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### Global governance and global crime

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## Chapter 2

# Global Governance and Global Crime – Do Victims Fall In Between?

*Rianne Letschert and Marc Groenhuijsen*

### **1. Introduction**

Over the last decades, several states have made significant progress in raising awareness of victims' rights, setting out the (quasi-) legal framework and establishing institutions and formal and informal mechanisms for providing protection, redress and justice.<sup>1</sup> Victims' rights legislation – be it through provisions in criminal codes or complete victims' rights charters – and policies have been developed, although mostly in the more affluent countries of the world. Also at the global level, important achievements were made. What started with the *United Nations Declaration on the Basic Principles of Rights of Victims of Crime and Abuse of Power* in 1985 was followed by several instruments from both international and regional organizations. Whereas several of the international and regional instruments focus on what is often referred to as conventional crime, other instruments were influenced by the effects of globalization both on crime and its victims.

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<sup>1</sup> For the purpose of this chapter, victims are defined as those who have been harmed by acts defined as criminal in national or international law.

As indicated in the introductory chapter to this volume, globalization processes, besides impacting on the economic, political and cultural spheres, have also had profound implications for the world of crime and justice. The globalization of various forms of crime poses serious challenges to the conventional systems of criminal justice. More than any other state institution besides the armed forces, criminal justice systems can be seen as quintessential expressions of the sovereign state, claiming exclusive jurisdiction over offences committed within its national borders. But in the context of globalization, both law enforcement organizations, prosecutorial agencies and the courts are trying to find ways to deal with emerging forms of transnational and international crimes. To bring to justice those committing crimes in other jurisdictions than their country of residence, requires cumbersome and time-consuming procedures of international legal assistance. On the other hand, the legal principle of universal jurisdiction and the emergence of such concepts as humanitarian intervention and “responsibility to protect” in the global arena, enable states or international organizations to deal with the scourge of crimes such as genocide, war crimes and crimes against humanity, regardless of territorial borders.

Whereas domestic laws and procedures of criminal justice are replaced or supplemented by international or European criminal law, existing victim protection schemes have remained largely domestic in scope and coverage. They will need to be adjusted to these new settings or better implemented. Without new initiatives to assist victims of global crimes, their needs will largely remain unmet. In this chapter we will explore the magnitude of this challenge and how it could and should be met by the world community.

Various forms of victimizations by complex crimes will be discussed in this book. They can roughly be divided in cross-border victimizations and collective victimizations. Cross-border victimization can impose difficulties in many ways; either the victim becomes victimized in another country than his country of residence, or the victim is victim of a crime committed in another jurisdiction than his own but the effects of the victimization take place in his country of residence (for example cybercrimes); a further complication is that such crimes are often committed by a network or group of (foreign)

criminals residing in different countries. These characteristics each pose difficulties in making use of the existing victims' rights provisions.

Furthermore, there are the intricacies of collective victimization through international crimes such as genocide, war crimes, crimes against humanity or terrorism and organized crime. These crimes victimize whole communities or populations rather than individuals. The problems in providing victims' rights to such collective victim groups do not only occur in countries where the crimes were committed, or before international courts like the International Criminal Court (hereafter ICC), but also in those countries that prosecute alleged perpetrators on the basis of the universal jurisdiction principle.<sup>2</sup>

The aim of this chapter is firstly to analyze implementation difficulties of victims' rights focusing in particular on victims of international crimes and victims of cross-border victimization (section 2). We will start by giving an overview of international and regional standards for the rights of victims and provide, where available, information on their implementation status. We will begin by presenting the main, generalist instruments, namely the 1985 UN Declaration, the recent initiative of drafting a *UN Convention on Justice and Support for Victims of Crime and Abuse of Power (2005)* and several instruments emanating from the European Union and the Council of Europe respectively. Next, we will discuss international legal instruments focusing on special categories of victims such as victims of international crimes, human trafficking and terrorism.

This will be followed by an analysis of global or multi-level governance structures in this field and some first proposals will be made to adjust existing victim protection schemes to the changing demands of a globalized world (section 3).<sup>3</sup>

## **2. Analysis of victims' rights instruments<sup>4</sup>**

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<sup>2</sup> For a thorough analysis of this, see Ferstman, C. & Schurr, J. (2010), 'Universal Justice? The Practice and Politics of Universal Jurisdiction Cases Relating to Crimes Committed in Africa', in: Letschert, R.M., Haveman, R., Brouwer, de A.L.M., & Pemberton, A. *Developing Victimological Approaches to International Crimes, Focus on Africa*, Intersentia.

<sup>3</sup> More elaborate proposals relating to the specific themes of this book will be made in the respective chapters.

## 2.1. General Victims' Rights Instruments

### *United Nations*

The 1985 *United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the UN General Assembly, covers a broad range of issues. These vary from truly abstract principles of justice (“compassion and respect for dignity”), to very practical demands (such as 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 (such as restitution as an available option for sanctioning). There are also quite a few parts touching upon concrete, tangible rights and issues. We briefly mention the main provisions:

- Establishing mechanisms 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)).
- Providing State compensation to direct victims and family and dependants (Para. 12).
- Receiving the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means (Para. 14).

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<sup>4</sup> See *Compilation of International Victims' Rights Instruments* for an overview and exact references of the instruments discussed in this part. Also for a discussion of the legal status of the various instruments. Groenhuijsen and Letschert (2008), Wolf Legal Publishers.

- Training police, justice, health, social service and other personnel concerned to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid (Para. 16).
- In providing services and assistance to victims, giving special attention to particularly vulnerable victims (Para. 17).<sup>5</sup>

### *Implementation*

Resolutions of the UN General Assembly are considered to be soft law. Although the UN Declaration is therefore not legally binding, there are many indications that it has positively influenced the interpretation of existing texts, and contributed to the creation of legally binding rules in many countries. Declarations generally do not make any reference to a monitoring mechanism, as is also the case with the Victims' Rights Declaration. Nevertheless, the UN itself initiated several monitoring projects in the years following the adoption of the Declaration.<sup>6</sup> Several studies were carried out in the last twenty-five years that demonstrate that considerable progress has been made.<sup>7</sup> In that sense, the Declaration could rightly be regarded as a catalyst of change and an important source of inspiration for domestic legislators across the world.

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<sup>5</sup> See for more detailed information on the UN Declaration, Van Genugten, W.J.M., Van Gestel, R., Groenhuijsen, M.S., & Letschert, R.M. (2007). 'Loopholes, Risks and Ambivalences in International Lawmaking; The Case of a Framework Convention on Victims' Rights', *Netherlands Yearbook of International Law*, Vol. XXXVII, pp. 109-154., available also through <http://ssrn.com/abstract=999315>.

<sup>6</sup> More details are provided by Groenhuijsen, M. (1999). 'Victims' Rights in the Criminal Justice System: A Call for More Comprehensive Implementation Theory', in: Van Dijk, Van Kaam & Wemmers (eds.), *Caring for Crime Victims: Selected Proceedings of the Ninth International Symposium on Victimology*, New York: Criminal Justice Press, p. 85-114, Groenhuijsen, M.S. (2005). 'International Protocols on Victims' Rights and some Reflections on Significant Recent Developments in Victimology', in: Snyman, R. & Davis, L. (Eds.), *Victimology in South Africa*, Pretoria: Van Schaik Publishers, p. 333-351, or Van Genugten *et al* (2007).

<sup>7</sup> For an overview, see Schneider, H.J. (2000). 'Victimological Developments in the World during the Last Three Decades: A Study of Comparative Victimology', in: Gaudreault, A. & Waller, I. (eds.), *Beyond Boundaries. Research and Action for the Third Millennium*, Montreal: Association québécoise Plaidoyer-Victimes, pp. 19-68; and Brienens, M., Groenhuijsen, M.S. & Hoegen, E., (2000). 'Evaluation and Meta-Evaluation of the Effectiveness of Victim-Oriented Legal Reform in Europe', *Criminologie*, Volume 33, No. 1, p. 121-144.

