of the implementation efforts after the adoption of the Declaration. More details are provided by M. Groenhuijsen, ‘Victims’ Rights in the Criminal Justice System: A Call for More Comprehensive Implementation Theory’, in J.J.M. van Dijk, R.G.H. van Kaam and J.-

which is keenly aware of the limitations of 'merely' adopting solemn declarations. Consequently, immediately after 1985, a full programme was initiated in order to give worldwide effect to the provisions contained in the Declaration. In 1986, so-called 'implementation principles' were developed by the UN, followed by a 'commentary' on the basic rights and services with an outline of examples of best practices collected from different regions. Nevertheless, in 1993 the 'Onati report' was issued, culminating in the following conclusion: 'There was general agreement that despite the valuable work of the United Nations and the undeniable progress in many countries, the work on the implementation of the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, as well as related international, regional and national standards and norms, had been insufficient.'²⁸ The next step, following that report, was to circulate an extensive questionnaire, covering all items in the Declaration, to be completed by the UN Member States in 1995. However, reactions were received from only 44 states, the lowest reply-rate in any UN survey on implementation in the field of victims' rights. These results were generally seen to be extremely disappointing and the data could not be considered as reliable.²⁹

Two more steps, to be situated at the dividing line between implementation and monitoring, have to be mentioned here. In 1999, the 'Guide for Policymakers on the Implementation of the UN Declaration' was published by the UN, joined by the 'Handbook on Justice for Victims: On the Use and Application of the Declaration'.³⁰ The 'Guide' was a brief booklet, developed to highlight programmes and policies that had been put into effect in various jurisdictions to implement the Declaration and to ensure that the effectiveness and fairness of criminal justice, including related forms of support, are enhanced in such a way that the fundamental rights of victims are respected. The 'Handbook' is a much larger document, designed as a tool for implementing victim service programmes and for developing victim-sensitive policies, procedures and protocols for criminal justice agencies and other organisations and professionals that come into contact with victims. The Handbook was drafted recognising that differences arise when its principles are applied in the content of different legal systems, social support structures and cul-

A. Wemmers, eds., *Caring for Crime Victims: Selected Proceedings of the Ninth International Symposium on Victimology* (New York, Criminal Justice Press 1999) pp. 85-114.

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

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

30. Available through <www.victimology.nl> under 'key instruments'.

tural settings. The Handbook is not meant to be prescriptive but to serve as a set of examples for jurisdictions to examine and test best practices.

The level of implementation in different states varies considerably. Research in 22 European jurisdictions mentioned before has revealed a long list of victim-oriented legislative initiatives in the period before 1985 and in the period between 1985 and 1999.³¹ Many of the provisions in the relevant statutes literally conform to the standards set by the Declaration. But we do not think that this is enough. Again: compliance is more important than implementation. Substance must prevail over form.

In assessing compliance with the Declaration, we suggest that a consumer perspective should be adopted. That is to say, the decisive criterion should be whether individual victims actually benefit from the rights and services to which they are entitled. Implementation and compliance are not determined by the 'law in the books', but by 'law in action'. Fortunately, in the past decade at least a few empirical research projects as to the latter have been completed.³² These studies have resulted in a general set of criteria for predicting the effectiveness of legal reform on behalf of victims. Some main findings are:

- The likelihood of success is increased when a country has established a *powerful 'steering group'*, with all relevant stakeholders represented in its composition and being responsible for drafting a comprehensive strategy.

31. Brienen and Hoegen, *supra* n. 19, pp. 1172-1174.

32. For an overview, see H.J. Schneider, 'Victimological Developments in the World during the Last Three Decades: A Study of Comparative Victimology', in Gaudreault and Waller, *supra* n. 9, pp. 19-68; and M. Brienen, M. Groenhuijsen and E. Hoegen, 'Evaluation and Meta-Evaluation of the Effectiveness of Victim-Oriented Legal Reform in Europe', 33 *Criminologie* (2000) pp. 121-144. Empirical research by the National Center for Victims of Crime in the US has, for instance, shown that strong legal protection – i.e., legally binding rules, like State constitutional amendments – can make a difference in affording victims their rights to be involved and to feel that the system is responsive to their needs. They were especially more likely to be notified of relevant events in their cases, to be informed of their rights as crime victims and of the services available, to exercise (some of) their rights to participate in the criminal justice process, and to give high ratings to the criminal justice system. On the other hand, the same research has proven that strong legal protection is often not sufficient. More than one in four victims from the strong-protection States were very dissatisfied with the criminal justice system. Nearly half of them were not notified of the sentence hearing, and they were as unlikely as those in weak-protection states to be informed of plea negotiations. Furthermore, substantial proportions of victims in both the strong and weak-protection States were not notified of other rights and services, including the right to be informed about protection and to discuss their case with the prosecutor. See D. Beatty, S. Smith Howley, and D.G. Kilpatrick, *Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims* (Washington D.C., National Victim Center 20 December 1996). For a summary of the findings: D.G. Kilpatrick, D. Beatty, and S. Smith Howley, *The Rights of crime victims – Does Legal protection make a Difference?*, National Institute of Justice, US Department of Justice, Research Brief, December 1998.

- The attitude of those responsible for rendering the services or for effectuating legal rights must be favourable to change. This applies to the *leadership of the authorities* operating the criminal justice system as well as to all those who actually have face-to-face contact with the victims.
- Solid attitudes are indispensable, but not sufficient. Change can only be attained when the relevant personnel also have *adequate knowledge* of victims' issues. Hence training must be mandatory.
- New legal rights and expanded services bring about a heavier workload for the authorities. Common sense – corroborated by empirical research – dictates that this can only be adequately performed when *additional resources* are appropriated for this purpose.
- Named senior officials at the relevant ministries have to be charged with *express responsibility* for the identification and the promotion of policies for victims of crime.
- Service-providing organisations should act as a '*problem owner*' and maintain a sense of urgency.³³

In conclusion: having analysed the 1985 landmark Declaration on Victims' Rights in terms of its contents and legal character, as well as the ways in which it is implemented and complied with, one can conclude that in twenty years much has been achieved. Furthermore, it can be stated that the Declaration has positively influenced the interpretation of existing texts, and has contributed on its own terms to the creation of a series of other legally non-binding as well as binding instruments.³⁴ However, much more has still to be gained especially in terms of compliance monitoring. The core question then is whether such progress is most likely to be realised by a victims' rights convention. Entering into that discussion, we start with some general reflections upon international lawmaking, relevant in order to answer that particular question.

33. PHARE report, 2002, p. 57.

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

3. REFLECTIONS UPON INTERNATIONAL LAWMAKING

3.1 Introduction

It is generally accepted that the divide between hard and soft law instruments is problematic and no longer very helpful. Without entering into that debate in full, in this section some references are made to specific contributions to that debate which are relevant in the present context. Further to that, this section deals with some risks and problems of lawmaking in the UN context, followed by a discussion of a few specific cases of international lawmaking, namely the case of indigenous peoples and migrant workers, the case of the Draft articles on state responsibility and the attempt to come to a UN Forest Convention, which offers some ‘lessons learned’ to the victimology field.

