

**Facing the Victims
in the Global Fight against Terrorism**

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WORKING PAPER

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Abstract

The fate of victims of violent acts contrary to international law stands in urgent need of serious attention in the Global Fight against Terrorism. The increasing number of demands for justice that have arisen as a result of the changing nature of the international crime of terrorism (high-casualty or ‘catastrophic’ terrorism) and the upsurge of national counter-terrorism measures some of which are clearly at odds with international human rights and humanitarian law are putting pressure on national governments. At the moment, however, most of the global efforts for fighting terrorism focus on how to *prevent* terrorism; the way to tackle situations where these measures fail is an issue that has become marginalized. In particular, no comprehensive international approach has been developed for responding to the growing number of rightful claims for justice voiced by victims of international terrorism and wrongful counter-terrorism measures.

Instead of common engagement on how to build a forceful response to (mass) victimization resulting from extensive international law violations, international security and human rights communities have come to select and sympathize more easily with some categories of victims. Indeed, the current international politics of justice do not aim at universal recognition and respect for all victims, but instead (1) legitimize ignorance and neglect of many victims; (2) fail to offer safeguards against unfair or arbitrary treatment; and (3) open the door for political instrumentalization and abuse of their demands for justice. In this sense, the present state of affairs risks alienating those who suffer most because of terrorist attacks and wrongful counter-terrorism measures (i.e. ‘secondary victimization’) from the ultimate goals pursued in the Global Fight against Terrorism of suppressing and eliminating the occurrence of this crime.

The present paper seeks to explain the need for a global response to the fate of victims based on the principle of equal concern and respect. Such a response assumes that all victims of violent acts contrary to international law (that is, of both international terrorism and wrongful counter-terrorism measures) have equal rights to recognition and justice. This approach is seen as having the potential of transcending political divides and as offering a vehicle towards a more affirmative, inclusive and fair implementation of the universal rights to recognition and justice in the context of global counter-terrorism initiatives. The paper reviews and criticizes existing international legal instruments and institutions for not having been able to offer a general definition of the term ‘victims’ or given sufficient consideration to the rights of both categories of victims in law and in practice. It also outlines a number of recommendations on how to curb the realities of non-recognition and ignorance of persons in their status as victims as well as unjustifiable inequalities in terms of treating these victims.

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1. The Fate of the Victims as a Collective Security Concern

We speak about laws and policies. But we should never forget that this is about people, about families. Terrorism creates victims. Counter-terrorism is creating new victims.
 Nicholas Howen, Secretary-General, Commission of Jurists, ICJ Biennial Conference, Berlin 2004.

The fate of victims of violent acts contrary to international law stands in urgent need of serious consideration by the international community.¹ Since 9/11 there has been a significant increase in the number of such victims.² The trend is the result of the changing nature of international terrorism (high-casualty or 'catastrophic' terrorism).³ It is also the consequence of an upsurge of national counter-terrorism measures several of which are clearly at odds with fundamental principles of international human rights and humanitarian law.

¹ The study is limited to victims of 'violent acts contrary to international law' (and, thus, focuses on victims of acts that have been condemned as wrongful by the international community). As a consequence, it does not entail a consideration of victims of violent acts prohibited by domestic law only. The notion of victim is defined in broad terms and includes a consideration of 'direct victims' (killed, wounded and kidnapped) (as done in security-orientated studies) as well as 'next of kin' (relatives and dependents) (as usually done in international human rights law) well as 'indirect victims' (of poverty, etc.) (as done by e.g. the World Bank). Indeed, as stated by the World Bank, far more people die from *indirect* consequences of major terrorist attacks, such as slowdowns in the global economy, than from the attacks themselves. See 'Poverty Warning after US Attacks', *BBC News*, 1 Oct. 2001.

² See e.g. *Human Security Report. War and Peace in the 21st Century* (Oxford: Oxford University Press, 2005) (hereafter 'Human Security Report 2005'), p. 19. Available online at: <http://www.humansecurityreport.info/index.php?option=content&task=view&id=28&Itemid=63>.

³ For an analysis of the changing nature of terrorism since 9/11, see e.g. Stephen Gale, 'Terrorism 2005: Overcoming the Failure of Imagination', *E-notes, Foreign Policy Research Institute*, 16 Aug. 2005. Available online at: <http://www.fpri.org/enotes/20050816.americawar.gale.failureofimagination.html> and Walter Enders and Todd Sandler, 'After 9/11: Is it All Different Now?', *Journal of Conflict Resolution* (April 2005). See also forthcoming book by Walter Enders and Todd Sandler, *The Political Economy of Terrorism* (Cambridge: Cambridge University Press, 2006), especially the introduction. For the purpose of this study, it is important to note that one key component of today's fundamentalist terrorists is to seek maximum casualties and to induce fear.

Though it is difficult to find reliable and precise data, international and domestic reports affirm an upward trend in terms of the number of victims since 9/11. One obstacle to finding exact measures is the lack of a definition of 'terrorist act'. As noted in the *Human Security Report* (2005), 'it is impossible to count events if there is no agreement on how to define them'. Furthermore, the idea of collecting data on security issues is fraught with sensitivity. For example, proposals to establish a professional in-house analytic and data collection capacity in the UN Secretariat that would focus on security-related matters have been repeatedly blocked by member states in the General Assembly.⁴ These difficulties notwithstanding, the *Human Security Report* concludes that available evidence suggests that, while the overall number of terrorist incidents has declined, high-casualty attacks have increased. There is an uneven but clear upward trend in the number of killed and wounded in international terrorist attacks from 1982 to 2003.⁵

The US government is heavily engaged in monitoring patterns of international (or global) terrorism and publishes annual data on victims of terrorist attacks. As a consequence of its desire to see a decline in global terrorism in response to its 'war on terror', including the military interventions in Afghanistan and Iraq, the counting of victims has fallen prey to intense politicking and debate. Even so, most data sets ensuing from the US government manifests a significant increase in the number of victims since 9/11. According to its report issued in April 2005, the amount of terrorist attacks around the world tripled between 2003 and 2004, rising from 208 in 2003 to 655 in 2004 with 9,321 victims (625 killed and 3,646 wounded).⁶ The subsequent

⁴ *Human Security Report* (2005), p. 40. Available online at: <http://www.humansecurityreport.info/index.php?option=content&task=view&id=28&Itemid=63>.

⁵ *Ibid.*, 42 ff. For data on victims, see figure 1.14 at 44.

⁶ National Counterterrorism Center, 'A Chronology of Significant International Terrorism for 2004' (27 April 2005), p. 87. Available online at: http://www.tkb.org/documents/Downloads/NCTC_Report.pdf. For figures for 2003, see *Patterns of Global Terrorism 2003*, 22 June 2004, section on the year in review. Available online at: <http://www.state.gov/s/ct/rls/pgtrpt/2003/33771.htm> See also Office of the Coordinator for Counterterrorism, 'Chronology of Non-Significant International Terrorist Incidents, 2003 (Revised 6/22/2004)'. Available online at: <http://www.state.gov/s/ct/rls/fs/2004/33786.htm>.