Many victimology experts felt that the Declaration, twenty-five years after its adoption, needed to be updated to reflect advances in the theory and practice of victimology. It was also felt that implementation of the basic principles of justice for victims should be made the subject of a fully-fledged UN Convention, similar to the recently adopted UN conventions against organized crime and corruption. The World Society of Victimology (WSV), a worldwide lobby organization for the advancement of victims' rights, and the International Victimology Institute of Tilburg University (INTERVICT) therefore decided to convene a meeting in December 2005 with experts from different world regions to discuss the need and possible contents of a draft convention on victims' rights. The meeting concluded that such document was indeed desirable and elaborated a first draft of a *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 12<sup>th</sup> International Symposium on Victimology organized by the World Society of Victimology in Orlando, USA, leading to some revisions.<sup>8</sup> Since then, the WSV has been lobbying Member States of the UN to propose a formal consideration of the draft text by the UN Commission on Crime Prevention and Criminal Justice (Crime Commission for short).<sup>9</sup>

The Draft reflects state-of-the-art notions of the desired position of victims in criminal justice settings and about victim support. Furthermore, it takes into account the most recent developments in standard-setting on victims' rights by other international and regional organizations. And, finally, and perhaps most importantly, the Draft includes an extensive section on a strong mechanism for monitoring implementation. The draft convention provides for the establishment of a Committee on Justice and Support of Victims of Crime and Abuse of Power which would review the progress made by States Parties in achieving their obligations under the convention. According to the

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<sup>8</sup> The first draft, including the revisions, can be found at <<http://www.tilburguniversity.nl/intervict/undeclaration/convention.pdf>>. Further revisions have been discussed and agreed upon during a Symposium held at the Tokiwa International Victimology Institute on February 15&16, 2008. The proceedings of this Symposium have been published: Dussich, J. & Mundy, K. (eds.) (2009). *Raising the Global Standards for Victims: The Proposed Convention on Justice for Victims of Crime and Abuse of Power*, Mito, Seibundo Publishing Co., Ltd.

<sup>9</sup> Representatives of the WSV attended the annual meetings of the UN Crime Commission in 2008 and 2009 to this end, and the UN Crime Congress in Brazil 2010.

draft convention, this committee would not rely exclusively on the information provided by States Parties but could invite the Secretary General of the United Nations to gather information and provide expert advice on matters of implementation. With the adoption of this provision, Member States would opt for a monitoring and review mechanism that is on a par with those of other international criminal law and human rights conventions (e.g. the OECD Convention on Bribery) and go beyond those from the UN conventions against organized crime and corruption.

Although the objective of a better deal for crime victims is widely embraced across the world, it seems at this juncture doubtful that any UN Member State will take the lead in initiating a formal discussion that could lead to the opening of negotiations on the proposed convention. Besides the usual difficulties on reaching consensus among Member States with diverging political, economic and cultural agendas on the need of elaborating a new convention on a particular topic, the current mood in the UN Crime Commission does not seem to be conducive to such initiative. As will be discussed in Chapter 5, there is insufficient political will to follow up vigorously the implementation of existing, newly adopted criminal law conventions and protocols. This disappointing reality may dissuade Member States sympathetic to the idea of a victims' rights convention to form coalitions that could take the lead in elaborating new UN legislation in this domain. An argument why the UN Crime Commission would yet be well-advised to consider discussions on a possible convention, or on another major initiative to promote victims' rights, is that it would serve to provide the somewhat lacklustre UN Crime Prevention and Criminal Justice Programme with a new, appealing people-oriented focus. Such focus could revitalize the programme by balancing the current somewhat controversial association of the programme with the USA-led wars on drugs and terrorism and broadening its international constituencies. A victim focus for the UN Crime Prevention Programme will not only assure that ordinary people will be among its primary beneficiaries. It will also, through the consultation of representatives of victim communities, introduce a countervailing force against political pressures to serve special state interests in the control of crime. As was already mentioned in the



introductory chapter, a focus on victim interests can help legitimize the use of force immanent in international criminal law arrangements beyond state interests.

Whether the adoption of the Draft Convention could also help to alleviate some of the complexities caused by collective or cross-border victimizations remains to be seen. The Draft contains some references to cross-border victimizations. One rather vague reference to cross-border victimization can be found in Article 7 (1.i.) which stipulates that states should facilitate information which also entails the following: “if they are resident in another State, any special arrangements available to them in order to protect their interests.” Also, Article 11 (7) provides that “in cases of cross border victimization, the State where the crime has occurred should pay compensation to the foreign national, subject to the principle of reciprocity.” In spite of these two provisions, the Draft as it stands, fails to clearly recognize the peculiarities and complexities that such victimizations bring about. The whole language of the Draft Convention seems inspired by the many achievements victimology has reached with regard to conventional crimes committed in a domestic setting. References to special assistance measures in case of collective victimizations are absent altogether, despite the fact that victims of abuse of power are prominently represented in the title of the convention. These omissions constitute a missed opportunity since the UN 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* also fell short in this respect. It included only four rather vaguely formulated articles relating to victims of abuse of power.<sup>10</sup>

### *The European Union and the Council of Europe*

Compared to most other regions in the world, Europe has made significant progress since the adoption of the 1985 UN Declaration by creating a comprehensive (quasi) legal framework offering protection to victims of crime. Both the European Union and the Council of Europe have drafted several binding and non-binding instruments in this

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<sup>10</sup> See Lamborn, L.L. (1987). ‘The United Nations Declaration on Victims’, 19 *Rutgers LJ*, pp. 59-95; See also Bassiouni, M. (2006). ‘International Recognition of Victims’ Rights’, *Human Rights Law Review*, Vol. 6, pp. 203-279.

field.<sup>11</sup> Other regional organizations, such as the African Union or the Organization of American States,<sup>12</sup> have made important achievements in the field of human rights, but have not adopted any specific victims' rights instruments. It is for that reason that the following examples relating to provisions aiming to address cross-border victimization or collective victimization mainly stem from European instruments.

The most important achievement within the EU concerning the protection of general victims' rights is the adoption of the *EU Council Framework Decision on the Standing of Victims in Criminal Proceedings* (2001) and of the *EU Directive on Compensation to Crime Victims* (2004).<sup>13</sup> The EU Directive on Compensation is legally binding for all Member States. The EU Framework Decision, although not a treaty in the formal sense of the word, is also a legally binding document. It imposes a formal obligation on the EU Member States to ensure that their domestic laws and practices approximate the new EU standards. In case of gaps or discrepancies, either new legislation should be introduced or existing legislation adapted, or policy measures should be taken in order to ensure compliance. In other words, the goals of the Framework Decision are binding, although the Member States are left some discretion as to the means they choose to warrant compliance.<sup>14</sup>

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<sup>11</sup> Note Triffterer who stated that "Europe seems predisposed as a forerunner of the 'globalization of criminal justice'." Triffterer, O. (2000). 'Legal and Political Implications of Domestic Ratification and Implementation Processes', in: Claus Kreß & Flavia Lattanzi (ed.), *The Rome Statute and Domestic Legal Orders*, Nomos: Baden-Baden and Il Sirente: Ripa di Fagnano Alto, vol. 1, 1-28 at 25-27.

<sup>12</sup> Note that the Inter-American Court of Human Rights does grant victims procedural rights, such as participation rights.

<sup>13</sup> Other EU legislation also touches upon victims' needs and rights, for instance a framework decision on combating terrorism, a framework decision on combating human trafficking, and a framework decision on combating sexual abuse and exploitation of children.