3.2 The irrelevance of the classical divide between hard and soft law

In the discussion on hard law versus – or alongside – soft law we find consensus on two propositions. The first relates to the notion that dividing standards into two categories is a tremendous reduction of the variety and complexity of international legal instruments. According to Dinah Shelton, for instance, international legal instruments can be typified by both their form (binding or non-binding) and content (normative or promotional inspiration), and taking form and content together would lead to four possible labels: 1) law (binding legal instrument with a sanction in case of non-compliance); 2) commitment (a political or moral obligation); 3) hortatory (law with very weak obligations aiming for a change in mentality/internalisation); and 4) freedom of action (no commitment at all).³⁵ Shelton has further categorized non-binding norms into ‘primary soft law’ and ‘secondary soft law’. She considers primary soft law to be ‘those normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization’. A primary soft law instrument ‘may declare new norms, often as an intended precursor to adoption of a later treaty, or it may reaffirm or further elaborate norms previously set forth in binding or non-binding texts’. According to her, secondary soft law includes ‘the recommendations and general comments of international human rights supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other *ad hoc* bodies, and the resolutions of political organs of international organizations applying primary norms’.³⁶

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

36. Shelton, *supra* n. 3, pp. 449-451.

Also other authors have argued that the content of treaties can be both hard and soft.³⁷ Sometimes commitments in treaties are rather soft, for instance because they consist largely of symbolic norms and principles. And compared to soft law, treaties are generally seen to be more readily enforceable through binding dispute resolution, but in some conventions disputes can only be referred to non-binding conciliation mechanisms.³⁸ It all supports the conclusion that at the end ‘it is axiomatic that neither the form nor the nomenclature of an instrument is determinative of its legal status’.³⁹ Other factors play a determining role, such as the intention of the parties and their subsequent behaviour and the subject-matter and content of the instrument.⁴⁰

The second level/point of departure relates to the practical usefulness of the divide between hard and soft law. Kenneth Abbott and Duncan Snidal, for instance, have argued, in line with, amongst others, Dinah Shelton, that in the realm of international law, the division has become so blurred as to become functionally irrelevant. They also claim that soft law has been widely criticised and even dismissed as a relevant factor in international affairs, while according to them one could even argue that in the absence of an independent judiciary with supporting enforcement powers most international law is in fact rather soft, at least compared to most domestic law systems.⁴¹ Having said this, they have put forward a model of thinking about international lawmaking that exceeds the traditional binary approach. According to them it makes more sense to describe the status of international regulatory documents in terms of a function of Obligation (O) + Precision (P) + Delegation (D). In their theory, O refers to how binding the requirements of a regime are,⁴² P refers to the level of detail that is prescribed regarding how parties should go about meeting their obligations, and D refers to the extent to which each state must allow international authorities to play a role in the domestic implementation of the regime, and to the assurance of compliance. Abbott and Snidal use capital letters to indicate a high level of a given property, lower case letters for moderate levels, and dashes for (extremely) low levels. In other words: if a text is strong on

37. A. Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’, *ICLQ* (1999) pp. 901-913.

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

39. C. Chinkin, ‘Normative Development in the International Legal System’, in Shelton, *supra* n. 3, pp. 21-42, at 37.

40. *Ibid.*

41. K.W. Abbott and D. Snidal, ‘Hard and Soft Law in International Governance’, *International Organization* (2000) pp. 421-456, at 422.

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

all three indicators it is considered to be O, P, D. If, however, there is hardly any obligation, precision and delegation, they refer to it as (–, –, –). In that case, according to them, one cannot speak of law whatsoever.⁴³

Alongside with and following Shelton, Boyle, Abbott and Snidal, scholars such as Robert Keohane, Andrew Moravcsik and Anne-Marie Slaughter have argued that each of the three dimensions of legalization (O, P, D) is a matter of degree and gradation and not of a rigid dichotomy. As a consequence the process of legalization encompasses rather a continuum, ranging from ‘hard legalization’ in which case all three properties are maximized, to ‘softer’ forms of legalization involving lower levels of obligation, precision and delegation and even non-legalization of certain issues.⁴⁴

In line with the growing awareness of the fading relevance of the classical divide between hard and soft law, the concept of lawmaking itself is now also changing.⁴⁵ On the one hand, it is increasingly accepted and acknowledged that compliance with rules occurs for many reasons other than their legal status. Concerns about reciprocity of expectations, reputation mechanisms (naming and shaming) and other potential economic and political benefits or damages to valuable governmental institutions very often play a key role when it comes to the effectiveness of rules. On the other hand, international lawmaking will also remain a process of political bargaining, framed by rules of sovereignty and other background legal norms concerning the political authority of state institutions. As a result of these two processes, the attention of international lawmakers might be gradually shifting towards subtle blends of law and politics, hard and soft law, as well as towards regulatory regimes invoking varying degrees of obligation, precision and delegation.⁴⁶

Finally, some scholars, like Sol Picciotto, have argued that the growth and changing character of all kinds of soft law mechanisms and the blurring of the public-private law divide indicates that conventional rulemaking in international law no

43. Abbott and Snidal, *ibid.*, p. 424.

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

45. R. Keohane, *Power and Governance in a Partially Globalized World* (New York, Routledge 2002).

46. Especially Keohane has continuously stressed the importance of shifts in governance and fundamental institutional changes in order to fight global issues. In his presidential address to the American Political Science Association in 2000, for instance, he delivered a passionate plea that political institutions in liberal democracies should foster persuasion instead of relying on coercion and interest-based bargaining. It seems inevitable that this should also result in a search for more flexible (legal) policy instruments. See R.O. Keohane, ‘Governance in a Partially Globalized World’, 95 *American Political Science Review* (2001) pp. 1-13.

longer fits the classical model of negotiated agreements on behalf of states.⁴⁷ International law increasingly allows regulatory regimes to be developed and applied by private parties instead of through diplomatic channels and foreign offices and represents a growing range of different types of obligations, institutions and compliance and enforcement mechanisms.⁴⁸ We will come back to that in section 4.

3.3 Risks and problems of lawmaking in the UN context

In international law the use of non-written law next to legal instruments remains very important. Especially since the coming into existence of the United Nations, states have used a variety of forms. In the human rights field for instance, the United Nations Member States have adopted about 100 ‘instruments’, about 50 % of which are conventions, while the rest are labelled as declarations, proclamations, codes of conduct, guidelines, basic principles, and the like.⁴⁹

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

- Sometimes there is a need for mutual confidence building before a hard law approach can succeed.
- This need may result from the necessity to stimulate a policy development that is still in progress.
- The creation of a preliminary, flexible regime might possibly provide for a development in stages.
- A non-treaty agreement can be used as an impetus for coordinated national legislation.
- Officially non-binding (detailed) agreements may be easier to accept for states, because the consequences of not complying are sometimes less evident.
- International relations might be overburdened by hard law, with the risk of failure and deterioration in relations.
- Soft law documents can show immediate evidence of international support and consensus about an agreement, whereas the effects of treaties depend more on reservations and the need to wait for ratification.

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

48. W. Reinicke and J.M. Witte, ‘Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords’, in Shelton, *supra* n. 3, pp. 75-100.

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

- Avoidance of cumbersome domestic approval procedures in case of amendments.⁵⁰

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

3.3.1 *Strong conventions, but a lack of ratifications: the Cases of Indigenous Peoples and Migrant Workers*

In 1989, the International Labour Organisation adopted ILO Convention 169, concerning Indigenous and Tribal Peoples in Independent Countries. In adopting it, the ILO moved away from its assimilationist predecessor, ILO Convention 107 of 1957, thereby, one might say, understanding the signs of the 1970s and the 1980s of the need to give indigenous groups the right to preserve (parts of) their identity, while also participating in societies at large. The Convention was seen by many states as innovative, and was strongly supported by representatives of indigenous peoples and relevant NGOs, but those who expected many ratifications have become very disappointed: so far the Convention has only been ratified by 17 states, the last one back in 2002. The main reasons for this non-ratification are simply that

50. See H. Hillgenberg, ‘A Fresh Look at Soft Law’, 10 *EJIL* (1999) pp. 499-515, at 501, who quotes Klabbers, Aust and Schachter. See also V. Nanda, ‘The Role of International Organizations in Non-Contractual Lawmaking’, in R. Wolfrum and V. Roben, eds., *Developments of International Law in Treaty Making* (Berlin, Springer 2005) pp. 157-182.

the Convention is believed to be too strong on issues such as the right to self-determination and the use of natural resources.⁵¹