According to *Patterns of Global Terrorism 2003*, the

adoption of a broader notion of terrorism to include 'non-significant terrorist attacks' led to a radical revision of the figures for 2004: 3,192 terrorist attacks and 28,433 persons killed, wounded or kidnapped.⁷ The information that was first published for 2003 (307 killed and 1,593 wounded)⁸ was amended in response to a critique mounted by two prominent US scholars, Alan B. Krueger and David Laitin, who argued that, contrary to the US report on *Global Patterns of Terrorism 2003*, there had been an increase rather than decline in terrorist attacks between 2002 and 2003.⁹ Earlier US reports for 2002 (725 killed and 2,013 wounded),¹⁰ 2001 (3,295 persons killed and 2,283 wounded),¹¹ 2000 (405 killed and 791 wounded),¹² and 1999 (233 killed and 706 wounded)¹³ have not been subject to similar criticisms.¹⁴

increase in the number of wounded depends on numerous indiscriminate attacks during 2003 on 'soft targets', such as places of worship, hotels and commercial districts, intended to produce mass casualties.

⁷ Tim Reid, 'The 28,000 victims of terrorism', *The Times*, July 7 2005. Available online at: <http://www.timesonline.co.uk/article/0,,3-1684077,00.html>.

⁸ Office of the Coordinator of Counterterrorism, *Report on Patterns of Global Terrorism 2003*, 29 April 2004. Available online at: <http://www.state.gov/s/ct/rls/pgtrpt/2003/31569.htm>

⁹ Alan B. Krueger and David Laitin, 'Misunderestimating' Terrorism', *Foreign Affairs* (Sept/Oct. 2004). Available online at: <http://www.foreignaffairs.org/20040901facomment83502/alan-b-krueger-david-d-laitin/misunderestimating-terrorism.html>. See also *Report on Patterns of Global Terrorism 2003*. Available online at: <http://www.state.gov/s/ct/rls/pgtrpt/2003/>; and *Chronology of Non-Significant International Terrorist Incidents, 2003* (Revised 6/22/2004). Available online at: <http://www.state.gov/s/ct/rls/fs/2004/33786.htm>.

¹⁰ *Report on Patterns of Global Terrorism 2003*. Available online at: <http://www.state.gov/s/ct/rls/pgtrpt/2003/>.

¹¹ *Report on Patterns of Global Terrorism 2002*, US Department of State, April 2003. Available online at: <http://www.state.gov/documents/organization/20109.pdf>.

¹² *Report on Patterns of Global Terrorism 2000*, US Department of State, 30 April 2001. Available online at: <http://www.state.gov/s/ct/rls/pgtrpt/2000/2420.htm>.

¹³ *Ibid.*

¹⁴ Since 2003 US Reports on Patterns of Global Terrorism are no longer published. Instead, as of 2005, country reports are published. These reports include a consideration of victims but do not provide an overview on the number of victims. This change follows a reorganization of the counter-terrorism activities after the enactment of the Executive Order

If counting the victims of international terrorism is difficult, still more problematic is finding out how many persons have suffered from *wrongful or arbitrary counter-terrorism measures* adopted since 9/11. However, in spite of the high degree of national sensitivity towards international publicity of international human rights and humanitarian law violations, the UN Secretary-General, the Special Rapporteurs of the UN Human Rights Commission and the UN Office of the High Commissioner for Human Rights assert that there has been a noteworthy degradation in terms of human rights protection in the last four years.¹⁵ According to their sources, the most pressing human rights abuses are violations of the principle of legality, arbitrary detention and conditions of treatment in pre-trial detention, freedom from torture, fair trial rights, and due process guarantees.¹⁶ The Amnesty International report issued in 2004 affirms that, a result of the 'war on terror', 'the current framework of international law and multilateral action is undergoing the most sustained attack since its establishment half a century ago'.¹⁷

The increase in the number of victims of violent acts in breach of international law and resulting from international terrorism and counter-terrorism

National Counterterrorism Center, 27 Aug. 2004. Available online at:

<http://www.whitehouse.gov/news/releases/2004/08/20040827-5.html>.

¹⁵ See *Report of the Secretary-General: Protecting human rights and fundamental freedoms while countering terrorism*, UN Doc. A/60/374 22, Sept. 2005, p. 4; *Report of the Secretary-General: Protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/58/266, 8 Aug. 2003, pp. 12-13; *Report of the Secretary-General: Protecting human rights and fundamental freedoms while countering terrorism*, UN Doc. A/59/404, 1 Oct. 2004; *Report of the High Commissioner for Human Rights: Protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2005/100, 16 Dec. 2004; and 'Joint Statement on the Protection of Human Rights and Fundamental Freedoms in the Context of Anti-terrorism Measures', *Press Release*, 25 June 2004. Available online at: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/6E4B60B7E5590BE9C1256EC10029E9D0?opendocument>.

¹⁶ See *Report of the Secretary-General: Protecting human rights and fundamental freedoms while countering terrorism*, UN Doc. A/60/374 22, Sept. 2005, p. 4; and *Report of the Secretary-General: Protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/58/266, 8 Aug. 2003, pp. 12-13.

¹⁷ Amnesty International, 'Building an International Human Rights Agenda: Resisting Abuses in the Context of the War on Terror' (2004). Available online at: <http://web.amnesty.org/report2004/hragenda-1-eng>.

initiatives since 9/11 should be of direct concern to the international community and be recognized as matter of collective and human security. In seeking to maximize casualties, the threat of international terrorism, which is ever so present, endangers the life, liberty and security of individual human beings, both in terms of actual attacks and in terms of the measures, including military interventions, which have been waged in response to this threat. Although, as acknowledged in the *Human Security Report* (2005), international terrorism poses far less of a threat compared to other forms of political violence or violent crime, it remains a critically important human security issue for several reasons. Most importantly from the standpoint of the victims, 'the number of 'significant' international terrorist attacks appears to have increased dramatically in 2004'; also, 'the "war on terror" has major implications for human security'.¹⁸

2. An Inventory of International Instruments and Mechanisms

In spite of the upward trend of victims of violent acts condemned in international law, the international community has been slow in responding to the realities of unmet demands for justice in the context of the Global Fight against Terrorism, affording them recognition in their status as victims, and ensuring respect for their international rights. In particular, no comprehensive approach has been advanced that explains how the UN and its member states ought to respond to their claims. Instead, for the most part, there is a belief that existing international instruments and mechanisms aimed at protecting victims of international law violations and ensuring their rights will do the job.

The great majority of the international instruments in the field of counter-terrorism focus on how to *prevent* and *suppress* terrorism; the way to tackle situations where counter-terrorism measures fail (and produce extensive human suffering) is an issue that has become marginalized. Out of the

¹⁸ The *Human Security Report* (2005) also adds that: The 9/11 attacks led to the most radical shift in Western security policy since the end of the Cold War; the 'war on terror' provided part of the rationale for two major conventional wars in Afghanistan and Iraq, the anti-terrorist campaign has been associated with an extraordinarily high level of anti-Western sentiment in the Muslim world; and the global impact of mass-casualty terror attack with weapons of mass destruction could push tens of millions of already poor people into poverty, greatly increasing death rates from malnutrition (p. 46).

dozen (plus one) international anti-terrorist conventions on hand, only two touch on the issue of victims.¹⁹ The *International Convention against the Taking of Hostages* (1979) proscribes restitution of objects which the offender has obtained as a result of taking hostages (article 3.2), and the *International Convention for the Suppression of the Financing of Terrorism* (1999) urges States Parties to consider 'establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims...' (article 8.4). In addition, some regional anti-terrorist conventions, such as the *Convention of the Organization of the Islamic Conference on Combating Terrorism* (1999)²⁰ and the *Council of Europe Convention on the Prevention of Terrorism* (2005)²¹ consider the need for assistance to victims of terrorist acts. A concern for victims of *counter-terrorism measures* in these instruments is, at best, indirect.²²

More substantive provisions on the rights of victims of international law violations of direct relevance to the Global Fight against Terrorism

¹⁹ *Convention on offences and certain other acts committed on board aircraft* (1963); *Convention for the suppression of unlawful seizure of aircraft* (1971); *Convention for the suppression of unlawful acts against the safety of civil aviation* (1971); *Convention on the prevention and punishment of crimes against internationally protected persons* (1973); *International Convention against the taking of hostages* (1979); *Convention on the Physical Protection of Nuclear Material* (1980); *Convention for the suppression of unlawful acts against the safety of maritime navigation* (1988); *Convention on the marking of plastic explosives for the purpose of detection* (1991); *International Convention for the Suppression of Terrorist Bombings* (1997), *International Convention for the Suppressing of the Financing of Terrorism* (1999). The 13th international instrument is the recently adopted *International Convention for the Suppression of Acts of Nuclear Terrorism* (2005).