<sup>14</sup> With the entry into force of the Treaty of Amsterdam, framework decisions under Title VI of the EU Treaty (Police and Judicial Cooperation in Criminal Matters) have replaced joint actions. More binding and more authoritative, they should serve to make action under the reorganized third pillar more effective. Framework decisions are used to approximate (align) the laws and regulations of the Member States. Proposals are made on the initiative of the Commission or a Member State and they have to be adopted unanimously by the European Council. They are binding on the Member States as to the result to be achieved but leave the choice of form and methods. Contrary to directives, framework decisions have no direct effect. With the entry into force of the Lisbon Treaty distinctions between the EU pillars have been abolished and existing framework decisions such as those on the position of crime victims will have

The adoption of the Framework Decision was initially legitimized by invoking a classical EU objective, namely the freedom of movement. The link to developing specific provisions for victims of crime was made by arguing that residents of any Member State of the EU who choose to temporarily or permanently reside in another Member State should receive the same level of protection as they would in their home country. The Framework Decision was thus clearly inspired by cross-border victimizations. In addition, it was argued that those actually victimized by crime were likely to be in need of special protection (mainly because “foreign” victims – such as workers, students or tourists – have no knowledge of the judicial system of the country where they were victimized, and/or may not speak the language etc.).<sup>15</sup> The main articles relating to cross-border victims are Articles 11 and 12. Article 11 places a general duty on Member States to ensure that authorities can take appropriate measures to minimize difficulties, e.g. in the organization of proceedings, where the victim is resident in a different country from the state of the offense. Specific items where assistance should be provided are as follows: the possibility to make a statement immediately after the crime; the possibility to use video and telephone conferencing for hearing a victim; the possibility to report a crime before the authorities of the country of residence rather than the country of crime. Article 12 prescribes the duty for states to foster, develop and improve cooperation with foreign states in cases of cross-border victimization, whether in the form of networks directly linked to the judicial system or of links between victim support organizations. The Framework Decision thus acknowledges the importance of both governmental and non-governmental cooperation.

In 2006, another European regional organization, the Council of Europe, issued a *Recommendation on Assistance to Crime Victims (2006)*.<sup>16</sup> The Recommendation contains a wide variety of victims’ rights which in some regards are more elaborative

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to be transformed into regular directives.

<sup>15</sup> For more information on the background to the adoption of the Framework Decision, see Rock, P. (2004). *Constructing Victims’ Rights: The Home Office, New Labour and Victims*, Oxford, Oxford University Press.

<sup>16</sup> See further [www.coe.int/victims](http://www.coe.int/victims) for more information on the work of the CoE on victims of crime, and also for the other CoE victims’ rights instruments.

compared to other victims' rights instruments. For instance, Article 3.1 relating to assistance urges states to "undertake that victims are assisted in all aspects of their rehabilitation, in the community, at home and in the workplace." Another example is Article 5.1 which encourages states to "provide or promote dedicated services for the support of victims and to encourage the work of non governmental organizations in assisting victims." Furthermore, Article 16.3 emphasizes the important role of NGOs in focusing public attention on the situation of victims. States are furthermore encouraged to set up centers for victims of specific crimes such as sexual and domestic violence (Article 5.3) but also for victims of crimes of mass victimization such as terrorism (Article 5.4). In addition, Article 12.3 notes that specialized training should be provided to all persons working with specific groups of victims, including victims of terrorism. That this recommendation contains more detailed provisions compared to the UN Declaration or the EU Framework Decision is also demonstrated by Article 5.5 which provides that states should consider setting up or supporting free national telephone help lines for victims and Article 10.9 which encourages the media to adopt self-regulation measures in order to protect victims' privacy and personal data.

Regarding coordination and cooperation, Article 14.2 states that each state should ensure, both nationally and locally, that all agencies which in one way or another have contact with victims, work together to ensure a coordinated response. In addition, it is mentioned that "additional procedures are elaborated to deal with large-scale victimisation situations, together with comprehensive implementation plans including the identification of lead agencies." Article 15 addresses transnational crimes. It states that "States should co-operate in preparing an efficient and co-ordinated response for transnational crimes. They should ensure that a comprehensive response is available to victims and that services co-operate in providing assistance (15.1)." Section 15.2 provides that "in cases where the victim does not normally reside in the state where the crime occurred, that state and the state of residence should co-operate to provide protection to the victim and to assist the victim in reporting the crime as well as in the judicial process."

### *Implementation*<sup>17</sup>

The European Commission published a first evaluation report on the implementation of the EU Framework Decision on 16 February 2004 which examined transposal as of 25 March 2003. In 2009, the second report of the Commission was published.<sup>18</sup> This latest report takes into account implementation of all Articles of the Framework Decision by 15 February 2008 in all twenty-seven Member States. The Commission found the implementation of this Framework Decision generally unsatisfactory. The national laws of many Member States sent to the Commission contain numerous omissions. Moreover, they largely reflect existing practice prior to adoption of the Framework Decision. According to the report, “the aim of harmonising legislation in this field has not been achieved owing to the wide disparity in national laws. Many provisions have been implemented by way of non-binding guidelines, charters and recommendations. The Commission cannot assess whether these are adhered to in practice.” This means that already two implementation reports concluded that implementation was unsatisfactory.<sup>19</sup> Although the Commission also acknowledged that more reliable data is needed to make a full assessment of Member States’ implementation.

Therefore, in 2007, the European Commission asked Victims Support Europe,<sup>20</sup> represented by the Portuguese Victim Support organization APAV in cooperation with

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<sup>17</sup> The implementation of the CoE recommendation has not yet been evaluated and will therefore not be further analysed here.

<sup>18</sup> Brussels, 20.4.2009, COM(2009) 166 final, Report From The Commission, Pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) [SEC(2009) 476].

<sup>19</sup> ‘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’. See Shelton, D. (2000). ‘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, p. 1-18, p. 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 Prechal, S. (2006) *Directives in EC Law*, Oxford: Oxford University Press.

<sup>20</sup> Victims Support Europe is an umbrella organization of national victim support organizations, see <<http://www.victimsupporteurope.eu/>>.

INTERVICT, to conduct a study aiming to provide the European Commission and other interested parties with a fuller and more comparative picture of the effects of the Framework Decision on the twenty-seven Member States and on the practical support to victims of crime. The goal of the project Victims in Europe was to see to what extent the Member States have complied with the Decision, not only through implementation in legislation, but also in practice.

Out of this survey came that cross-border victims generally have access to translators across the EU. However, in many cases, this is not a right specific to victims of cross-border crimes but stems from general criminal procedure. The same can be said about the right of victims to make a statement immediately after the commission of the crime, which exists in approximately half of the Member States.<sup>21</sup> Furthermore, from both the Commission's and Victims Support Europe's evaluations, it follows that the right to information is not properly implemented. Access to information is one of the most fundamental victims' rights since non-compliance with it often entails that the victim does not become acquainted with any of his other rights. Considering that this right is not adequately implemented for conventional crime victims, it is to be feared that the situation will even be far worse for cross-border victims. In addition, the majority of the EU Member States do not offer victims the opportunity to report crimes committed abroad once they return home. Most of the countries offer victims this opportunity only in cases in which they themselves have jurisdiction. As this provision in Article 11 lies at the heart of the framework decision, improvements are urgently called for.<sup>22</sup>

### *Changes after the adoption of the Lisbon Treaty*

With the adoption of the Treaty on the Functioning of the European Union (Lisbon Treaty), framework decisions will have to be updated and transformed into directives. This transformation is likely to enhance the legal status of the EU standards for victims'

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<sup>21</sup> APAV-INTERVICT Report (2010), Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union, Project on behalf of Victims Support Europe, p. 149. Available at <[http://www.apav.pt/portal\\_eng/](http://www.apav.pt/portal_eng/)> and <<http://www.tilburguniversity.nl/intervict/>>.

<sup>22</sup> APAV-INTERVICT report, p. 156.

rights. The Treaty of Lisbon sets out, in relation to the rights of victims of crime, that minimum standards can be established to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters (Article 82.2). In the provision of sub 2 itself, some important limitations to EU competence are included. First of all, the substantive limitations stating that the legal measures shall only concern the following aspects: mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime. The Council can extend this list to other aspects of criminal procedure by taking such a decision unanimously and after the consent of the Parliament. Furthermore, the provision includes some procedural limitations. First of all, the provision must be necessary to facilitate mutual recognition and police and criminal law cooperation. Second, it must have a cross-border dimension. Third, the differences between the legal traditions and systems of the Member States must be taken into account. And fourth, only minimum rules can be adopted.