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

3.3.2 *Endangering declaratory texts with a customary law character: the Case of the Draft Articles on State Responsibility*

Embarking upon a conventional route for the protection of victims' rights might also endanger achievements realised so far. An example of a non-treaty text illustrating that problem is the 'Articles of State Responsibility for Internationally Wrongful Acts', drafted by the International Law Commission and successively 'taken note of' by the UN General Assembly (GA).⁵² So far, the Articles on State Responsibility are an annex to a GA resolution only, and one of the questions is whether or not they should be transferred into a convention. In its 2001 resolution the GA stated that 'it should consider at a later stage (...) the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic (...)'.⁵³ The reality, however, is that many states are not in favour of a convention at all. One state warned, for instance, 'against being too hasty and risking unraveling the gains of nearly fifty years work by upsetting the delicate balance of the text'.⁵⁴ The Netherlands is against drafting a convention because of the risk of 'jeopardizing much of the *acquis* in the text of the articles, the risk of a lack of ratifications and the intricacies surrounding the inclusion into the articles of a dispute settlement mechanism'. In addition, according to The Netherlands, 'the greater part of the articles reflects customary international law. The incorporation of this part in a convention would add little to the

51. W. van Genugten and C. Perez-Bustillo, 'The Emerging International Architecture of Indigenous Rights: the Interaction between Global, Regional, and National Dimensions', 11 *The International Journal on Minority and Group Rights* (2004) pp. 379-409.

52. GA Res. 56/83 of 12 December 2001, adopted without a vote.

53. Ibid.

54. UN Doc. A/56/589.

development of international law'.⁵⁵ Finally, it is worth recalling the opinion of the Finnish representative Martti Koskenniemi, speaking on behalf of Denmark, Iceland, Norway, Sweden and his own country: 'If they [the draft Articles on State Responsibility] were to take the form of a convention, they would be subject to the whims of politics and eroded by the compromises inherent in a diplomatic conference. But as a restatement of customary law, the articles and related commentaries would remain the authoritative text until superseded by future international developments, as customs change to reflect new principles and priorities.'⁵⁶ The quote reflects arguments that would have to be taken into consideration in the discussion on a victims' rights convention as well, without inevitably leading to the same outcome.

3.3.3 *Dealing with frustrations in international lawmaking: the case of the Forest Convention*

At the UN Conference on Environment and Development (UNCED, Rio de Janeiro 1992), the protection of forests featured highly on the agenda. Nevertheless, governments were not able to agree upon a legally binding instrument. This was the case despite the fact that agreements were reached on closely related issues, like the Convention on Biodiversity and the Convention to Combat Desertification. The forests-related outcome of the 1992 Summit was a set of non-legally binding 'Forest Principles' and chapter 11 of Agenda 21,⁵⁷ Combating deforestation.⁵⁸ Afterwards, especially the Forest Principles met with much criticism, amongst other things because they start off with affirming the sovereign right of states to 'convert' forests to other uses in accordance with their socio-economic development needs.⁵⁹ To date, actors engaged in the international forest policy dialogue are strongly divided into pro and anti-convention camps.⁶⁰

Arguments pro the convention are, for instance, that global forestry policies need the moral authority derived from an international legally binding instrument

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

56. UN Doc. A/C.6/56/SR.11, para. 34.

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

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

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

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

and a participatory, empowered central body or forum capable of providing policy adaptability and monitoring coordination. A convention is also believed to be able to provide a legal basis for addressing forest-related issues in a holistic manner in contrast with the current fragmented approach resulting from existing international policy instruments. Moreover, a convention is thought to be able to create a solid legal basis for financial assistance and technology transfer, monitoring, reporting and developing uniform compliance mechanisms.⁶¹

Forces that work against a convention are, for example, the fear that wealthy Northern states are going to dictate how forests within Southern states should be managed,⁶² the inability to develop a fair balance between nature conservation, socio-economic development, and the protection of free trade, and the fact that, according to NGOs, the international community already has a clear understanding of the problems to be addressed. In their eyes, negotiations on a convention would only delay the decisive action needed to halt the current alarming rate of deforestation.

A number of experts tried to find a middle ground. They expressed their preference for a framework convention. Such an instrument could, according to them, provide for a flexible agreement of regional protocols appropriate to particular regions and differentiate between specific technical matters. However, this attempt came too late. Governments have agreed to work towards a non-legally binding instrument on forests.⁶³

Overall, the lengthy process of attempts to legalise forest management has left many policy actors, particularly NGOs, extremely frustrated. Disillusioned by the inter-governmental inability to put deforestation into action, NGOs have in the meanwhile turned to promoting self-regulation and certification programmes in forest management as an alternative means to pursue their goals.⁶⁴

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

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

62. G. Porter and J. Welsh Brown, *Global Environmental Politics* (Boulder CO, Westview Press 1996) pp. 115-129.

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

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

and content of a strong legal document while the underlying problems kept growing. In the end, similar processes might take place in the field of victims' rights and that might cause serious frustrations on the side of, *inter alia*, victims' rights organisations. In the case of deforestation these frustrations were canalised into something good, namely the initiative of NGOs to establish a private certification system for sustainable forest management. There is no guarantee, however, that something akin to this could happen or would be fruitful in the context of victims' rights. In retrospect, environmental NGOs would probably advise victims' rights organisations: 'Don't do as we have done, do as we have learned.' 'Try to keep an open mind for alternative solutions⁶⁵ and do not focus solely on the means of protection, while forgetting that the ends are more important'.

4. FRAMEWORK CONVENTIONS AND FORMS OF CO-REGULATION

4.1 Introduction

In section 3 it was noted that in the context of the discussion on a Forest Convention, the possibility of a framework convention was tabled. It is surprising to us that in that context this proposal was not taken more seriously by states. It would have been clearly an attempt to find a way out for those who are in favour of a convention with strict rules and strong monitoring and enforcement mechanisms and those who favour more open-ended rules and flexible implementation and compliance systems.

In the present section we will further discuss the instrument of a framework convention, starting from the assumption that it is possibly relevant in the field of the victims' rights protection as well. The instrument is linked here to the legislative technique of co-regulation, bringing together states and other 'stakeholders' of the victims' rights project.

4.2 The idea and actual use of framework conventions

The term 'framework convention' refers to the objective of fixing norms defining an action programme for states, without immediately creating subjective rights for

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

individuals, and leaving states a wide margin of discretion concerning the necessary means to implement the convention, thereby enabling them to take particular circumstances into account.

This regulatory instrument has been used, for example, by the Council of Europe when addressing the issue of the protection of national minorities, leading to the Framework Convention for the Protection of National Minorities (FCNM).⁶⁶ The provisions in the FCNM are programme-type provisions, leaving the states concerned with a wide margin of discretion in the implementation of and compliance with the objectives. At the beginning, the FCNM attracted more criticism than appraisal.⁶⁷ The main criticism focused, especially, on the programme-type character of the convention and its alleged feeble monitoring mechanism. Some thought that the fact that the convention was set up as a legally binding document was not of great importance, for instance because of the weakness of the language used ('shall endeavour', 'where appropriate', 'as far as possible').⁶⁸ It has also been argued, however, that requirements such as 'shall endeavour' and 'as far as possible' are duties of conduct which require action on the part of the state: 'They are expressed in imperative language which aim not at minima but, rather, are open-ended and maximum-oriented'.⁶⁹

Another illustrative example of a framework convention is the World Health Organisation Framework Convention on Tobacco Control (FCTC).⁷⁰ Article 5(1) of the FCTC states that each state party shall develop, implement, periodically update and review comprehensive multi-sectoral national tobacco control strategies, plans and programmes in accordance with the convention and the protocols to which it is a party. However, Article 5(2) declares, among other things, that each

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

67. Among others G. Gilbert, 'Minority Rights under the Council of Europe', in S. Wheatley and P. Cumper, eds., *Minority Rights in the 'New' Europe* (The Hague, Nijhoff Publishers 1999) p. 63.