²⁰ *Convention of the Organisation of the Islamic Conference on Combating International Terrorism* (1999), para. B(4) ('Extending necessary assistance to victims of terrorism').

²¹ *Council of Europe Convention on the Prevention of Terrorism* (2005) (art. 14) affords protection, compensation and support for victims of terrorism: 'Each State Party shall adopt such measures as may be necessary to protect and support the victims of terrorism that has been committed within its own territory. These measures may include, through the appropriate national scheme and subject to domestic legislation, *inter alia*, financial assistance and compensation for victims of terrorism and their close family members.'

²² For example, the *Council of Europe Convention on the Prevention of Terrorism* (2005) considers the fate of victims of counter-terrorism measures indirectly by affirming that all counter-terrorism measures must respect human rights (preamble).

are found in other areas of international law. The universal right to justice for victims, which in international law originally was confined to a right to reparation for States who were 'victims' of wrongful acts (i.e. breaches of international law),²³ has been extended to include human beings and crystallized into a broad range of more specific rights, including rights to an effective remedy, access to justice, access to relevant information concerning violations and reparations mechanisms, safeguards against intimidation and threats in the course of proceedings, etc. Also, the understanding of the right to reparation has been refined and consolidated to entail restitution, compensation, rehabilitation, and satisfaction.

International humanitarian law, applicable in case of armed conflict, was first to place the circumstance of human victims at the center of international legal attention. However, unlike international human rights law, it does not entail provisions on concrete courses of action;²⁴ furthermore, it only gives partial recognition of the right to justice: the most straightforward right of victims recognized in the Geneva law is that of compensation.²⁵

The idea of human rights, formally introduced in 1948, has had a significant impact on the progressive development of a general international legal framework that recognizes natural persons as bearers of a universal right to justice if subject to violent acts condemned by the

²³ *Factory at Chorzow, Jurisdiction*. Judgment No. 13 1928, P.C.I.J., Series A. no. 17, p. 29. See also *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: 'Every internationally wrongful act of a State entails the international responsibility of that State' (UN Doc. A/CN.4/L.602/Rev., 26 July 2001).

²⁴ For a more comprehensive analysis, see e.g. Liesbeth Zegveld, *Remedies of Violations of International Humanitarian Law*, *IRRC*, vol. 85, no. 185, September 2003.

²⁵ *Third Geneva Convention relative to the Treatment of Prisoners of War*, art. 68: Any claim by a prisoner of war for compensation in respect of personal effects monies or valuables impounded by the Detaining Power under article 18 and not forthcoming on his repatriation, or in respect of loss alleged to be due to the fault of the Detaining Power or any of its servants, shall likewise be referred to the Power on which he depends. ... *First Additional Protocol relating to the Protection of Victims of International Armed Conflicts*, art. 91: Responsibility: A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

international community as unlawful, and specifies the more specific meaning of this right as well as corresponding obligations of states. In general the right to justice is broadly defined as a right to effective remedy. According to the *Universal Declaration of Human Rights* (1948), 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.²⁶ Moreover, the *International Covenant on Civil and Political Rights* (1966) affirms the human right to an 'effective remedy', and stipulates that:

any person claiming such a remedy shall have his right thereto determined by the competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.²⁷

Other relevant international instruments include the *Convention against Torture* (1984),²⁸ the *Convention on the Elimination of All Forms of Racial Discrimination* (1965),²⁹ and the *Convention on the Rights of the Child* (1989)³⁰

²⁶ *Universal Declaration of Human Rights*, art. 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

²⁷ *International Covenant on Civil and Political Rights*, art. 2(3): Each State Party to the Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; To ensure that any person claiming such a remedy shall have his right thereto determined by the competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; To ensure that the competent authorities shall enforce such remedies when granted.

²⁸ *Convention against Torture*, art. 12: Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

²⁹ *Convention against the Elimination of All Forms of Racial Discrimination*, art. 6: State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

³⁰ *Convention on the Rights of the Child*, art. 39: States Parties shall take all appropriate measures to

although their provisions on the rights of victims are confined to specific international human rights violations. And, while restricted in geographical scope, the *European Convention on Human Rights* (1950),³¹ the *American Convention on Human Rights* (1978),³² and, to some extent, the *African Charter on Human and Peoples' Rights* (1981)³³ also recognize the rights of victims to effective remedy.

Also relevant is the creation of several international and regional judicial (and quasi-judicial) mechanisms designed to guarantee the right to justice for victims of violations of international human rights law in case of state failure to protect this right. The regional human

promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse: torture or any other form of cruel, inhuman or degrading treatment or punishment: or armed conflicts. Such recovery or reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

³¹ *European Convention on Human Rights*, art. 5(5): Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation; and art. 13: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

³² *American Convention on Human Rights*, art. 25:1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted. Art. 68: (1) States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. (2) That part of a judgment that stipulates compensatory damage may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state. Art. 63(1): If the Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

³³ *African Charter on Human and Peoples' Rights*, art. 21(2): In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

rights courts are especially significant in this respect,³⁴ but so is also the establishment of the International Criminal Court (ICC). The latter is the first permanent international criminal tribunal to afford access to justice for victims of grave international crime (genocide, war crimes and crimes against humanity). The ICC recognizes the right of victims to participate in proceedings,³⁵ a possibility of claiming reparations,³⁶ and to enjoy protective measures (in terms of identity and confidentiality).³⁷

3. Non-Recognition of Victim Status

In the light of an evident proliferation of rights for victims in different fields of international law as well as of international judicial (and quasi-judicial) mechanisms to strengthen their implementation and ensure their fulfilment, the international community must be seen as having made critical advances in terms of facing human victims of violent acts contrary to international law. Nevertheless, a closer examination of the efficiency and applicability of these instruments and mechanisms in the context of the Global Fight against Terrorism reveals a picture that is much more disconcerting and troublesome. Several legal and other obstacles clearly stand in the way of ensuring these victims their universal rights to recognition and justice.

³⁴ The European Court of Human Rights, the Inter-American Commission and Court of Human Rights and the African Court of Human Rights.

³⁵ *Rome Statute*, art. 68.3 and *ICC Rules of Procedure*, rule 89. Participation may occur at various stages of proceedings and may take different forms. In most cases, participation will take place through a legal representative (*ICC Rules of Procedure*, rule 91) and will be conducted 'in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial' (*Rome Statute*, art. 68.3).