Especially the addition of the cross-border dimension looks, at first sight, to seriously limit the thematic scope of competences of the EU, also with regard to improving victims' rights. However, with regard to the cross-border dimension, we agree with Peers who states 'that the European Union's specific criminal procedural powers would be rendered meaningless if they could only be applied in cross-border proceedings.'<sup>23</sup> Moreover, in the past years, under the previous EU regime - the three pillar structure-, the scope of approximation of laws was widened by adopting legislation relating to procedural issues where the legal basis and competence of the EU was also not as such prescribed.<sup>24</sup>

Also on a policy level, increased calls for the improvement of victims' rights implementation are made. The European Council, in the 2009 Stockholm Programme, called for an integrated and coordinated approach to victims. The Council acknowledged the unsatisfactory implementation of the Framework Decision and the Directive. It called upon Member States and the Commission to take a variety of measures, from

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<sup>23</sup> Peers, S. (2008). 'EU Criminal Law and the Treaty of Lisbon', *European Law Review*, Vol. 33, issue 4, pp. 507-529.

<sup>24</sup> See further Rijken & Letschert, 'Harmonizing Legislation Post-Lisbon' (forthcoming 2010).

strengthening legislation and policy to increasing research. The European Council called on the Commission and the Member States to, amongst others:

- examine how to improve legislation and practical support measures for protection of victims and to improve implementation of existing instruments;
- offer better support to victims otherwise, possibly through existing European networks that provide practical help and put forward proposals to that end;
- examine the opportunity of making one comprehensive legal instrument on the protection of victims, by joining together the Directive on compensation to victims and the Framework Decision on victims, on the basis of an evaluation of the two instruments.<sup>25</sup>

Work to that end has recently been initiated by the European Commission early in 2010 in consultation with Victim Support Europe and individual experts. Under consideration is an omnibus directive incorporating updated versions of both the Framework Decision and the Directive on State Compensation. It therefore appears that the European Union is currently putting the victims' issue, unlike the UN, more prominently on the agenda.<sup>26</sup> A careful caution should, however, be made. Considering the poor implementation results of the existing EU victims' rights instruments, the question how to effectively improve the current situation seems more and more urgent. The various, often uncoordinated, evaluation studies have until now not been able to provide a clear and coherent picture on desirable reforms.

### **Compensation to crime victims**

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<sup>25</sup> See The Stockholm Programme - An open and secure Europe serving and protecting the citizen, European Council, Brussels, 2 December 2009.

<sup>26</sup> See also Council Conclusions on a strategy to ensure fulfilment of the rights of and improve support to persons who fall victim to crime in the European Union, 2969<sup>th</sup> Justice and Home Affairs Council Meeting, Luxembourg, 23 October 2009. Also within the field of violence against women, children and sexual identity violence important developments are underway. The EU is considering adopting harmonizing legislation in this field and is currently (2010) undertaking a feasibility study in this regard



At the European level, two important documents exist that deal with the specific issue of compensation to victims. It is often stated that victims are primarily in need of respect and recognition. Having noted that, it is obvious that many victims also suffer financial consequences from the crime committed against them. This burden can be alleviated by payment of compensation (or reparation) by the offender (in American law known as restitution). In a majority of cases, though, the offender is not found or apprehended, or is unwilling or unable to compensate the damages incurred by the victim. It is widely felt that when this happens in instances of violent intentional crime, the state should step in and provide financial compensation to victims as an expression of solidarity with their fate. State funds for the payment of (partial) compensation are among the oldest provisions for victims of crime, in many Western countries dating back to the 1970s. This principle has also been fully recognized in the UN Declaration of 1985, and was subsequently reaffirmed and elaborated in a number of instruments specifically dedicated to this topic. Most noteworthy in this respect are the early Council of Europe *Convention on the Compensation of Victims of Violent Crimes* (1983) and the more recent *European Union Directive relating to Compensation to Crime Victims* (2004), already mentioned.

The *Council Directive 2004/80/EC of 29 April 2004 relating to Compensation for Crime Victims* aims at establishing state compensation funds in Member States where they do not exist and to facilitate access to compensation in situations where the crime took place in another Member State than that of the victim's residence. The Directive seeks to set minimum standards, not to harmonize national laws because "the latter would not be appropriate in view of the current differences between the Member States, due to the close connection to national laws on civil liability and tort and also due to socio-economic discrepancies."<sup>27</sup> The Directive ensures equal access for all EU citizens to compensation. The Directive sets up a system of cooperation to facilitate access to compensation to victims of crime in cross-border situations, which must be implemented by the

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<sup>27</sup> See Proposal for a Council Directive on Compensation to Crime Victims, COM (2002) 562 final, 2002/0247 (CNS), Brussels, 16 October 2002, p. 10.

compensation Funds of Member States. The Directive therefore requests from all Member States that a functioning compensation mechanism is in place.<sup>28</sup>

Article 2 states that compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed. The Directive furthermore instructs states to establish *assisting* authorities and *deciding* authorities, whose tasks vary from providing assistance to potential applicants and deciding upon applications for compensation. The Directive does not address issues relating to the nature of the expenses eligible for compensation.<sup>29</sup> According to the explanatory memorandum, close relatives and dependants of victims that have died as a result of the injuries sustained are also entitled to protection under the Directive.<sup>30</sup>

The Council of Europe adopted in 1988 the first piece of hard law on victims' rights with a Convention on the thematic issue of crime compensation. This Convention, which entered into force on 1 February 1988, creates minimum standards relating to compensation for the State Parties.<sup>31</sup> The scope of application of the Convention concerns victims of intentional crimes of violence who have suffered *serious* bodily injury or impairment of health, which is directly attributable to the intentional crime. Surviving dependants of persons who have died as a result of such crimes (Article 2) are eligible as well. Article 3 incorporates the territoriality principle, which declares the Convention applicable to nationals of the State Party to the Convention, and to nationals of all Member States of the CoE who are permanent residents in the state on whose territory the crime was committed. Compensation is independent of the arrest of the perpetrator.

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<sup>28</sup> See paragraph 7 of the Preamble.

<sup>29</sup> The original draft did contain standards on this issue, noting that 'compensation shall cover pecuniary and non-pecuniary losses [...]. Id., Article 4, p. 22.

<sup>30</sup> Proposal for a Council Directive on Compensation to Crime Victims, COM (2002) 562 final, 2002/0247 (CNS), Brussels, 16 October 2002, p. 12.

<sup>31</sup> Signed in Strasbourg on 24 November 1983, European Treaty Series (ETS) – no. 116. 21 of the 47 Member States of the CoE have ratified the convention, most of them being also EU Member States. Already in 1977, a resolution on compensation of victims of crime was adopted by the Council of Ministers which paved the way for the 1983 Convention. See for more information also Buck, K. (2005). 'State Compensation to Crime Victims and the Principle of Social Solidarity - Can Theoretical Analysis Contribute to a Future European Framework', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 13/2,148-178.

Compensation shall cover at least the following items: loss of earnings, medical and hospital and funeral expenses, and, with regard to dependants, loss of maintenance (Article 4).

### *Implementation*

Unsurprisingly, the latter two legally binding documents have been adopted in one of the more affluent regions of the world. In most countries of the world, a national compensation scheme for victims of violent crimes is still a distant ideal. Improving this situation globally would seem one of the main challenges for the victims' rights movement in the present century.

The application of the *EU Directive on Compensation to Crime Victims* (Directive 2004/80/CE du Conseil du 29 avril 2004) was recently evaluated.<sup>32</sup> All Member States who have implemented the Directive have schemes in place which allow victims to submit an application for compensation. All Member States who have implemented the Directive (with the exception of Estonia) have implemented Articles 2-3 which requires the creation of responsible authorities and administrative procedures.