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

69. Address by John Packer at the Conference on the 5th Anniversary of the Framework Convention. For the Conference proceedings, see *Filling the Frame, Five Years of Monitoring the Framework Convention for the Protection of National Minorities*, Council of Europe Publishing (2004) p. 46.

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

state party shall ‘in accordance with its capabilities’ adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other parties in developing policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke. And Article 5(6), for instance, determines that the parties shall, ‘within means and resources at their disposal’, cooperate to raise financial resources for effective implementation of the convention.

It can be added that within such an open texture of framework conventions, one can also easily insert combinations of soft law and hard law elements. This is the case, for instance, within the framework of the ILO, where conventions sometimes refer to the need to live up to codes of practice. These codes and standards are then seen as valuable tools for national authorities in deciding how to implement the provisions of the relevant ILO convention. Furthermore, according to the ILO, referring to standards of best practice or state of the art in, for example, technology gives a convention far greater flexibility in adapting the policy measures it requires from national authorities to future changing circumstances. Non-binding codes and standards are usually easier to amend than the text of a convention itself. The ILO nowadays admits that whereas traditionally codes of practice were meant to serve as model regulations for the implementation of policy at the national level, their use and function seem to be evolving.⁷¹

4.3 The idea and actual use of the technique of co-regulation

A combination of hard and soft law mechanisms can also be found on the European level, in the Action plan ‘Simplifying and improving the regulatory environment’.⁷² In this document, the European Commission made a warm-hearted plea for ‘co-regulation’ as a way of implementing European laws, especially so-called directives.⁷³ In the Interinstitutional Agreement ‘Better Law-

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

72. COM(2002) 278 final.

73. A directive is a legislative act of the European Union, which requires Member States to achieve a particular result without dictating the means which have to be used to achieve the result. It can be distinguished from regulations which are self-executing and do not require any implementing measures. Directives normally leave Member States some leeway as to the exact rules that need to be adopted. See Article 249 of the Treaty establishing the European Union. A consolidated version of the treaty can be found at <http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/html/C_2002325EN.003301.html>. Apart from directives and regulations the European Union also has so-called ‘framework decisions’. With the entry into force of the Treaty of Amsterdam, these new instruments under Title VI of the EU Treaty (Police and judicial cooperation in criminal matters) have

making',⁷⁴ drafted by the European Council, the European Commission and the European Parliament, co-regulation is defined as: '(...) the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements' (point 22).

Co-regulation enables actors to ensure that the legal principles and policy objectives defined by the legislature can be achieved in the context of measures carried out by the concerned parties recognised within the field of regulation. The Action Plan provides a framework for the use of co-regulation:

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

One of the characteristic features of co-regulation is that it makes use of some core insights as to how to reach the highest attainable effectiveness of legislation. As Philip Eijlander has argued, it aims at combining the advantages of the predictability and binding nature of legislation, on the one hand, and the more flexible regulatory approach of negotiated public-private rulemaking on the other.⁷⁵

replaced joint action. Being more authoritative, they should serve to make action under the reorganised third pillar more effective. Framework decisions are used to approximate (align) the laws and regulations of the Member States. Proposals are made on the initiative of the Commission or a Member State and they have to be adopted unanimously. They are binding on the Member States as to the result to be achieved but leave the choice of form and methods to those Member States. Contrary to directives, framework decisions can have no direct effect if the implementation period has expired. An example relevant in the context of the present article is the framework decision of 15 March 2001 on the standing of victims in criminal proceedings.

74. European Parliament, Council, Commission, 'Interinstitutional Agreement on better law-making', *OJ* (2003) C 321/01.

75. Ph. Eijlander, 'Possibilities and constraints in the use of self-regulation and co-regulation in legislative policy: experiences in the Netherlands – lessons to be learned for the EU?', 9 *Electronic Journal of Comparative Law* (2005) p. 6. Also see the *White Paper on European Governance*, Work Area No. 2, Handling the Process of Producing and Implementing Community Rules, Group 2c, May 2001.

Further to that, there are also developments that link the concept of a framework convention to the legislative technique of co-regulation. A consortium of academics united in the Internet Governance Project⁷⁶ launched interesting thoughts in this respect. In 2004 this group raised the idea of developing a framework convention for Internet governance. The participants in the Internet Governance Project claimed that the approach of a framework convention could help to reconcile conflicting (domestic) legal regimes, in areas where further agreements are needed to resolve fundamental differences, for instance on the relationship between protecting intellectual property and safeguarding freedom of expression. In addition it was argued that a framework convention could legitimise the role of civil society and private sector organizations in a way which is unprecedented. Because these organizations have been critical of the development and maintenance of the internet, they should be allowed to play a role in the formal governance process.⁷⁷

The intention to give private organisations a more significant role in the rulemaking process points towards a more responsive, communicative and discursive approach to lawmaking. In short, this approach boils down to a conscious choice for codifying general norms, fundamental principles and aspirational rules that require interpretation and elaboration by the ‘interpretive community’. As Willem Witteveen has pointed out, communicative laws are not merely symbolic, they also aim to influence what people and organisations really do.⁷⁸ The ‘communicative legislator’ chooses a less hierarchical and more interactive approach instead of opting for ‘full control’ in an instrumental way. Important ideas behind theories about communicative legislation are that, in some cases, consensus-building and including non-governmental actors in the rulemaking process will be more successful than a more traditional top-down approach to lawmaking that is going to result in both compromise rules and reluctance in monitoring and enforcement efforts.

Translated into the concept of a framework convention and into co-regulation in the field of victims’ rights, using a communicative approach would suggest that when opting for a less intrusive legal instrument, states would be more willing to accept the contents of the convention. Of course, more emphasis will then have to be put on reviewing the results of the implementation and compliance process to find out if the objectives of the convention are really being met in practice. But then again, in a communicative approach also the implementation and compliance process can be made more accessible for non-governmental actors, which might

76. See <<http://www.internetgovernance.org/about.html>>.

77. See <<http://www.internetgovernance.org/pdf/igp-fc.pdf>>.

78. W. Witteveen, ‘Turning to communication in the study of legislation’, in N. Zeegers, W. Witteveen and B. van Klink, eds., *Social and Symbolic Effects of Legislation under the Rule of Law* (Lewinston NY, Edwin Mellen Press 2005) pp. 17-44.

generate extra legitimacy and commitment. The lawmaking policy of the European Union suggests that this could be a fruitful way to move forward on governance issues that cannot do without support from civil society.⁷⁹

5. MONITORING IMPLEMENTATION AND COMPLIANCE

5.1 Introduction

Over the course of decades, the ways to improve the implementation of and compliance with international law have evoked many heated debates and have led to extensive academic literature. Various implementation and compliance theories have been developed to analyse what factors potentially affect implementation and compliance.⁸⁰ In short, on a macro level, some theories contend that a state's implementation and compliance performance is linked to the extent that a state engages in international institutions that can create norms affecting state behaviour.⁸¹ This is referred to as the *managerial approach*, which relies on a problem-solving approach instead of a coercive one.⁸² Others adhere to the so-called *realistic approach*, claiming that the extent to which a state complies with international norms depends on factors such as a state's political, economic, and military power.⁸³ Still other theorists add another component and question whether '(...) a state's propensity to comply depends upon *the messenger* – individual or institution – that is asking them to comply'.⁸⁴

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

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

81. See A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Arrangements* (Cambridge MA, Harvard University Press 1995) pp. 88-134. See also R. Keohane, 'International Relations and International Law: Two Optics', 38 *Harvard ILJ* (1997) pp. 487-502, at 490. For an overview of different theories, also see S.R. Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?', 32 *NY Univ. JIL and Pol.* (2000) pp. 591-698, at 647 et seq.