³⁶ *Rome Statute*, art. 75. The Court may (either upon request or on its own motion in exception circumstances) determine the scope and extent of any damage, loss and injury. It may either order the convicted person to afford reparations or where appropriate, order the award for reparation through the Trust Fund.

³⁷ *Rome Statute*, art. 68. In this sense, it differs radically from the two *ad hoc* international criminal tribunals for Rwanda and the former Yugoslavia none of which afford the victims legal standing. Claims for reparation must instead be directed to 'a national court or other competent body'. *ICTY and ICTR Rules of Procedure and Evidence*, rule 106.

A. *The Lack of a Common Legal Definition of Victim*

International law lacks a common definition of victim that cuts across its different fields. Though the notion of victim appears in a variety of contexts, in the main, there is no formal substantive definition of victim. Instead, most international legal documents treat the circumstance of different groups of victims of international law violations in an isolated manner. A specific category of victims may be singled out on the basis of the nature of the violation, the perpetrator, the nationality or location of the victims, or their specific interests and needs.

International humanitarian law makes explicit mention of 'victims of conflict' (or 'war victims'), and distinguishes between 'wounded soldiers on the battlefield', 'wounded and shipwrecked at sea', 'prisoners of war', and 'civilians under enemy control' as well as 'victims of internal violence'. However, it provides no formal substantive account of the notion of victim. Neither does international human rights law provide a formal legal definition of the term victim.³⁸ Still, the notion of victim is not without relevance. For example, most international individual complaint mechanisms in the area of human rights are restricted to those who claim to be victims. The UN Human Rights Committee only accepts complaints of persons who claim to be a victim of a violation of any of the rights set forth in the Covenant on Civil and Political Rights.³⁹ In a similar vein, the European Court of Human Rights receives applications from 'any person, non-governmental organisation or group of individuals claiming to be the victim of a

³⁸ While the final text of the *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* (2005) does not define 'victim', early drafts of the same text did include such a provision: 'Reparation may be claimed ...by the direct victims, the immediate family, dependants or other persons or groups of persons connected with the direct victims'. See Revised set of Basic Principles and Guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo Van Boven pursuant to Sub-Commission decision 1995/117, Sub-Commission for the Prevention and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996.

³⁹ Article 1 of the *Optional Protocol to the International Covenant on Civil and Political Rights* (1966).

violation by one of the High Contracting Parties of the rights set forth in the convention...'⁴⁰

Definitions of the term 'victim' in the area of international human rights law have instead been developed in international jurisprudence. Such definitions include at the very least the person whose rights and freedoms have been violated. In general, it does not consider his or her nationality. Unlike security-orientated definitions which are confined to killed and wounded, the notion entails relatives and dependents. The former European Commission on Human Rights has defined the term 'victim' as covering 'not only the direct victim or victims of the alleged violation, but also any person who would indirectly suffer prejudice as a result of such violation or who would have a valid personal interest in securing the cessation of such violation'.⁴¹ Furthermore, the Inter-American Court of Human Rights interprets the notion of victim in broad terms to include those who suffer the 'immediate effects' of breaches of human rights guarantees. Thus, a victim's family members have been recognized as 'injured parties' and as capable of presenting their own claims of reparation. The Court has also interpreted the term 'next of kin' in a broad sense to include all persons linked by a close relationship, including the children, the parents and the siblings.⁴²

⁴⁰ Article 34 of the *European Convention on Human Rights* (1950). However, the Inter-American Convention on Human Rights does not use the term victim in its text; in fact, complaints to the Inter-American Commission are not restricted to victims, but 'any person or group of persons, or any nongovernmental entity legally recognised in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party' (see Article 44 of the Inter-American Convention of Human Rights, 1969).

⁴¹ See e.g. *X. v. Federal Republic of Germany*, App. 4185/69, 35 *ECHR Decision & Reports* 140, 142 (1970). Cited in Dinah Shelton & Thordis Ingadottir, *International Criminal Court Reparations to Victims of Crime (Article 75 of the Rome Statute and the Trust Fund (Article 79). Recommendations for the Court Rules of Procedure and Evidence*. Prepared by the Center on International Cooperation, New York University, for the 26 July – 13 August 1999 Meeting of the Preparatory Commission for the International Criminal Court, p. 8.

⁴² *Loyaza-Tamayo v. Peru*, Inter-American Court of Human Rights, Judgment on Reparations, 27 November 1998, paras. 88-92. See also *Blake v. Guatemala*, Inter-American Court of Human Rights, Judgment, para. 38: 'The condition of victim cannot be denied also to the next of kin of the disappeared person; who have their day-to-day life transformed into a true cavalry, in which the memories of the person dear to them are intermingled with permanent

The criminal branch of international law includes a formal definition of the term 'victim'. Pursuant to the *Rules of Procedure and Evidence of the International Criminal Court* (2002), victim 'means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.⁴³ However, this definition is designed to regulate the accessibility of the ICC in relation to victims. As such, it only covers crimes over which the court may exercise jurisdiction. Thus, at the moment, it excludes victims of the international crime of terrorism.⁴⁴ Neither does it embrace victims of all kinds of international human rights law violations, limited as it is, to victims of crimes of a certain magnitude.⁴⁵

The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) offers a more general substantive definition of victim:

'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.⁴⁶

However, while adopting a more inclusive and affirmative approach to the circumstance of

torment of his forced disappearance. ... The complex form of violation of multiple human rights which the crime of disappearance represents has as a consequence an enlargement of the notion of victim of violation of the protected rights.'

⁴³ *ICC Rules of Procedure and Evidence*, rule 85.

⁴⁴ Resolution E of the Final Act of the Rome Statute, A/CONF./10, 17 July 1998, laments that 'no generally acceptable definition of the crimes of terrorism and drug crime could be agreed upon for inclusion in the jurisdiction of the Court'. However, it then notes that the Assembly of States Parties may consider including this crime at a later stage once a definition has been determined. But see also Irune Aguirrezabal, 'Countering Terrorism: Legal Responses and ICC Prospects', *Young Europeans for Security, Danish Security and Defence Policy Network*, June 2005.

⁴⁵ *Rome Statute of the International Criminal Court*, arts. 1 and 5.1 (according to which the Court's jurisdiction is limited to 'the most serious crimes of international concern').

⁴⁶ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34 of 29 Nov. 1985.

victims, this Declaration is not a legally binding document and, as such, does not create international legal rights.

More importantly in this context, the declaration in question does not tackle the hurdles surrounding the lack of a formal definition of international or global terrorism. Nevertheless, this is one serious obstacle towards affording victims of such violence formal status in the international context. The Security Council came close to a definition in 2004. In its resolution 1566 it defined such acts as:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.⁴⁷

Nevertheless, in spite of efforts to move forward on this matter at the World Summit in September 2005, no progress has been made since 2004. Thus, at the moment, not all acts of terrorism are recognised as international crimes. For example, neither assassinations of businessmen, engineers, journalists or educators; attacks or acts of sabotage by means other than explosives against a passenger, train or bus, or a water supply or electronic power plant; nor cyber-terrorism are covered.⁴⁸ The issue is not simply a technical one; from the standpoint of victims of terrorist acts, a generally accepted formal definition of which acts qualify as such is crucial for them to have a firm international legal basis for voicing their demands for justice.

⁴⁷ U.N.S.C. Res. 1566 (2004), para. 3.