Only few victims make use of the option to file complaints against foreign compensation funds through sister organizations in their home country. A major shortcoming is furthermore that in two Member States no general compensation schemes for victims of violent crime exist at all (Italy and Greece). The huge variation in eligibility criteria of existing schemes also seems to limit the possibility of victims to claim compensation in many Member States. Other differences within the EU Member States relate to rules with regard to the eligibility requirements concerning cross-border victimization, especially with regard to EU nationals victimized outside the EU and non-EU residents victimized in an EU Member State. It should furthermore be considered whether a clear rule should be established on additional compensation from a

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<sup>32</sup> See Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Directive 2004/80/EC relating to compensation to crime victims, SEC(2009)495, Brussels, 20.4.2009.<  
[http://ec.europa.eu/justice\\_home/doc\\_centre/civil/studies/doc/study\\_compensation\\_to\\_crime\\_victims\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/study_compensation_to_crime_victims_en.pdf)>.

victim's home country. For example, if a Dutch citizen becomes a victim of a crime in Hungary, should this entail that he has a statutory right to claim additional compensation in the Netherlands? The APAV-INTERVICT study of 2010 on the implementation of the Framework Decision furthermore indicates that there is broad dissatisfaction over the timelines of compensation, the adequacy of payment, the compensation procedure and the ease of making a claim.

## **2.2. Specific instruments: victims of international crimes<sup>33</sup>**

Victims of international crimes such as genocide, crimes against humanity and war crimes, or other gross human rights violations often experience existing international and regional legal instruments on general victims' rights to be inadequate or difficult to implement. By adopting the UN 1985 Declaration, governments agreed to respect the rights of victims of crimes in their domestic courts. The initial draft of the Declaration sought to extend its scope to include victims of abuse of power. For lack of political consensus, the rights and interests of victims of abuse of power were not fully addressed in the adopted version. This omission was partly corrected by the subsequent adoption of the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.<sup>34</sup> The acknowledgement of the victimological notion of collective victimhood makes this instrument conceptually truly innovative.<sup>35</sup> The Preamble explicitly notes that "contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively." Interesting is also that in section V, Article 8, it is stated that "where appropriate, in accordance with domestic law, the term "victim" also

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<sup>33</sup> The examples in this section follow the themes discussed in the subsequent chapters; for that reason, no mention is made of the still expanding legal victims' rights framework relating to violence against women and children.

<sup>34</sup> The principles are often referred to as the Van Boven/Bassiouni Principles, referring to the two principal drafters.

<sup>35</sup> The guidelines were adopted and proclaimed by the United Nations General Assembly on 16 December 2005 (Res. 60/147), after a 15-year period of negotiations. Note that the Preamble mentions that the principles and guidelines do not 'entail new international or domestic legal obligations, but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms.'

includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” and thus follows the definition of the 1985 Declaration. The latter category is not mentioned in all victims’ rights instruments.<sup>36</sup> Furthermore, relating to access to justice, Article 13 provides that, “in addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.”

Section VII, Article 11b refers to “reparation” as constituting a moral imperative, in the sense that “what has been broken must be mended.” It entails much more than “compensation,” by which international law understands “restitution in money.” Reparation implies restoration of the victim. In this way, it can contribute to aims of rehabilitation, reconciliation, restoration of democracy and law. In case of acts of omissions which constitute gross violations of international human rights law or serious violations of international humanitarian law that can be attributed to a state, a state must provide victims with adequate, prompt and effective reparation. Liable parties are obliged to reimburse the state when the latter has already paid the victims. States should furthermore endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet its obligations. The different forms of reparation were identified by the UN Special Rapporteur entrusted with the task to draft the principles, Mr. Van Boven, as meaning “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition,” now laid down in Article 18.<sup>37</sup>

The Basic Principles and Guidelines have incorporated some of the classical victims’ rights, such as the one in Article 10 relating to the treatment of victims (ensuring that victims should be treated with humanity and respect for their dignity, ensure safety,

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<sup>36</sup> For instance in the EU and CoE instruments mentioned above.

<sup>37</sup> Van Boven, T. van (2009). ‘The Right to a Remedy as contained in International Instruments: Access to Justice and Reparation in Treaties and the New United Nations Principles’, in: Flauss, J.F. (ed.), *La protection internationale des droits de l’homme et les droits des victimes* (pp. 31-56), Bruxelles: Editions Bruylant, p. 22. See also De Greiff, P. (2006). ‘Justice and Reparations’, in De Greiff (2006), *The Handbook of Reparations*, The International Center for Transitional Justice, Oxford University Press, pp. 452-503.

physical and psychological well-being and privacy, and the prevention of secondary victimization). Another example of a classical victims' right is the right to information (Article 24), urging states to develop means of informing the general public and, in particular, victims of gross violations, of the rights and remedies contained in the Basic Principles, and of all available legal, medical, psychological, social, administrative and all other services to which victims may be entitled. Important also is that Article 24 mentions that victims are entitled to seek and obtain information on the causes leading to their victimization, and to learn the truth with regard to these violations. The right to learn the truth is not incorporated so prominently in other international victims' rights instruments. For victims of international crimes, this is an important aspect that needs to be addressed when guaranteeing the right to information. It goes beyond existing regulations about providing information on important developments in a possible criminal procedure or the availability of services.<sup>38</sup>

### **Victims at the International Criminal Court**

International criminal justice mechanisms have too often overlooked the fact that providing justice in the aftermath of international crimes should also adequately address victims' needs.<sup>39</sup> Victims of crimes tried by international tribunals such as the Tribunal for the Former Yugoslavia or the Rwanda Tribunal found that their rights were only marginally addressed. The International Criminal Court takes a more comprehensive approach in its mandate. The *Statute of the Court* has been hailed as "a milestone in victimology" because it contains some far-reaching provisions relating to victims' issues.<sup>40</sup> Compared to the procedural rules governing previous International Tribunals

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<sup>38</sup> See for more information on the van Boven/Bassiouni Principles and reparation in general, Shelton, D. (2005). 'The United Nations Principles and Guidelines on Reparations: Context and Contents,' in: De Feyter, Parmentier, Bossuyt & Lemmens (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerpen: Intersentia, pp. 11-32, and Letschert, R.M, Haveman, R., Brouwer, de, A.L.M., & Pemberton, A. (2010). *Devising Victimological Approaches to International Crimes*, Intersentia.

<sup>39</sup> See Drumbl, M.A. (2007). *Atrocity, Punishment and International Law*. Cambridge. Cambridge University Press.

<sup>40</sup> Groenhuijsen, M.S. (2005). 'International Protocols on Victims' Rights and some Reflections on Significant Recent Developments in Victimology', in: Snyman & Davis (eds.), *Victimology in South Africa*, Pretoria: Van Schaik Publishers, pp. 333-351.

(such as the former Yugoslavia and Rwanda), the main improvements are the extended availability of protective measures for victims, expanded victim participation, and better provisions on reparation.<sup>41</sup> Another innovation is the establishment of a Victims and Witnesses Unit that advises the Prosecutor and the Court on a wide range of appropriate protective measures, security arrangements, counseling and assistance. The ICC also boasts a Victims' Participation and Reparations Section that is responsible for assisting victims with the organization of their legal representation before the Court.<sup>42</sup> These are major steps forward and the ICC provisions in this regard might turn out to be a "best practice" in reducing risks of secondary victimization.<sup>43</sup> Furthermore, an important innovation is that the Court may award reparations on an individualized basis or, where it deems appropriate, on a collective basis or both. In addition, a Trust Fund has been set up aiming to provide victims with reparation.<sup>44</sup>

Nevertheless, the enormous number of victims wishing to participate in the Court's procedures poses the Court for a yet still unresolved challenge, as will be further elaborated in Chapter 12. There is, however, a significant interest here for victims, as a satisfactory day in court could add to rebuilding a victim's self-esteem, as is evidenced by various victimological studies.<sup>45</sup>

## **Victims of trafficking in human beings and other forms of organized crime**

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<sup>41</sup> Garkawe, S. (2003). 'Victims and the International Criminal Court: Three Major Issues', *International Criminal Law Review*, 3, pp. 345-365.

<sup>42</sup> See for more information <<http://www.icc-cpi.int/victimsissues.html>>.

<sup>43</sup> Secondary victimisation is defined in CoE Recommendation 2006 (8) as 'victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim' (Article 1.3).

<sup>44</sup> <http://www.icc-cpi.int/vtf.html>.