82. Chayes and Chayes, *supra* n. 81, at p. 3.

83. In Ratner, *supra* n. 81, at p. 648.

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

It would go beyond the scope of this paper to fully discuss the monitoring of states' implementation of and compliance with international law at large. It would demonstrate that the international legal arena consists of a huge variety of such mechanisms, with different characteristics, depending on the specific working domain (peace and security, international economic law, etc.), while it would also become obvious that there are many ways of looking at these mechanisms. Considering that the monitoring mechanism in the proposed Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power resembles, to a large extent, international human rights treaties, our discussion of the monitoring of implementation and compliance focuses upon this field.⁸⁵ In addition, it will be discussed what lessons can be drawn from the monitoring procedure attached to one of the framework conventions presented in this paper: the Framework Convention for the Protection of National Minorities, primarily because of the assessed effectiveness of the monitoring mechanism.

5.2 Learning from human rights monitoring procedures

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

All UN human rights conventions oblige states parties to submit periodical reports regarding their own implementation of and compliance with treaty provisions. Most treaty-based independent expert committees, such as the Human Rights Committee (HRC), have adopted detailed reporting guidelines with instructions on reporting by states.⁸⁶ The HRC has furthermore adopted a General Comment on reporting obligations of states parties, which states that the practices of non-report-

85. The discussion whether victims' rights belong to the realm of human rights falls outside the scope of this article. Some authors have listed criteria that can be used to measure whether a certain right belongs to the family of human rights. See B. Ramcharan, 'The Concept of Human Rights in Contemporary International Law', 1 *Canadian Human Rights Yearbook* (1983) at p. 280 and P. Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control', 78 *AJIL* (1984) at pp. 614-615.

86. For a thorough overview of the reporting procedure under the International Covenant on Civil and Political Rights, see I. Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights, Practice and Procedures of the Human Rights Committee* (Antwerp/Oxford, Intersentia/Hart 1999).

ing states may be reviewed by the Committee as well, thereby filling a gap which was left by the original rule-maker.⁸⁷ Many states have fallen far behind with regard to their regular compulsory reports, while the follow-up to the findings of the committees often leaves a great deal to be desired, both in terms of content and in terms of their control.⁸⁸

As to individual complaints it has been decided by the HRC in its ‘case law’ that there is no objection to a group of individuals, who claim to be similarly affected, submitting a communication.⁸⁹ In relation to that, it is also relevant to mention the collective complaints procedure attached to the European Social Charter in 1995.⁹⁰ Article 1 of the relevant Protocol sets forth that ‘other international non-governmental organizations [than the traditional employers’ organizations or trade unions] which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee’ may lodge complaints pertaining to the observance of the Charter. This can be seen as an *actio popularis* and goes further than and is to be seen as different from the right to submit individual claims collectively.

Turning back to the UN HRC, it can be observed that the ‘views’ of the committee following upon the discussion of the complaints do lead to an obligation for the state party ‘to adopt appropriate measures to give legal effect to the views of the Committee’.⁹¹ The HRC has furthermore decided that it may fix a sum for compensation, even though the first Optional Protocol to the ICCPR, establishing the individual complaint procedure, does not provide for this. The implementation of the Committee’s views is entrusted to a Special Rapporteur whose task it is to meet with state representatives and ensure a follow-up.⁹² All in all, one can appreciate

87. General Comment No. 30, ‘Reporting Obligations of States parties under Article 40 of the Covenant’, 18/09/2002, para. 4 (b).

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

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

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

91. *Peter Bradshaw v. Barbados*, No. 489/1992, CCPR/C/31/D/489/1992, para. 5.3, quoted in A.H.E. Morawa, ‘The Jurisprudence of the United Nations Human Rights Committee and the Other Treaty Monitoring Bodies’, 1 *EYMI* (2001/2) pp. 461-485, at 463.

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

the fact that the states parties' compliance with the rules 'is increasingly being watched from 'above' by the organisation, and from 'below' by individuals'.⁹³

In addition to the treaty-based procedures, several international organisations and bodies also use approaches and monitoring methods that can be characterised by their non-judicial nature.⁹⁴ The former UN Commission on Human Rights has established an elaborate system of country or thematic special procedures, addressing various human rights issues. These special procedures, so far continued by the newly established Human Rights Council, usually involve a Special Rapporteur.⁹⁵ During one of the meetings on a possible draft convention on victims' rights, the establishment of a Special Rapporteur on victims' rights was also suggested. It was seen as instrumental in making progress as to the future adoption of such a convention.⁹⁶ The Rapporteur is then not so much seen as an 'enforcement agent' but more as a 'diplomat' who has a mission to promote the benefits of a new legislative instrument.

Once it is clear that a state violates its treaty obligations, different methods are available to the supervisory committees. Apart from overall 'enforcement techniques' like discussions with governments, the friendly settlement of disputes through good offices, mediation and conciliation, one can think of the 'mobilisation of shame', *i.e.*, putting the names of states on lists and in reports – for instance the overall annual reports of the General Assembly of the United Nations – which those states would rather avoid. In the eyes of many human rights monitoring bodies, however, a cooperative approach is often more appropriate than trying to force an unwilling state to change its behaviour, while the attitude towards the underlying rules and principles that have been neglected stays the same. Thinking along these lines, several international human rights treaty bodies have tried to expand their working methods in order to better review the implementation and compliance behaviour of states. For instance, some of these bodies conduct country visits, which enhances the ability to determine whether countries adhere to international norms and, furthermore, enables the supervisory bodies to enter into a dialogue with the government and other parties involved. With regard to several mecha-

93. N.M. Blokker and S. Muller, *Towards More Effective Supervision by International Organizations, Essays in Honour of Henry G. Schermers* (Dordrecht, Nijhoff Publishers 1994) p. 289.

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

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

96. For more information see <<http://www.tilburguniversity.nl/intervict/UNdeclaration/>>.

nisms, the authority to conduct such visits was not incorporated in the original mandates. It has been able to develop in practice because states Parties did not object to it.⁹⁷

One of the major advantages of the present human rights mechanisms is that they are flexible in that they can develop new approaches when deemed necessary. Indeed, such supervision ‘respects the autonomy of the Parties and takes into consideration their wishes and interests. (...) In addition, the deciding body can offer new, attractive alternatives, possibly in fields not directly connected with the matter at issue. It can break fresh ground, taking account of the overall picture and considering all aspects of the problem.’⁹⁸ The human rights bodies mostly use non-confrontational tools to induce governments to implement and comply with certain standards. Key characteristics embraced by these mechanisms include constructive dialogue, advice and persuasion. These are aspects that relate closely to the so-called communicative approach in lawmaking that we discussed in subsection 4.3 of this paper. Instead of opting for ‘command and control’, these monitoring mechanisms are aiming at convincing states parties. One of the benefits of this approach is that it focuses upon internalisation of rules and values, which might have a long-lasting effect on compliance behaviour.

Finally, it is relevant to note that under several human rights monitoring mechanisms, both quasi-judicial and non-judicial, the information needed to fulfil the tasks belonging to the review phase is most of the time not only provided by the state or the individual submitting the complaint. Several international mechanisms allow NGOs to submit such information as well. Further to that, in various states NGOs also play an active role on the national level as the follow-up to the concluding observations of the supervisory committees.⁹⁹

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

98. T.M.R. Chowdhury, *Legal Framework of International Supervision* (Täby, Akademistryck 1986) p. 231.

99. For more information, see I. Boerefijn, A. van Gans and R. Oostland, ‘De Rol van Niet-Gouvernementele Organisaties in de Toezichtprocedures op Basis van VN-Mensenrechtenverdragen’, in C. Flinterman and W. van Genugten, *Niet-Statelijke Actoren en de Rechten van de Mens: Gevestigde Waarden, Nieuwe Wegen* (The Hague, Boom 2003) pp. 121-133.