⁴⁸ For a comment on the partial criminalisation of acts of terrorism under the international anti-terrorist conventions regime, see Michael Sharf, 'Defining Terrorism By Reference to the Laws of War: Problems and Prospects', International Scientific and Professional Advisory Council, *Countering Terrorism Through International Cooperation* (Milan, ISPAC, 2001), p. 135.

B. The Circumstance of Victims of International Terrorism

In the context of the Global Fight against Terrorism, victims of international terrorism, as opposed to wrongful counter-terrorism measures, are more vulnerable in terms of going unrecognized, formally speaking, in their status as victims of international law violations. The formal recognition of such status is a precondition to enjoy any of the rights granted to victims in international law.

In a European context, there has been some progress in responding to this legal gap. The initiatives include the European Union's *Council Framework Decision on combating terrorism* (2002),⁴⁹ which affirms the applicability of the *Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings* to victims of terrorist acts. The 2002 Decision furthermore obliges member states 'if necessary, to take all measures possible to ensure appropriate assistance for victims' families'.⁵⁰ Additionally, in 2005, the Council of Europe adopted a set of *Guidelines on the Protection of Victims of Terrorist Acts*, which recognize the circumstance of these victims and afford them specific rights. Nevertheless, while these efforts toward recognition signify a will to improvement, all of them are limited to the European context. Furthermore, none of these documents define the term victim.⁵¹ Thus, the situation of ignorance and non-recognition of victims of international terrorism in their status as victims of violent acts contrary to international law remains at large.

⁴⁹ Council Framework Decision of 13 June 2002 (2002/475/JHA), art. 10: (1) Member States shall ensure that investigations into, or prosecution of, offences covered by this Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed on the territory of the Member State. (2) In addition to the measures laid down in the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, each Member State shall, if necessary, take all measures possible to ensure appropriate assistance for victims' families.'

⁵⁰ Council Framework Decision (2002), art. 10 (concerning the protection of, and assistance to, victims).

⁵¹ The European instruments can provide guidance to develop a more affirmative response to the fate of victims of terrorism. Irune Aguirrezabal, 'UN's Responsibility towards Victims of Terrorism', *FRIDE Working Paper 16* (November 2005).

The recent terrorist attacks in the UK, Spain, and the US have required the respective governments of these states to define the term 'victim of terrorist act'. Spain had laws and policies for victims of terrorist acts in place prior to 11-M. Who is a victim of a terrorist act is determined by the Spanish Ministry of Interior. According to the Spanish law 32/1999, 'victims of acts of terrorism or events committed by individuals or people integrated in armed bands or groups or who would act with the purpose of seriously altering public order and safety, will have the right to be compensated by the State which will assume upon an extraordinary basis the imbursement of the respective compensation as part of its civilian responsibility and as agreed in the Law on Solidarity with the Victims of Terrorism'.⁵² However, the aid scheme set up in response to the 11th of March attacks (*Fondo de Ayuda de 11-M*) by the Ministry for Labour and Social Affairs required a formal definition of victim of terrorist acts. The aid scheme is applicable to direct victims (killed and wounded), and those affected by the attack, i.e. those persons who have a direct link with the direct victims (relatives, dependents, including co-habiting partners).⁵³

The US had adopted a federal compensation act concerning compensation to victims of terrorism a year before 9/11.⁵⁴ According to the act, a victim of terrorism is 'a person who is a national of the United States or an officer or employee of the US government who is injured or killed as a result of a terrorist act or mass violence occurring outside the United States'. The 9/11 terrorist attacks required the creation of a unique compensation programme

⁵² Spanish text: 'Las víctimas de actos de terrorismo o de hechos perpetrados por persona o personas integradas en bandas o grupos armados o que actuaran con la finalidad de alterar gravemente la paz y seguridad ciudadana, tendrán derecho a ser resarcidas por el Estado, que asumirá con carácter extraordinario el abono de las correspondientes indemnizaciones, en concepto de responsabilidad civil y de acuerdo con las previsiones de la Ley de Solidaridad con las Víctimas del Terrorismo' (<http://www.mir.es/sites/mir/indexayyu/ayudasterror/indemnizaciones/ambito.html>).

⁵³ Orden TAS/475 (2005)25 Feb. 2005. Available online at: <http://www.seg-social.es/imserso/normativas/OMTAS4752005.pdf>.

⁵⁴ See Sections 2002-2004 of the Victims of Trafficking and Violence Prevention Act of 2000, Part B, the Violence Against Women Act of 2000. For an overview, see also http://www.ojp.usdoj.gov/ovc/assist/nvaa2002/chapter22_9.html.

(the September 11th Victim Compensation Fund of 2001). The Fund is authorized to compensate any individual or the personal representative of a deceased individual who was physically injured or killed as a result of terrorist-related aircraft crashes on September 11, 2001, or during the immediate aftermath up to seventy-two hours after the attack.

In the UK, it is the Criminal Injuries Compensation Authority (CICA) that is responsible for the reparation and compensation for victims of terrorist acts. The CICA issued a special guide after the 7th of July bombings which identifies who can apply for economic compensation as a victim.⁵⁵

According to the guidelines you may be able to receive compensation from the CICA if you are in one of the following three groups: (a) immediate family of someone who died in the bombings (parents, children, spouse or co-habiting partner of either sex); (b) physically injured in the bombings, if the injury was more serious than cuts and bruises; and (c) those who suffered trauma, diagnosed by a doctor or (for more serious cases) a psychiatrist, which was due directly to your reasonable fear of immediate physical injury or death in the bombings (e.g. those who were in the underground trains that were bombed).

In the absence of generally accepted legal definitions of victims of terrorist acts, each government defines victims of terrorist acts in a somewhat different manner. As a result, a person who claims to have suffered from a terrorist act may be recognized as a victim in one country but not in another. While there is no such thing as perfect justice it should be possible to identify best practices in terms of defining who is a victim on the basis of accumulated experience.

C. New Challenges Related to Implementation

Besides alerting us to realities of non-legal recognition, the Global Fight against Terrorism also directs attention to widespread *de facto* ignorance and non-recognition of victims. While many victims of international terrorism (especially outside Europe) suffers largely from a lack of international legal recognition of their status, victims of wrongful or arbitrary counter-terrorism measures, on the other hand, in spite of the many international legal rights they formally have on hand, encounter enormous difficulties in terms of actually benefiting from their rights.

The understanding of international terrorism as an essential threat to the security of mankind, human rights, and democratically governed societies, has fuelled a sense of emergency, necessity and urgency to eliminate this threat. The fate of victims of wrongful or arbitrary measures has much less priority. While there is continued reliance on ordinary mechanisms for dealing with crime, above all, the criminal justice system, the real evidentiary problems related to the investigation of terrorist acts and the prosecution of those accused of such acts contribute to a belief about the need for extraordinary measures. Because of these problems, the line between suspect and victim is made ever more fragile. For example, a person who is detained for an indefinite period by public authorities is seen as a victim of wrongful counter-terrorism measures by human rights and humanitarian organizations while, at the same time, treated as a terrorist suspect by intelligence services and the police.

The present situation is made more complicated in the light of attempts to evade the applicability of international law with respect to victims while combating terrorism. One example is the US administration's invention or incorporation of terms, such as 'collateral damage' or 'illegal enemy combatants', when speaking of victims in the 'war on terror'. While most international legal experts affirm that the US has not succeeded in introducing legitimate exceptions from the international law related to victims, these developments point to the importance of reaffirming and emphasizing the obligations of states in respecting the universal right to justice for victims as recognized and specified in international law.