<sup>45</sup> In July 2009, INTERVICT organized an expert meeting on "developing victimological approaches to international crimes", analyzing whether victims of the latter have different needs than victims of conventional crime. The results are published in Letschert et al. (2010). See furthermore <http://www.tilburguniversity.nl/intervict/events/reportrwanda.pdf> for the report of the conference. See further Danieli, Y. (2009). 'Massive Trauma and the Healing Role of Reparative Justice', in: Ferstman, C., Goetz, M. & Stephens, S., *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Martinus Nijhoff Publishers.

According to the 2005 Human Security Report, “the trafficking in human beings has burgeoned into a multi-billion-dollar industry that is so widespread and damaging to its victims that it has become a cause of human insecurity.”<sup>46</sup> In the past ten years, human trafficking has become a major priority of the world community. In 2000, the UN adopted the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the Convention against Transnational Organised Crime.<sup>47</sup> The Protocol contains some specific victims’ rights which have a wide scope in the sense that reference is made to a set of socio-economic measures. For instance, Article 6.3 notes the following: Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of: (a) Appropriate housing; (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities.

International organizations such as the IOM, ILO, UNICEF and UNODC have initiated global programmes against human trafficking. The European Commission has been actively engaged by developing a comprehensive and multidisciplinary approach towards the prevention of and the fight against human trafficking. Also, a *Framework Decision on Combating Trafficking in Human Beings* was adopted, although here the focus is on prevention and not so much on the victims.<sup>48</sup> In 2010, following the Lisbon Treaty, the EU is negotiating a proposed Directive on Preventing and Combating Trafficking in Human Beings, and Protecting Victims. This document has a wider scope than merely combating and includes various provisions relating to the protection of and assistance to victims. The Council of Europe adopted in 1995 a *Convention on Action*

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<sup>46</sup> Human Security Report, 2005, 86.

<sup>47</sup> See also Chapters 4 and 5. Chapter 5 will provide detailed analyses of the implementation status of the Convention against Transnational Organized Crime.

<sup>48</sup> 2002/629/JHA: Council Framework Decision of 19 July 2002 on combating trafficking in human beings.



*against Trafficking in Human Beings*, including measures to protect and promote the rights of victims. The OSCE has set up the Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, whose mandate is to support the development and implementation of anti-trafficking policies, also promoting a comprehensive approach.<sup>49</sup>

These initiatives all share a commitment to pursue an integrative approach, covering both prevention, protection of victims and prosecution of criminals. An integrative approach is necessary, considering the wide range of interdependencies in both countries of origin, transit and destination that influence human trafficking. Development in these efforts will be further discussed in Chapters 4 and 5.

### **Victims of terrorism**

In 2005, the CoE adopted *Guidelines on the Protection of Victims of Terrorist Acts*.<sup>50</sup> The guidelines aim to address the specific needs and concerns of victims of terrorist acts, in identifying the means to be implemented to help them, and to protect their fundamental rights while excluding any form of arbitrariness, as well as any discriminatory or racist treatment.<sup>51</sup> The scope of the guidelines is primary (excluding those who only suffer economic loss) and secondary victims (meaning direct victims and their close family, in appropriate circumstances). The Council of Europe was the first European organization to adopt a specific instrument for victims of terrorism.

In 2007, the European Union commissioned a group of research institutes to draft EU recommendations for victims of terrorist acts.<sup>52</sup> The proposed *EU Recommendation on Assistance to Victims of Acts of Terrorism* covers a more extensive approach for the assistance to victims of terrorism, including, among other things,

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<sup>49</sup> <[Http://www.osce.org/cthb/13408.html](http://www.osce.org/cthb/13408.html)>.

<sup>50</sup> See Guidelines of the Committee of Ministers of the Council of Europe on the Protection of Victims of Terrorist Acts, 2 March 2005. The Guidelines are laid down in the Appendix to this chapter. The CoE also adopted Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers at its 804th meeting (11 July 2002), which addresses victim's compensation issues in paragraph XVII.

<sup>51</sup> Preamble, para. h.

<sup>52</sup> See Letschert, R.M., Staiger, I., & Pemberton, A. (2010). *Victims of Terrorism, Towards a European Standard of Justice*, Springer Publishers, also including the Draft Recommendation.

provisions relating to psycho-social assistance (both emergency and continuous assistance), access to justice, compensation, information strategies, and access for victims of terrorism to restorative justice practices and procedures. As regards, for instance, emergency assistance, Member States should ensure that evidence-based and well-coordinated emergency assistance, including the provision of information and medical, psychological, social and material support is available. With regard to access to justice and administration of justice, particular focus was put on participatory rights for victims of terrorism as well as on legal aid. In this respect, a more extensive approach than offered in the existing international legal instruments was incorporated in the standards. The compensation provision does not only focus on ensuring adequate financial compensation (also through mass claims), but also calls upon states to consider other reparative measures such as commemorations and tributes to the victims. Finally, restorative justice approaches were included in the proposed EU recommendation. This approach was not explicitly mentioned in the Council of Europe Guidelines (2005), although a reference to mediation, as one form of restorative justice practice, can be found in other legal instruments at CoE level.

Finally, within the UN, important developments relating to victims of terrorism are taking place, mainly relating to the establishment of a voluntary trust fund.<sup>53</sup>

### *Implementation*

There are still considerable difficulties for victims of international crimes or gross violations of human rights to access effective and enforceable remedies and reparations for the harm they suffered or to access various other rights.<sup>54</sup> It is a long established principle of international law that the breach of an international obligation by a State

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<sup>53</sup> In September 2009, the UN organised a High-Level Expert Meeting on Addressing the Needs of Victims of Terrorism, for the report see 'Supporting Victims of Terrorism', available through <<http://www.un.org/terrorism/pdfs/UN%20Report%20on%20Supporting%20Victims%20of%20Terrorism.pdf>> (last checked March 2010). See also <<http://www.un.org/terrorism/workgroup3.shtml>>.

<sup>54</sup> See also Falk, R. (2006). 'Reparations, International Law and Global Justice', in: Pablo de Greiff, *The Handbook of Reparations*, The International Center for Transitional Justice, Oxford University Press, p. 491 and Letschert, R.M. and Van Boven, Th. (2010). 'Reparation to Victims of Mass Crimes – Challenges involved', in Letschert et al (2010).

entails the duty of the State to make reparations.<sup>55</sup> As the result of an international normative process, the legal basis for a right to a remedy became firmly anchored in the elaborate framework of international human rights' instruments, now widely ratified by States.<sup>56</sup> And yet, only few reparations have actually been granted in the aftermath of mass atrocities.<sup>57</sup> Mere codification of this general overarching right in various national and international instruments is just a first step. A process of consistent implementation and compliance of the various rights embodied under this general principle is one of the biggest challenges. Although the reparation claim is well-founded *in abstracto*, in assessing the claim *in concreto*, we must be cautious to conclude too firmly that a rule of general international law providing the individual or groups of individuals with a right to claim reparations for human rights violations exists.<sup>58</sup> As Seibert-Fohr notes, however, practice under the international human rights treaties at least reveals one common

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<sup>55</sup> Factory at Chorzow, Judgment No. 8, 1927, P.C.I.J., Series A, no. 17, at 29. Article 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53rd Session 2001.

<sup>56</sup> Boven, T. van (2009). 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines', in: Ferstman, Goetz and Stephens, *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Martinus Nijhoff, p. 21.

<sup>57</sup> Roth-Arriaza, N. (2003-2004). 'Reparations Decisions and Dilemmas', *Hastings International & Comparative Law Review*, Vol. 157.