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

The Framework Convention for the Protection of National Minorities (FCNM) contains open, programme-type norms that leave much discretion to the states parties. The monitoring mechanism under the FCNM has an important role to play in that it must ‘evaluate the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework Convention (...)’.¹⁰⁰ The monitoring mechanism consists of an independent expert committee (the ‘Advisory Committee’), which assists the decision-making Committee of Ministers of the Council of Europe.

While many commentators consider the Framework Convention as a step in the right direction towards an effective system of minority rights protection, they have also criticised its accompanying monitoring mechanism. It has, for instance, been stated that ‘the Framework Convention adopts the weakest form of international supervision of human rights commitments’.¹⁰¹ The wind seems to be changing, however. Over the years, the FCNM has turned into an important reference document, not only in relations between the Advisory Committee and governments when discussing state reports, but also as a reference document for other international organisations. Since the Convention has not changed, it can easily be argued that the positive sounds are due to the work of the Advisory Committee. An active Committee was very much needed since the Convention notes in the Preamble that ‘implementation shall take place primarily through national legislation and appropriate governmental policies’. Considering the fact that the Convention contains mostly programme-type provisions, the Advisory Committee has put much time into interpreting the provisions and providing guidance to states on how to implement and comply with them.

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

100. Art. 26 FCNM.

101. G. Gilbert, ‘The Council of Europe and Minority Rights’, 18 *Human Rights Quarterly* (1996) p. 188.

meetings are held with government representatives, NGOs and minority groups, without the need to request a formal mandate from the Committee of Ministers in advance.¹⁰² These meetings provide most of the information needed for drafting the Advisory Committee's opinions, which aim to cover all perspectives. When additional information is needed, the Committee has the possibility to send a questionnaire to the government, which the government needs to submit in addition to the already submitted state report.

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

Finally, it can be observed that the involvement of civil society in the activities of the monitoring mechanism has been unexpectedly high. Unexpectedly because, as mentioned before, the Framework Convention attracted great resistance in the beginning because of the vagueness of the provisions and the alleged weaknesses of the monitoring mechanism (also from NGOs working in the field). The latter might just have been the reason why NGOs felt that their input would be of the utmost importance in order to give the Convention any practical effects. As a consequence, several NGOs started promotional activities to inform their supporters of the importance of the FCNM. In addition, in many countries NGOs drafted shadow reports through which the monitoring mechanism was given another perspective than the one put forward in state reports.¹⁰³

6. A PRELIMINARY ASSESSMENT OF THE DRAFT UN CONVENTION ON JUSTICE AND SUPPORT FOR VICTIMS OF CRIME AND ABUSE OF POWER

6.1 Introduction

Following Garkawe's call for a convention, the World Society of Victimology and the International Victimology Institute of Tilburg University, INTERVICT, con-

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

103. See Letschert, *supra* n. 97, chapter 4.

vened an informal meeting with experts from different regions to discuss the need and contents of a draft convention. The meeting took place in December 2005, at Tilburg University, and led to the ‘Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power’. Following that meeting, in August 2006 the draft was discussed at the 12th International Symposium on Victimology organised by the World Society of Victimology in Orlando, USA, leading to some revisions.¹⁰⁴ Since then, discussions have started with the international community of states (more on that in the subsection on co-regulation; see below).

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

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

6.2 Legal character of the standards

It should be stated at the outset that the text of the draft is not a legal text in that it is not based on a legal source. However, the typologies we discussed earlier allow us to analyse the legal nature of the standards apart from its legal source.

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

Assessing the draft Convention in terms of ‘law, commitment, hortatory, freedom of action’ (Shelton) and ‘Obligation, Precision and Delegation’ (Abbott and Snidal), while bearing in mind the nuances and additional views tabled by the other authors, reveals a somewhat shattered picture. To begin with: some articles in

104. The first draft, including these revisions, can be found at <<http://www.tilburguniversity.nl/intervict/undeclaration/convention.pdf>>.

the draft apparently show a high level of legal Obligation ('law', in Shelton's words) and (required) Commitment by states parties and are formulated in a very detailed and precise manner, while other articles 'only' call upon states to change their behaviour (hortatory) and/or are formulated rather vaguely.

Examples of the first category can be found in Articles 5 and 7 on access to justice and fair treatment and the right to be informed. For example, Article 5(2)(a): 'Giving the victim a fair hearing within a reasonable time in the determination of their entitlement to a remedy for the injury, loss or damage suffered by them as a result of their victimization without prejudice to the accused', and in the same Article and section, under (c): 'Allowing victims to present their views and concerns themselves or through legal or other representatives without prejudice to the discretion of the court, tribunal or other appropriate authority, and in consonance with the relevant domestic criminal justice system', or Article 7(3): 'States parties shall take the necessary measures to ensure that the victim is notified, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released.'

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

Referring to Abbott and Snidal's criterion of Delegation, the draft Convention is again far from uniform. On the one hand, part III of the draft (on 'Implementation, Monitoring and Cooperation') relies heavily on the willingness of states parties to 'take appropriate measures': 'States parties shall take appropriate measures to: (...) (b) establish and enhance such institutions and mechanisms as may be necessary for the achievement of the objectives of this Convention; (c) ensure the establishment and/or enhancement of appropriate procedures, which are victim-friendly and which must be adhered to' (Art. 12(1)). Especially Articles 13(1) and (2) on 'monitoring' are quite disappointing. They state that '(1) States parties shall take appropriate measures to monitor the efficiency and effectiveness of policies and measures designed for the implementation of this Convention. In particular, they shall undertake periodical review and evaluation of their legislation, regulations and procedures, including through research. (2) States parties shall ensure that the various agencies, organs or bodies dealing with victims shall submit periodical reports to an appropriate authority within their domestic jurisdiction designated for this purpose. (...)'. For these provisions to be effective, much self-criticism will be indispensable. Further to that, not so much self-criticism but rather good faith is vital for the implementation of and compliance with Article 13(3), which requires

the parties to the convention ‘to make the principles and provisions of the convention widely known, by appropriate and active means’. A wide margin of discretion is left in the course of the implementation of and compliance with these articles.

On the other hand, under Article 14 of the draft Convention a Committee on Justice and Support of Victims of Crime, Abuse of Power would be established to examine the progress made by states parties in achieving the realisation of the obligations undertaken in the convention. The draft Convention states that this committee will not just have to rely on the information provided by states parties. It may, for instance, also invite the United Nations Office on Drugs and Crime, the UN Specialised Agencies and other competent bodies to provide expert advice on matters of implementation. If such provisions related to the establishment and functioning of a Committee would make it to the final text of the convention, it would be a serious commitment to the objectives of the draft convention.

As to Shelton’s criterion of ‘freedom of action’ – understood as ‘no commitment at all’; see subsection 3.2 – no relevant articles can be found in the draft Convention.

All in all the draft Convention offers a mixed picture: some articles directly aim for ‘hard’ obligations, other articles have an open character, more or less asking instead of requiring from states that they adopt new policies and practices. In section 3.3, we cited Hartmut Hillgenberg, who listed a number of reasons why states might be against hard obligations (‘law’ in Shelton’s scheme; obligations with a big ‘O’ in Abbott and Snidal’s terminology). One reason is that states may feel the need to stimulate a new policy development, or may consider that the creation of a preliminary, flexible regime is a first step in a development in stages. Reading the draft Convention in this way, one can say that the drafters have kept an eye open to the need not to formulate hard obligations only, but also to address the issues in terms flexible standards, allowing states a serious margin of discretion. Whether states will be of the opinion that the right issues are addressed in the right legal form remains to be seen.