⁵⁵ Criminal Injuries Compensation Authority, 'Compensation for the victims of the London bombings of July 7, 2005'. Available online at: https://www.cica.gov.uk/pls/portal/docs/PAGE/INFORMATION_PAGES/INFO_BOX_BOTTOM_ABOUTCICA/BKL4%20COMPENSATION%20FOLLOWING%20LONDON%20BOMBINGS.PDF.

4. Unequal Rights

The universal right to justice has several components. In broad terms, it entails the investigation and prosecution of offenders, access to justice, fair treatment, and reparation. As it is now, however, not all victims of direct relevance to the Global Fight against Terrorism can benefit from all these rights. Instead, the rights that have been formally endorsed in relation to different categories of victims tend to differ.

Some differences in terms of treatment of victims may be justified, such as the difference in international law between, say, a victim of torture and a victim of a violation of his right to found a family in terms of remedies. While for the latter some form of compensation may be of interest, more pertinent for him is that the laws of his country change so as to allow him to do what is not permitted, whether it is to marry or to adopt a child. For a victim of torture, on the other hand, compensation, rehabilitation, investigation and prosecution, are all central components of his right to justice. He, too, wants a change of practice, but it may be secondary to his claim to these other components. The kind of differentiation that exists between these two categories of victims can be explained in terms of their diverse particular interests and needs.

Other instances of unequal rights seem more problematic, such as that between a victim of a terrorist bombing and a victim of torture. At the moment, a victim of a terrorist bombing outside European boundaries has no international protection while a victim of torture has been afforded a range of international rights and mechanisms. Nevertheless, to the extent that both terrorist bombings and torture are horrific crimes that are condemned in international law, both call for equal international rights to investigation and prosecution, access to justice, fair treatment and reparation.

Furthermore, to the extent that consideration has been given to victims of terrorist attacks most emphasis in the international context is placed on the right to compensation.⁵⁶ No doubt,

⁵⁶ U.N.S.C. Res. 1566 (2004), para. 10 reads in full: 'Requests further the working group, established under paragraph 9 to consider the possibility of establishing an international fund to compensate victims of terrorist acts and their families, which might be financed through voluntary contributions, which could consist in part of assets seized from terrorist organizations, their members and sponsors, and submit its recommendations to the Council'. See also follow-up to this initiative in *Report of the Secretary-General: Human Rights and Terrorism*, UN Doc. A/60/326, 1 Sept. 2005.

compensation is important; however, as recent European instruments indicate, it is not enough.⁵⁷ Similarly to victims of other violent acts contrary to international human rights law, victims of international terrorism have legitimate claims related to the prosecution of offenders, legal recourse to the courts, fair treatment, and reparation (that is not limited to compensation, but includes the means for rehabilitation).

In addressing problems of inequalities, it must also be pointed out that some rights, though formally recognized, may be especially difficult to enjoy for some victims. For example, victims of torture have an international right to an effective remedy. In addition to international legal obligations of states to implement this right, there is a range of international institutions, including individual complaint mechanisms, to which these victims can turn for redress.⁵⁸ Nevertheless, as has been pointed out several times by UN Special Rapporteurs on Torture, the obligation of states to carry out impartial investigations, and to bring to justice the perpetrators of torture is often neglected.⁵⁹ Indeed, the practice of impunity in relation to government

⁵⁷ See e.g. Council Framework Decision of 13 June 2002 (2002/475/JHA), art. 10: (1) Member States shall ensure that investigations into, or prosecution of, offences covered by this Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed on the territory of the Member State. (2) In addition to the measures laid down in the Council Framework Decision 2001/220/JHA of 15 March 2000 on the standing of victims in criminal proceedings, each Member State shall, if necessary, take all measures possible to ensure appropriate assistance for victims' families.' See also *Guidelines on the Protection of Victims of Terrorist Acts*, Committee of Ministers, Council of Europe, 3 March 2005.

⁵⁸ For an overview of the international rights of torture victims, see e.g. Redress, 'Taking Complaints of Torture Seriously. Rights of Victims and Responsibilities of Authorities' (September 2004). Available online at: <http://www.redress.org/publications/PoliceComplaints.pdf>.

⁵⁹ See e.g. Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with Assembly resolution 57/200 of 18 December 2002, UN Doc. 3 Jul. 2003, paras. 32-43; Report on torture, and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights, in accordance with General Assembly resolution 53/139, paras. 47-48, and Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/54/426, 1 Oct. 1999; Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/55/290, 11 Aug. 2000, paras. 31-33.

officials who are perpetrators of torture has taken on renewed and alarming importance in the context of counter-terrorism measures due to attempts to revise the absolute and non-derogable nature of the prohibition of torture.⁶⁰

Quite regardless of whether we consider legal or de facto inequalities in terms of rights protection for the victims in focus, it is highly doubtful whether any of them would be justifiable. Nevertheless, in the absence of common frameworks there is a more serious risk that these inequalities remain hidden from serious international public scrutiny and condemnation.

A. The Problem of Fragmentation

The need for common frameworks that affirm the same set of rights for different categories of victims has been felt on other occasions than now. The instruments that have been adopted point to the possibility of, and the need for, standardized international legal protection of human victims. The most notable achievement is the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985).⁶¹ This declaration upholds the rights to access justice and fair treatment for all victims of crime and abuse of power, and stipulates that judicial and administrative mechanisms should be responsive to the needs of victims, let them participate when their interests are affected, provide assistance, protect the privacy of victims and ensure their safety from intimidation and retaliation.⁶² According to the same instrument, victims also have rights to reparation.⁶³

A more recent attempt to find common ground in addressing the circumstance of victims and their right to justice is the *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and humanitarian law* (2005).⁶⁴ It succeeds in advancing a set of

rights applicable to victims of both international human rights and humanitarian law violations.⁶⁵ According to the *Principles*, victims of such violations have rights to:

1. Equal and effective access to justice;
2. Reparation for harms suffered (restitution, compensation, rehabilitation and satisfaction);⁶⁶ and
3. Access to relevant information concerning the violations and reparations mechanisms.

The *Principles* also stipulate that effective access to justice requires protection measures to ensure the safety of victims from intimidation and retaliation, during and after proceedings that affect their interests.⁶⁷

For the purposes of addressing the situation of victims in the Global Fight against Terrorism, both declarations are remarkable. Especially the 1985 Declaration is a key document that manifests the possibility of, and the need for, a common framework for addressing the rights of victims of crime (such as international terrorism) and victims of abuse of power (such as international human rights and humanitarian law violations). At the same time, none of them are sufficient to address the fate of the victims in the context of the Global Fight against terrorism. In particular, none of them speak of victims of international terrorism and wrongful counter-terrorism measures. Furthermore, none of the two declarations are legally binding on states.

⁶⁰ See e.g. Interim Report of Manfred Nowak, Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/60/316, 30 Aug. 2005, para. 17.

⁶¹ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. res. 40/34 of 29 Nov. 1985.

⁶² *Ibid.* paras. 4-7.

⁶³ *Ibid.* paras. 8-17.

⁶⁴ *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and humanitarian law*.

Annex to Human Rights Resolution 2005/35 of 20 April 2005 [hereafter *2005 Basic Principles and Guidelines*].

⁶⁵ *2005 Basic Principles and Guidelines*, principle VI. The right to remedy entails: (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning the violations and reparation mechanisms.

⁶⁶ *2005 Basic Principles and Guidelines*, principle VIII.