<sup>58</sup> Authors recognizing an individual right to reparation include Hofmann, R. (2006). 'Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation against States under International Law', in: Dupuy, Fassbender, Shaw & Sommermann (eds.), *Common Values in International Law – Essays in Honour of Christian Tomuschat*, Zegveld, L. (2003). 'Remedies for Victims of Violations of International Humanitarian Law', No. 851 *IRRC*, Fleck, D. (2007). 'Individual and State Responsibility for Violations of the Ius in Bello – An Imperfect Balance', in: Heintschel von Heinegg & Epping (eds.), *International Humanitarian Law Facing New Challenges*, Heidelberg. For the opposite view, see, amongst others, Seibert-Fohr, A. (2009). *Prosecuting Serious Human Rights Violations*, Oxford Press, p. 244, Tomuschat, C. (1999). 'Individual Reparation Claims in Stances of Grave Human Rights Violations: The Position under General International Law', in: Randerzhofer, A. & Tomuschat, C. (eds.), *State Responsibility and the Individual*, Martinus Nijhoff. More recently, the ILA Committee on Reparations to Victims of Armed Conflict came to the following conclusion: 'in view of the relevant state practice and taking note of a strong majority among scholars, the Committee came to the conclusion that, until most recently, international law did not provide for any right to reparation for victims of armed conflicts. The Committee submits, however, that the situation is changing: There are increasing examples of international bodies proposing, or even recognising, the existence of, or the need to establish, such a right,' Hofmann, R. (2010), 'Reparations for Victims of Armed Conflicts', Report to the ILA Hague Conference 2010, p. 2 and 14. The Committee has drafted a declaration on the topic of reparation which will be discussed at the 2010 ILA (International Law Association) Conference.

denominator; the right to *access to judicial remedies* which has been widely incorporated into international human rights treaties.<sup>59</sup>

Much has been written on the implementation of the far-reaching victims' provisions in the ICC Statute, both in the Court's own daily work, as well as on the domestic level when trying perpetrators of international crimes on the basis of universal jurisdiction.<sup>60</sup> A more detailed description and assessment of the ICC's treatment of victims will be given in Chapter 12.<sup>61</sup>

Victims of human trafficking often encounter various difficulties in claiming their rights. Besides being a victim of a heinous crime causing severe psychological trauma and socio-economic distress, they often fall victim to the non-corresponding prosecutorial interests of the Public Prosecution Office and the interests of the migration officers (see further Chapter 4).

Lastly, some words on the implementation of rights for victims of terrorism need to be added. Here the picture is somewhat diffuse. On the one hand, there are the many stories of victims who complain that their rights cannot be applied, often because of the fact that no court cases are being held (due to the fact that the perpetrator died during the attack or cannot be found). In addition, governments often hide in secrecy when it comes to unravelling the narrative about the causes of the attack, for reasons of state security.

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<sup>59</sup> Seibert-Fohr, A. (2009), p. 244 and Letschert, R.M. & Boven, T. van (2010). 'Challenges in Providing Reparations after Mass Victimization', in: Letschert et al 2010.

<sup>60</sup> See Redress Report, Universal Jurisdiction in Europe, Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide <<http://www.redress.org/documents/unijeur.html>>. The report gives the following examples; 'In Italy, for instance, groups representing relatives of the disappeared in Argentina were denied their applications to join proceedings. In Switzerland, the spouse of a victim who had died in the Rwandan genocide withdrew as *partie civile* from the case against N. when forced to choose between becoming an ordinary witness and gaining the right to witness protection measures, or remaining as *partie civile* and not being eligible for such protection. There are also disincentives for victims to apply to be *partie civile*. For instance, in Belgium if victims initiate an investigation from which no prosecution results, the victims are obliged to pay the costs of the investigation. Any compensation orders made in such cases are also difficult to enforce.' See also Goldmann, M. (2008). 'Implementing the Rome Statute in Europe: From Sovereign Distinction to Convergence in International Criminal Law?' *Finnish Yearbook of International Law*, vol. 16, (2005/2008), 5-29, also for further references.

<sup>61</sup> See also the stocktaking study on the impact of the ICC on victims that was carried out for the 2010 ICC Review Conference in Kampala, Uganda, available at <[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8R/ICC-ASP-8-49-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-49-ENG.pdf)>.

This leaves victims without their day in court and with many unanswered questions. On the other hand, several of the more recent massive terrorist attacks led to an enormous outbreak of activities by both governmental and non-governmental organizations providing psycho-social assistance or financial support through *ad hoc* established compensation schemes or charity.<sup>62</sup>

### **3. From multi-level governance to multi-level implementation**

What follows from the analysis above is that it is one thing to create an international or regional legislative framework in the form of legal or quasi-legal instruments, but quite another to actually uphold them in practice before domestic or international courts. The legal consequences of globalization, like the growth in collective legislation and regulation, national and international state and non-state actors, and the rise in the number of international fora for dispute settlement, undoubtedly also influence the implementation of victims' rights and the accommodation of victims' needs. What follows also from the discussion of the different victims' rights instruments in the previous section is that international legal orders are increasingly interrelated – be it through the spread of international standards, transnational effects of domestic provisions or decisions, or the increased weight of international or national non-state actors in the formation of international law.<sup>63</sup> To illustrate the latter, NGOs (especially the women's coalition) played an important role in shaping key provisions in the ICC Statute and in achieving early ratification of the ICC Statute. Within Europe, a network of victim support organizations focusing on victims of terrorism was created and has become an important lobby group for EU activities in this field.<sup>64</sup> Also, Victim Support Europe gains

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<sup>62</sup> For examples, see Letschert, R.M. & Ammerlaan, K. (2009). Compensation for Victims of Terrorism, in: Letschert et al.

<sup>63</sup> See Goldmann, M. (2008). 'Implementing the Rome Statute in Europe: From Sovereign Distinction to Convergence in International Criminal Law?' *Finnish Yearbook of International Law*, vol. 16, (2005/2008), 5-29. And Boyle, A. and Chinkin, C. (2007). *The Making of International Law*, Oxford Press

<sup>64</sup> See <<http://www.europeanvictims.net/>>.

influence over the European Union crime victims' agenda.<sup>65</sup> And the already mentioned World Society of Victimology lobbies in UN circles for the advancement of a UN Convention on victims' rights.

This global governance can be defined as the system of rules and institutions established by the international community and private actors to manage political, economic and social affairs on the global scale.<sup>66</sup> Common features emanating from global governance are the use of both non-hierarchical and sometimes top-down forms of governing, the emergence of multi-level structures of policy implementation, and the enhanced role of non-state actors within them.<sup>67</sup> Through forms of global governance, "state sovereignty becomes multiple, overlapping and shared."<sup>68</sup>

Governance, also in the field of victims' rights, has thus become more and more multi-level. The increasing decision-making powers and coordinating tasks of the European Union in the area of "freedom, security and justice" can serve as an example.<sup>69</sup> On the international level we can refer to the establishment of a permanent International Criminal Court, next to the several temporary special international or hybrid international tribunals.<sup>70</sup> The obligations for states to implement the provisions of the ICC Statute in their domestic legislation calls for increased cooperation between different

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<sup>65</sup> In 2009, VSE issued a Manifesto calling the European Union to take a number of measures to advance the implementation of victims' rights. Available at <<http://www.victimssupporteurope.eu/>>.

<sup>66</sup> The concept of multilevel governance was first used to describe European integration, introduced by Marks, G., Hooge, L., & Blank, K. (1996). 'European Integration from the 1980s: State-Centric v. Multi-Level Governance', *Journal of Common Market Studies*, Vol. 34, pp. 341-78.

<sup>67</sup> 'Multi-level governance is often referred to as a system of continuous negotiation among nested governments at several territorial tiers, describing how supranational, national, regional, and local governments are enmeshed in territorially overarching policy networks. Multi-level governance emphasizes both the increasingly frequent and complex interactions between governmental actors and the increasingly important dimension of non-state actors that are mobilized in cohesion policy-making and in the EU policy more generally', see Marks, M., (1993). Structural policy and Multi-level governance in the EC', in: Cafruny, A. & Rosenthal, G., (ed.) *The State of the European Community: The Maastricht Debate and Beyond*, Boulder, pp.391-411.

<sup>68</sup> Held, D. (1995), *Democracy and the Global Order*, Cambridge Press, in: Aas, (2007), p. 148.

<sup>69</sup> For instance, Europol, Eurojust, the European Arrest Warrant, Frontex and the Police Chiefs Operational Task Force can be mentioned.

<sup>70</sup> For an overview, see <<http://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts.html>>.

state and non-state actors when it comes to successfully prosecuting perpetrators of international crimes in domestic courts and providing services to victims.