6.3 Framework convention and co-regulation

In section 3, we referred to Hartmut Hillgenberg and Sol Picciotto, stating, in sum, that focussing upon flexible legal instruments, including soft law standards instead of treaty law, creates better possibilities to include non-state actors in the process of negotiated rulemaking. In section 4 we elaborated upon one such flexible instrument, *i.e.* framework conventions, in combination with the technique of co-regulation. The latter brings non-state actors into the legislation process, while it also leads to a focus upon the creation of measures to be carried out by the concerned parties recognised within the field of regulation. The latter refers to a more responsive, communicative and discursive approach to lawmaking. Translated into the

concept of a framework convention, using such an approach suggests that when opting for a less intrusive legal instrument, states will probably be more willing to accept the content of the convention. Both elements – a framework convention and co-regulation – are not necessarily linked, but linking them might create interesting insights.

Looking at the draft Convention as a framework convention, one will immediately observe that it contains many characteristics thereof. It includes differentiated types of rules and obligations, addressing in a strict sense some of the topics that are no longer really controversial (in section 6.2 presented as standards with a high level of Obligation or ‘Law’). At the same time, programme-type provisions have been drafted on other issues where there is no consensus as yet. An example of this is the provision on compensation. Such programmatic rules may gradually gain strength during the implementation process, but will also allow for a differentiation between states parties’ implementation, while the final objectives remain clear. And even as to the compensation issue, it would be good to keep in mind that framework conventions often arise out of a compromise between some states claiming that hard law is the only proper and lasting approach to be able to tackle a worldwide existing problem effectively and other states that do not want to lose control over the situation in their own country or think they are unable to live up to the expectations of the other parties due to, for instance, budgetary problems or a lack of knowledge and manpower.

As to the notion of co-regulation, it can be observed that the draft Convention seems to fully address the needs and capacities in the victims’ rights field. All advantages and characteristics of co-regulation elaborated upon in section 4, in particular the notion that involving civil society organisations in the rulemaking process will be more successful than a more traditional top-down approach of law-making that is going to result in both compromise rules and reluctance in monitoring and enforcement efforts, are extremely relevant in the victims’ rights field.

As to the way the present draft has been prepared, one can observe that many of the foregoing insights are already practised, although the terms framework convention and co-regulation have not been used. After the initial preparations, discussed in the introduction to this section, the World Society of Victimology started to gather support for the idea of a convention at the level of states. In April 2006, it attended the Fifteenth Session of the UN Commission on Crime Prevention and Criminal Justice and addressed the Commission with several recommendations, including that ‘Member States may wish to invite an expert group to consider the desirability and feasibility of (...) the elaboration of a UN convention on the rights of victims’.¹⁰⁵ The Commission indeed co-sponsored an intergovernmental expert

105. For more information and references, see <<http://www.tilburguniversity.nl/intervict/undeclaration/>>

meeting which took place in November 2006 and which aimed '(a) to design an information gathering instrument on standards and norms related primarily to victim issues and (b) to study ways and means to promote their use and application'. The report of the intergovernmental expert group meeting has been submitted to the Commission on Crime Prevention and Criminal Justice at its Sixteenth Session in April 2007. During this session most of the attention of the states was focussed on a new questionnaire as an information-gathering instrument on victims' rights. Representatives of the World Society of Victimology continued their discussions with national governments on working towards a future convention on victims' rights.¹⁰⁶ The process so far can be regarded as an example of co-regulation. However, it is too early to make decisive remarks on the interplay between NGOs and states.

6.4 Monitoring implementation and compliance

In section 5 we discussed the issue of implementation and compliance, focusing upon the lessons to be learned from victims' rights-related fields (human rights and the protection of national minorities). One of the lessons learned from the human rights field would be that a strong supervisory committee of independent experts is needed that in daily practice creates or is given the space to strengthen its supervisory procedures. We mentioned the advantages of collective complaints procedures, next to allowing every individual the right to complain about his or her specific case, but also underlined the importance of non-judicial procedures, meaning that a convention could be important in terms of compliance and enforcement but that alternative monitoring procedures should not be forgotten as well.

In section 5 we discussed a specific example of a framework convention – the Council of Europe Framework Convention for the Protection of National Minorities – that includes a supervisory mechanism of a mixed charter: an Advisory Committee composed of independent experts as well as a decision-making role for a political body. It was concluded that an active Committee was needed to make the states Parties live up to their core obligations, i.e., to effectuate the standards of the Convention through national legislation and appropriate governmental policies, while the Committee also gave authoritative interpretations of many of the programme-type provisions of the Convention. The Committee created space for itself, by simply doing its work carefully, and was backed by the Committee of Ministers, despite original hesitation.

These conclusions should be taken into consideration when constructing a supervisory mechanism for the draft UN victims' rights convention. In the draft it is

106. For documents relating to the sixteenth session, see <http://www.unodc.org/unodc/en/crime_cicp_commission_session_16.html>.

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

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

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

- Will closely cooperate with, *inter alia*, the United Nations Office on Drugs and Crime, and the UN specialized agencies and other UN organs as to the implementation of such provisions as fall within the scope of their mandate (Art. 16(1)(a));
- Shall develop a regular dialogue and discuss possible areas of cooperation with all relevant actors, including national human rights institutions, governments, relevant United Nations bodies, specialized agencies and programmes, in particular with the United Nations Office on Drugs and Crime, the Counter-Terrorism Committee of the Security Council and the Office of the United Nations High Commissioner for Human Rights (Art. 16(1)(b));
- Shall transmit, as it may consider appropriate, to the United Nations Office for Drugs and Crime, specialized agencies and other competent bodies, any

reports from states parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications (Art. 16 (1)(c)).

The composition and mandate of the Committee are modelled on the standard approach as applied in UN human rights conventions. However, as discussed above, international organisations and supervisory bodies in the field of human rights as well as minority rights have developed different ways to better monitor the implementation of and compliance with international norms. Based on the previous analysis, some other issues should be taken into consideration when discussing more detailed arrangements concerning the supervision of the (possible) future victims' rights convention.

Firstly: What kind of monitoring mechanism would optimally influence implementation and compliance by states in the field of victims' rights? What would be the best way to enhance the commitment of states to implement and comply with the full range and huge variety of victims' rights, from the right to respect for the dignity of victims, the right to receive proper information, to the more financially-oriented rights, like getting compensation for damages and such things as receiving a priority status when it comes to housing? Would one type of supervisory procedure be sufficient, or would it be better to think in terms of mixed procedures, varying from (quasi-)judicial decision-making on concrete complaints to an advisory and dialogue approach for other issues?

Secondly: Whatever choices will be made, as with all international norms and instruments, one cannot simply trust that state parties will automatically act in accordance therewith. Therefore, there should always be a supervisory body, composed of independent experts, as foreseen in the draft Convention. But having such an independent supervisory body does not automatically mean that its work should have the character of international independent (quasi-)legal decision-making, as is the case with, for instance, the UN Committee on Human Rights. Depending on the character of the convention to be adopted, the mandate of the committee could vary from giving 'views'/judgements, to 'assisting' a political decision-making body in forming its opinions on the state's behaviour in the field of victim's rights. As to the latter, we again refer to the positive experiences with the double-sided monitoring mechanism of the Council of Europe Framework Convention for the Protection of National Minorities.

Thirdly: Victims, or groups of victims, should be given the right to address the committee of independent experts, both in the form of providing information – by submitting shadow reports or attending hearings – and by complaining against any violations of their rights. Both elements are not included in the draft. The first element has most probably been left aside because the Committee is allowed to establish its own rules of procedure, which might include the wish to make use of

the knowledge available in the NGO world. The second because of the fact that a complaint procedure would not be appropriate in light of the open character of some of the provisions in the draft convention. At a later stage such complaint procedures should be taken into consideration. That could relate to an individual complaint procedure, working with admissibility criteria as incorporated in the main UN human rights conventions (and further elaborated upon by the relevant supervisory committees). It could also be decided that only specific hard elements in the convention (the ones referred to as obligations with a capital 'O'), could be open to such individual complaints. In addition, the right to complain could also be given to groups of victims, collectively submitting their claims, or even to NGOs acting within the format of an *actio popularis*, as is the case with the Protocol on collective complaints which was added to the European Social Charter in 1995. Especially in a situation of gross violations of rights, with their long-term and devastating effects upon human beings, such additional supervisory procedures would be indicated in our opinion.