⁶⁷ *2005 Basic Principles and Guidelines*, principle VII.

B. Rule of Law Concerns

While states are given discretionary power to decide on how to implement the right to justice for victims and ensure its fulfilment, there is a need for consolidated information on *best practices* in response to demands for justice in the wake of devastating terrorist attacks.⁶⁸ The recent events in the UK, US and Spain gave rise to demands for extraordinary measures to meet collective claims for justice. The absence of previous experience of catastrophic terrorism forced the governments to develop new methods for managing compensation claims in a fair and equitable manner.

The US had to face a host of unprecedented questions about methods of compensation (the courts, insurance companies, governments, charity) and who would be the rightful beneficiaries and how to afford them justice (should illegal immigrants be given compensation and if so how given their fears of approaching public authorities). And, in the case of the UK, new questions continue to surface, such as whether UK nationals who suffer terrorist attacks abroad should have a right to compensation from the UK. In spite of extensive compensation programs, the models remain contested.

There is no such thing as perfect justice for victims.⁶⁹ At the same time, having models in place in case of collective demands for justice following devastating terrorist attacks, and adopted in a democratic manner (deliberations in parliament and vote) would help governments to practically manage these kinds of situations. More importantly, it would render public responses to mass victimization more legitimate (in the sense that it would be a democratic instead of executive decision); more importantly, it would ensure respect for the rule of law, and in this way help to de-politicize claims for justice voiced by victims in moments of collective crisis and devastation.

⁶⁸ For a critique of national responses to questions about justice arising in the wake of devastating terrorist attacks, see e.g. Mark Drumbl, 'Terrorist Crime, Taliban Guilt, Western Victims, and International Law', 31 *Denver Journal of International Law and Policy* 101, at 2003.

⁶⁹ Peter H. Shuck, 'Some Thoughts on Compensating Victims', Discussion Paper, National Roundtable on Victim Compensation, May 2003, p. 2. See also Lawrence Freedman, *Total Justice* (Russell Sage Foundation, 1983).

5. The International Politics of Justice

Instead of constructive common engagement on how to face the victims of violent international acts of direct relevance for the Global Fight against Terrorism in a fair and equal manner, international security and human rights communities have come to select and sympathize with the fate of only some of them. On the security side, to the extent that the fate of the victims is at all a concern, it is with victims of terrorist acts. Most notably, in 2004, the Security Council requested its Counter-terrorism Committee to consider 'the possibility of establishing an international fund to compensate victims of terrorist acts and their families'.⁷⁰ The victims of wrongful and arbitrary counter-terrorism measures, on the other hand, have received no similar attention. Indeed, by now, the CTC is well-known for its policy of not regarding the need to prevent and redress human rights violations resulting from counter-terrorism measures as not being within its mandate. Still, a persistent ignorance towards the fate of these victims is inexcusable not least considering that human rights communities are near excluded from influencing UN decision-making on matters of international security.⁷¹

On the human rights side, in contrast, there is an intense preoccupation and effort to redress the grievances of victims of international human rights (and, to some extent, humanitarian) law violations resulting from wrongful counter-terrorism measures. The circumstances of victims of torture, arbitrary, prolonged and indefinite detention,⁷² extra-judicial killings, and disappearances inevitably rank high on the

⁷⁰ U.N.S.C. Res. 1566 (2004), para. 10 reads in full: 'Requests further the working group, established under paragraph 9 to consider the possibility of establishing an international fund to compensate victims of terrorist acts and their families, which might be financed through voluntary contributions, which could consist in part of assets seized from terrorist organizations, their members and sponsors, and submit its recommendations to the Council'. See also follow-up to this initiative in *Report of the Secretary-General: Human Rights and Terrorism*, UN Doc. A/60/326, 1 Sept. 2005.

⁷¹ Since June 2003, there is exchange between Office of the High Commissioner of Human Rights and the Counter-Terrorism Committee (CTC) of the Security Council. As from July 2005, the Counter-Terrorism Executive Directorate of the CTC has a human rights expert on its staff.

⁷² Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity. Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/60/321, 31 Aug. 2005.

international human rights agenda related to the Global Fight against Terrorism. At the same time, the position of the human rights community on the human rights of victims of international terrorist acts carried out by non-state actors, such as Al-Qaeda-like terrorist organizations, is less clear.⁷³ The problem is, in part, a legal one. The international human rights framework has been designed to regulate the relationship between the individual and the state. Unless the grievances suffered by victims of terrorist acts carried out by non-state actors are seen as the result of a failure of the state to fulfil its duty to protect the life, liberty and security of persons (and this will vary from case to case depending on whether the State could have prevented a terrorist attack), strictly speaking, the killed and wounded in a terrorist attack are not recognized as victims of international human rights violations (but instead of international crime). However, even though from this standpoint the lack of attention to these victims may seem logical, the international human rights framework can afford to incorporate a concern with victims of crime by non-state actors. As a matter of fact, it has done so before (e.g. trafficking in women or children).⁷⁴

The politicization of the fate of the victims is deeply regrettable from the standpoint of victims as it makes it seem as though their claims are subject to the whims of politics rather than founded on principles of justice and right. The importance of counting the victims, affording them recognition in their status as victims, and ensuring respect for their rights, cannot be underestimated. The singling out of only some categories of victims for consideration, whether victims of terrorism or wrongful counter-terrorism measures, is not only wrongful; it creates secondary victimization, hatred and mistrust in relation to those international public institutions which are responsible for addressing their situation.⁷⁵

⁷³ Specific Human Rights Issues: New Priorities, in particular, terrorism, counter-terrorism and human rights. Final Report of the Special Rapporteur Kallioupi Koufa, UN Doc. E/CN.4/Sub.2/2004/40, paras. 69-71.

⁷⁴ This theme of considering criminal activities carried out by non-state actors is well-established. For example, the UN has a special rapporteur on trafficking of persons, especially women and children (<http://www.ohchr.org/english/issues/trafficking/index.htm>) and a special rapporteur on the sale of children, child prostitution or child pornography (<http://www.ohchr.org/english/issues/children/rapporteur/index.htm>).

⁷⁵ The term 'secondary victimization' refers to 'victimization that occurs not as a direct result of the criminal act but through the response of institutions

6. Towards a Collective Security Response: Recommendations

The alternative of a broad collective security response to victims of direct relevance to the Global Fight against Terrorism needs to be developed. The UN Secretary-General launched the idea about a Global Strategy for Fighting Terrorism on 10 March 2005 at the International Summit for Democracy, Security and Terrorism in Madrid.⁷⁶ In launching this idea, some attention was given to the victims. Indeed, the Secretary-General acknowledged the victims of international human rights and humanitarian law violations resulting from wrongful or arbitrary counter-terrorism measures. However, instead of speaking of the responsibility of the international community to assist these victims and how it could do so in the form of new or revised international instruments and mechanisms, he instead reaffirmed the importance of respecting human rights while fighting terrorism for preventive purposes:

Compromising human rights facilitates the achievement of the terrorist's objective—by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. ... upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element.

In the same speech, the Secretary-General emphasized the need for solidarity and sympathy with the victims of terrorism, their families and friends:

no one who is not so directly affected can truly share their grief. At least let us not exploit it. We must respect them. We must listen to them. We must do what we can to help them. We must resolve to do everything in our power to spare others from meeting their fate.

and individuals to the victim'. See United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims. On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (New York, 1999), pp. 9-10. Available online at: <http://www.uncjin.org/Standards/9857854.pdf>.