A major challenge for the future is that national criminal justice systems not only exchange evidence and transfer offenders across borders but also cooperate regarding the involvement of victims residing outside national territories in the administration of justice. From the evaluations described above, it appears that providing redress to victims in a cross-border or collective context proves to be a particularly difficult challenge. We believe that weak institutional arrangements make international cooperation in addressing protection of victims in these situations difficult to achieve and they impair the implementation of effective legal and normative frameworks to handle the full range of victims' issues discussed in this book.

So far, experience in the field of implementing victims' rights on the national level teaches that a codification in order to be successful requires a complicated process of "multi-level implementation" in which the state, NGOs, judges, prosecutors, probation officers, police officials, and victim support practitioners all participate. All have an important role in safeguarding that the "chain of protection" remains unbroken.<sup>71</sup> But even that still falls far short of effectively turning the rights included in the international documents into a reality, if they would not be supplemented by proper budgets, plans, aims, objectives, targets and timetables for implementation.

Our argument is that the implementation of victims' rights in cases of cross-border victimization or collective victimizations poses additional problems because providing proper assistance, psycho-social, legal or financial assistance, becomes more complicated. Not only do national partners in the field of conventional crime victims need to cooperate, but now coordination and cooperation needs to be established with other national chain partners and international or regional partners that took over some of the state's responsibilities. The allocation of responsibility for implementation is unclear, forcing victims to go shopping in the wood of global governance. This is even more difficult with the complicated frameworks of access to justice in the international sphere.

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<sup>71</sup> See Van Genugten et al, 2007.

Between global governance and global crime, the victim often gets lost in the maze of abundant and heterogeneous victims' rights (referred to by Aas as global legal plurism)<sup>72</sup> and the desperate search for those responsible for upholding them.<sup>73</sup>

#### **4. Concluding observations**

The playing field for offenders has expanded from the local or national to the global, leading to new – international and transnational – forms and manifestations of crimes. States with their traditional systems of criminal prosecution and security policies as well as victims have often found themselves powerless to deal with these new forms of crime. Finding solutions for “problems without passports” has proved to be extremely difficult. In addition, the adequate implementation of victim protection schemes for victims of various forms of collective victimizations through terrorist attacks or international crimes such as genocide is a huge challenge.

The difficulty for cross-border victims to have access to justice in the country where the crime was committed, in combination with the difficulty to arrest and prosecute perpetrators of transnational crimes (leading to immunity for the perpetrators and impossibility for victims to claim victim status before a court), makes access to victims' rights often illusory.

In line with the spirit of Article 12 of the EU Framework Decision and Article 1 of the EU Directive, there is acknowledgement that additional measures need to be implemented in order to fulfil the needs of victims of cross-border victimization. To address this, we first present some recommendations with regard to the cross-border context, later followed by recommendations relating to collective victimizations.

What seems most urgent is that mutual legal aid in the field of criminal justice as foreseen by the Europol and Eurojust initiatives needs to be expanded with mutual victim

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<sup>72</sup> Aas (2007), p. 148.

<sup>73</sup> See Fraser who notes that within the globalised justice framework, it is no longer clear what the scope of justice is, and who counts as its subject. Fraser, N. (2005). 'Reframing Justice in a Globalized World', *New Left Review*, vol. 6, Nov-Dec, pp. 69-88, in: Aas (2007), p. 187.



assistance across borders. As rightly put: “the view is that borderless threats require borderless law enforcement across organizational entities nationally and internationally, and across categories of citizens and non-citizens.”<sup>74</sup> This applies as much to the law enforcement side as the victim protection part. This requires the setting up of institutional arrangements, which seem more feasible at this juncture in an EU setting than at the global level. The Spanish Presidency of the EU in 2010 has made the crime victims’ cause one of its priorities.<sup>75</sup> The time, we would say, seems right to set up an EU Victims’ Rights Agency to coordinate and monitor the various requirements laid down in the different instruments (or expand the mandate of Europol or Eurojust with a new operational mandate). Through such an Agency, Articles 11 and 12 of the Framework Decision could be brought to life. This agency could also take the lead in assuring compensation for cross-border victims on an equal footing across the Union, e.g. by setting up a complementary EU compensation fund. As argued above, the EU Directive which prescribes the creation of assisting and deciding authorities, is no guarantee for such equal playing field for cross-border victims.

Moreover, an overall improvement of knowledge and awareness amongst governmental and non-governmental institutions regarding cross-border victimization is needed. As recommended by Victim Support Europe, to address this, the EU could for instance arrange educational networks and lectures to improve coordination of cross-border operation and procedures between all bodies involved in giving support to victims.<sup>76</sup>

On a more global level, any institutional reform seems an unrealistic goal for the immediate future. However, much could be gained if existing bodies, notably UN bodies working in the crime field, such as the Crime Commission, would strengthen their efforts to enhance cooperation between the various international and national organizations and other actors in the victims’ rights field. This includes intergovernmental as well as

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<sup>74</sup> Cited in Aas, K.F. (2007), p. 106.

<sup>75</sup> <[http://www.apav.pt/portal\\_eng/pdf/programa\\_eu\\_2010\\_esp.pdf](http://www.apav.pt/portal_eng/pdf/programa_eu_2010_esp.pdf)>.

<sup>76</sup> APAV-INTERVICT Report, Recommendations Victims Support Europe on the basis of the report: p. 177.

non-governmental actors. As to the latter, it would be important to transcend the level of cooperation, and make national as well as international and regional NGOs full co-owners/stakeholders of the victims' rights agenda. They might be able to infuse the deliberations of these bodies with a people-oriented discourse that could help to overcome politically inspired deadlocks or stalemates.

There is little doubt that the elaboration and adoption of a future UN Convention would push forward the implementation of victims' rights. This would be even more the case if it retained the proposed monitoring mechanism of the Committee on Justice and Support for Victims of Crime and Abuse of Power. Ideally, such Committee would enter into a permanent dialogue with both governmental and non-governmental organizations. Also, including a Universal Periodic Review Mechanism as created by the UN Human Rights Council as one of the monitoring methods of the convention could enhance the implementation of victims' rights.<sup>77</sup>

We do, however, recommend – if the Draft would ever be seriously discussed at the UN – to reflect upon the need to add a section on both the cross-border and collective victimization contexts and what such victimizations entail for the underlying state obligations in guaranteeing victims' rights. Reference should be made to the ICC provisions, for instance the possibility to appoint common legal representatives of communities of collective victims. In addition, the establishment of the trust fund in combination with the reparations function of the ICC constitutes an unprecedented step forward for the rights of victims within international criminal law. Such provisions could be of great benefit for victims of terrorism or other forms of organized crime. This would make the future UN Convention better equipped to serve the needs of global crime victims.

In addition, it would also correspond to the human security concept as discussed in the following chapter. As indeed, parallel to transformations in the security domain to

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<sup>77</sup> The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all 192 UN Member States once every four years. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations.

address new forms of crime, criminal justice has become more people-oriented. If the concern for human security implies a need of developing global justice, such justice needs to be victim-centered to be viable and sustainable. A further analysis of collective victimization by a combined human security and victimological approach can significantly contribute to understanding the unique situation of human exposure to threats, risks, trauma and fear, and how to react appropriately to (re)gain security.<sup>78</sup> The human security concept will be further elaborated in the next chapter, from which it will also become clear that access to victims' rights in the less affluent countries is even more challenging than in most developed countries.

Globalization has enabled the creation of formal and informal networks which allow international and national NGOs to engage with global agendas. Through this networking process, globalization also offers empowerment possibilities for those marginalized groups that strive for the same cause. On the other hand, through globalization, a complex system of multi-level governance came to the fore and a multi-level legal framework has been created, also complicating effective implementation of victims' rights. However, since no national government alone can hope to tackle the shadow sides of globalization, multi-level governance to advance the interests of victims of global threats is inevitable. To make this a success, requires a coordinated and cooperative approach towards lawmaking, policy and institutional design, and an increased role for non-state actors.

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<sup>78</sup> See also Ewald, U. (2002). 'Victimization in the Context of War', *European Journal of Crime, Criminal Law and Criminal Justice*, 2-3, p. 91 and Letschert et al. (2010).