Fourthly: Apart from the follow-up procedures foreseen in the draft convention there should be other follow-up methods to ensure that a state confronted with a negative opinion by the committee cannot escape its responsibilities. One could especially think of appointing a special Committee rapporteur for the follow-up, but also of offering good offices, mediation and conciliation.

Finally: The draft Convention aims at cooperation between the Committee and other actors in the victims' rights field. This includes intergovernmental as well as non-governmental actors. As to the latter, however, it would be important to transcend the level of cooperation, and make national as well as international NGOs full co-owners or stakeholders of the victims' rights convention project as well. They might be able to create a substantial counter-force against indifferent or unwilling states and contribute to a serious follow-up in the long run.

7. FINAL OBSERVATIONS AND OVERALL CONCLUSIONS

The proposal by Sam Garkawe to draft a victims' rights convention, referred to in the introduction to this article, at first sight is appealing. After all, who could be against a stronger legal protection of victims' rights? At the same time, Garkawe's observations seem to presuppose that a convention will necessarily lead to a better protection of victims' rights.

Garkawe himself refers to the European Union Framework Decision on the Standing of Victims in Criminal Proceedings to show that most principles in the UN Declaration are apparently not so obscure, vague or uncertain that transforming them into a hard law document is impossible. Garkawe is certainly right in this respect as far as implementation on paper is concerned ('the law in the books'). He

does not mention, however, that not a single European country has followed up the Framework Decision by introducing a comprehensive legislative project. Where national ‘victim charters’ were in place, they had all been established before 2001. Not a single Code of Criminal Procedure was amended in a systematic way with an eye on implementing the Framework Decision’s requirements.¹⁰⁷ So the effects of legally binding instruments should not be overestimated.

Reports by the European Commission have also revealed that the practical follow-up to the Framework Decision (‘the law in action’) has been disappointing. Even the most basic rights and obligations, like informing victims about the release of offenders, have not been fully transposed into domestic law in most countries. Moreover, there is still very little knowledge about the practical benefits which the Framework Decision has brought for victims, because there has not been an independent, comprehensive, and methodologically sound empirical study on the effects of this codification. All in all, considering the long list of deficiencies, there is little evidence that the European Framework Decision has had a far greater impact on the lives of victims than the UN Declaration.

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

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

107. See M.S. Groenhuijsen & S. Reynaers, ‘Het Europees Kaderbesluit inzake de status van het slachtoffer in de strafprocedure: implementatieperikelen en interpretatievragen’, 3 *Panopticon. Tijdschrift voor strafrecht, criminologie en forensisch welzijnswerk* (2006) pp. 12-33.

of a convention went upward, the commitment to build in strong enforcement and compliance mechanisms immediately seemed to go down.

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

It might be pertinent to add here that some theorists have gone even further and have claimed that conventions are increasingly less adequate to meet the needs of an increasingly interdependent and changing world, which is marked by the globalisation of problems in various areas. Hans-Peter Neuhold, for instance, believes that conventions often fail to meet four essential requirements for an effective legal regime: speed (a quick response to new challenges), clarity and uniformity (the price for the adoption of a treaty is often deliberate ambiguity in the text), universality of participation (global problems can only be tackled through global participation) and flexibility and adaptability (a revision of a treaty is often a difficult and lengthy road to follow).¹⁰⁸ His 'warnings' are not translated by us in the advice to refrain from a victims' rights convention per se, but are in many ways reflected in our paper.

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

Analysing all this, we have taken up the challenge to find a middle ground between the ambitions behind the quest for a convention and the benefits and short-

108. H.P. Neuhold, 'The Inadequacy of Law-Making by International Treaties: 'Soft Law' as an Alternative?', in R. Wolfrum and V. Röben, eds., *Developments of International Law in Treaty Making* (Berlin, Springer 2005) p. 40.

comings of the present Declaration on victims' rights. Given the complexity and variety of the rights to be covered, the diversity of state opinions on the desirability of hard standards, the need to keep an eye open to the 'significance of national and regional particularities and various historical, cultural and religious backgrounds'¹⁰⁹ of the negotiating parties, the need to work towards cooperation between states and NGOs ('co-regulation'), we presented the concept of a framework convention as a possible solution. Such a convention tries to combine the benefits of legal bindingness with the flexibility and 'stepping-stone character' of successful soft law documents. We have seen that the instrument is used in, amongst other things, the field of international environmental law and the field of minority protection. In the present paper, we discussed especially the example of the Framework Convention for the Protection of National Minorities of the Council of Europe. At the beginning this convention met with a lot of criticism, amongst other things because of its many programme-type provisions and its weak supervisory mechanism. Recently, however, the opinions about the Convention appear to be positively changing. The Advisory Committee has been able to draft flexible rules of procedure and establish monitoring methods that were not foreseen in the convention. The fact that the independent experts have been able to introduce a system of on-site visits, without having a formal mandate, and even arrange for hearings with different kinds of stakeholders, including NGOs, is nowadays considered to be a major improvement in the protection of minority rights.

We then undertook the effort to look at the 'Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power' from the perspective of the views unfolded in the paper. We observed, *inter alia*, that the draft Convention is composed of different types of standards, from 'hard' obligations on topics which are really no longer controversial – such as access to justice and the right to be informed – to programme-type provisions on issues where no consensus could be reached as yet, such as compensation. As to the issue of co-regulation, it was observed that, at least so far, the process of drafting the Convention can be seen as a good case of such communicative lawmaking. Reflecting upon the monitoring mechanism of the draft Convention from the perspective of the specific framework convention which we have discussed in this paper – the Framework Convention for the Protection of National Minorities – it was stated, however, that the drafters of the (next) version of the Convention would still have to answer some fundamental questions concerning the character of the convention to be adopted, before making final proposals on that issue. Depending on the answer to these questions, the mandate of the monitoring mechanism could seriously vary. As a matter of fact, the supervisory committee's mandate should not necessarily have the character of in-

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

ternational, independent (quasi-)legal decision-making, modelled on international human rights conventions. The mechanism could also be situated halfway between (quasi-)legal decision-making and a readiness to enter into dialogue with unwilling states or states in a backlash position. In the latter case, the Committee's task would basically relate to advising – not meaning 'advising only', but rather something like preparing draft decisions which are taken over by the political supervisory bodies, unless otherwise indicated – political decision-making bodies as to the level of implementation and compliance by the states parties to the convention. As of now, it might be the best way to make progress, also in relation to the many states that are so far not very willing or able to live up to the 1985 Declaration.

ABSTRACT

The core document so far in the field of the protection of victims' rights is the "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", adopted in 1985 by the UN General Assembly. Starting from the notion that this is a declaration 'only', it was suggested by some to develop a victims' rights convention, aiming to improve the legal status of the rights concerned. Following that suggestion, the initiative was taken by independent experts to draft the "UN Convention on Justice and Support for Victims of Crime and Abuse of Power".

This article firstly discusses the legal status of the 1985 Declaration, including the question what parts might have reached the status of international customary law. This analysis is followed by the question of what can be learned from today's academic discussions on characterising international legal standards – hard alongside soft law, etc. – and from recent debates on lawmaking in the international legal field (inter alia, communicative lawmaking and co-regulation). The article addresses some major risks, when embarking on the route of a possible victims' rights convention, including experiences to be drawn from other policy areas. Having done this, it comes up with the instrument of a framework convention, combining the benefits of legal bindingness with the flexibility and 'stepping-stone character' of successful soft law documents. It is seen as a way out of the problems discussed in the article. After having presented some further thoughts on monitoring procedures, the article finally takes a careful look at the previously mentioned Draft Convention.