⁷⁶ For example, it considers the importance of (1) Dissuading disaffected groups from choosing terrorism as a tactic to achieve their goals; (2) Denying the terrorists the means to carry out their attacks; (3) Deterring States from supporting terrorists; (4) Developing State capacity to prevent terrorism; and (5) Defending human rights in the struggle against terrorism.

The delegates of the World Summit in September 2005 affirmed the importance of a Global Strategy and approved its elements as had been outlined by the Secretary-General in March that year. The World Summit requested the General Assembly ‘to develop these elements without delay with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses ... to counter terrorism’.⁷⁷ Furthermore, the World Summit Declaration ‘stresses the importance of assisting victims of terrorism and providing them and their families with support to cope with their loss and grief’.⁷⁸

The working out of a Global Strategy for Fighting Terrorism offers a suitable moment to reflect on how to redress the fate of victims and ensure their rights to recognition and justice.

A. *The Right to Recognition*

- In developing a Global Strategy for Fighting Terrorism related to victims serious attention must be given to the problem of non-recognition in law and practice of persons in their status as victims. Those who have suffered from violent acts contrary to international law regardless of perpetrator (state or non-state) or purpose (terrorism or counter-terrorism) must be recognized in their status as victims. No matter how many international rights victims have won in recent years, these rights continue to be worthless in the eyes of those persons who are wrongfully neglected or ignored in law or practice in their condition as victims.
- A distinction must be made between legal and *de facto* non-recognition of victims. The international community must consider both realities in advancing more specific strategies for the purpose of recognizing victims. While attempts to introduce legitimate exceptions from a minimum protection of victim status (such as ‘illegal enemy combatants’) have not succeeded in persuading the international community about the need for such exceptions, it nevertheless points to the need for measures that serve to reaffirm the right to recognition of all persons in their status as victims of violent acts contrary to international law.
- For the purposes of achieving formal recognition (i.e. recognition in international law) of all persons in their status as victims, in particular, victims of international terrorism, it is imperative to continue international efforts to overcome the dilemma of a lack of an international legal definition of the term ‘terrorism’ (‘global terrorism’ or ‘international terrorism’). The absence of such a definition accentuates the risk of heavily politicized exclusions of some categories of victims of terrorism from status of victims under international law.
- In addition, there is a need for a reasonably precise definition of victim. From the standpoint of collective and human security, a victim is primarily somebody who has been killed or wounded because of a violent act (whether terrorism or wrongful counter-terrorism measures). International human rights jurisprudence recognizes a broader notion of victim to include the dependents, relatives, etc. of a direct victim. None of them count *indirect* victims, such as victims of poverty brought about or accentuated by a terrorist attack and failing responses. Nevertheless, it is important that, in addition to direct victims, including relatives and dependents are recognized, the circumstance of indirect victims be acknowledged and considered as well.
- If realities of legal non-recognition of victims seem difficulties to overcome, even thornier seems the situation of *de facto* non-recognition of victims of arbitrary or wrongful counter-terrorism measures. This is made evident in the light of longstanding practices of impunity for government officials coupled with failing or failed public institutions (corruption, lack of resources, know-how, etc.) undermining the conditions to access justice and reparation for victims of international human rights and humanitarian law violations. Nevertheless, the international community must continue to their search for more efficient counter-terrorism measures, measures that also respect international human rights and humanitarian law. In particular, it has to stress the role and competence of domestic and regional courts in reviewing the legality of these measures.

⁷⁷ World Summit Declaration (14-16 September 2005), para. 82.

⁷⁸ *Ibid.* para. 89.

B. The Right to Justice

- Instead of simply reaffirming the obligations of respecting human rights and humanitarian law in the Global Fight against Terrorism, the international community needs to single out the right to justice for victims as a matter of special concern, not only from the standpoint of human rights, but also as a collective and human security issue.
 - The right to justice has several components, including investigation and prosecution of offenders, access to justice, fair treatment and reparation. However, at the moment, not all victims of direct relevance to international counter-terrorism initiatives can benefit from all these more specific rights. While in principle some differentiation among victims in terms of rights protection may be legitimate, much of the prevailing inequalities in the context of the Global Fight against Terrorism are unjustifiable. Measures must be adopted to redress this situation.
 - Given the fragmented international legal landscape, there is a need to reaffirm and clarify a common set of core rights for victims of international terrorism and wrongful counter-terrorism measures. Else, unjustifiable inequalities risk going unnoticed. The existing international declarations (adopted in 1985 and 2005 respectively) that define a common set of rights for victims of violent acts (regardless of perpetrator, i.e. state or non-state, or objective, i.e. terrorism or counter-terrorism) manifest the need for (and the possibility of) more general rights-based approaches for responding to victims of violent acts contrary to international law.
- Finally, there is a need for consolidated information on *best practices* on how to implement the different dimensions of the right to justice for victims of international terrorism and wrongful counter-terrorism measures. While states have some discretion in terms of how to fulfil their obligations in relation to victims of international law violations, there is a need for practical and substantive guidance. The international community could perform a critical role in terms of consolidating best practices and models in this area. The absence of previous experience of catastrophic terrorist attacks force governments to develop *ad hoc* methods for managing the kinds of reparation claims that arise in the aftermath of such attacks. While there is no such thing as perfect justice, having models in place to respond to collective claims for justice in case of devastating terrorist attacks, and which have been adopted in a democratic manner, would help governments to manage these situations in a fair and equitable manner. The prior adoption of laws and policies has the potential of rendering the response to mass victimization more legitimate; it would also ensure respect for the rule of law and in this way help to de-politicize claims for justice voiced by victims at times of collective crisis and devastation.

7. Concluding Remarks

Facing the victims of violent acts contrary to international law in the context of the Global Fight against Terrorism in the sense of identifying and adopting efficient and meaningful measures and strategies to strengthen their universal rights to recognition and justice are tasks that are long overdue. Still, ensuring universal recognition and respect for these victims is not a matter of convenience or a matter of moral and international legal obligation alone; the post-9/11 developments indicate that international terrorism, because of the increasing number of victims and extensive victimization, including secondary victimization, are breeding grounds for alienation, mistrust and hatred, and as such, also a collective and human security concern.

It is a mistake, as the current international approach does, to treat the circumstance of different groups of victims of international law violations in an isolated manner. It hides the fact that some victims go unrecognized in their status as victims. As a consequence, they lack a secure international legal basis for asserting their right to justice in response to what happened to them. It also seems to legitimize the workings of an international human rights regime that distributes different sets of rights to different groups of victims in an arbitrary and unfair manner.

Finally, in treating concerns with victimization (and secondary victimization) on a case-by-case basis, the problem seems less serious than what it in fact is. The present state of affairs of mass victimization carries the risk of alienating those who suffer most from flagrant failures in achieving the ultimate goals pursued in the Global Fight against Terrorism: the suppression and elimination of international terrorism. The current international politics of justice only serve to accentuate the shortcomings of the current approach.

The solution, as has been proposed in this paper, is to develop a more inclusive and affirmative approach to redress the circumstance of both victims of international terrorism as well as wrongful counter-terrorism consistent with the principle of equal concern and respect. The realization of such an approach necessitates a closer examination of outstanding challenges to legal and *de facto* recognition of all persons in their status as victims, and to the objective of affording them equal respect; it also presupposes a readiness on the part of both international security and human rights communities to make certain accommodations in their more specific frameworks to consider all victims.

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